



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT MURANG'A
ELECTION PETITION NO.1 OF 2017
IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)
PETITION RULES, 2017

AND

IN THE MATTER OF NULLIFICATION OF MURANG'A COUNTY NOMINATION LIST OF
28TH AUGUST 2017

BETWEEN

HELLEN NDIKO KIGIA.....1ST PETITIONER

MARY MBULA MAKAU.....2ND PETITIONER

JOSEPH NDUATI NGUGI.....3RD PETITIONER

-VERSUS -

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

JUBILEE PARTY.....2ND RESPONDENT

J U D G E M E N T

The Petitioners are members of Jubilee Party, the 2nd Respondent in this Petition. The 1ST Respondent, the Independent Electoral Boundaries Commission, is a body established under **Article 88 of the Constitution**, charged with exclusive mandate of conducting or supervising referenda and elections to any elective body or office established by the Constitution and any other elections as prescribed by an Act of Parliament. The 2nd Respondent is a Political Party registered under the Political Parties Act. This petition arises out of Jubilee Political Party List nominations of persons to serve as nominated members of Murang'a County Assembly preceding the General Elections held on 26th August 2017.

The Parties to this petition agreed that the Petition be disposed of by way of written submissions. The parties filed and served written submissions. The Parties did not call oral evidence. This judgment is written on the basis of evidence from the Petition, Responses, affidavits and submissions.

PETITIONERS' CASE

The 1st and 2nd Petitioners case is that they are members of Jubilee Party. They did campaigns for Jubilee Party in return for nominations in the County Assembly of Muranga. Their names were in the nomination list published by the 1st Respondent on 21st July 2017 but which list was nullified by the Political Parties Disputes Tribunal (PPDT) for lack of representation from marginalized persons. That the PPDT ordered Jubilee Party to come up with a new list that complied with article 100 of the constitution, 2010.

The 3rd Petitioner's case is that he was mandated by Jubilee Party to come up with a list of members that would represent Gatanga Constituency. That he came up with a list of members inclusive of the names of 1st and 2nd Petitioners and he forwarded the list to Jubilee Party the 2nd Respondent. That the names in the list inclusive other names from other constituencies in Murang'a County were submitted to the 1st Respondent. That the 1st Respondent republished the list pursuant to orders of PPDT on the Kenya Gazette on 28th August 2017. That the published list omitted the names of the 1st and 2nd Petitioners and did not reflect persons with disability, Marginalised persons and ethnic diversity therefore the list was not a true representation of the list that 3rd Petitioner forwarded to Jubilee party.

The Petitioners seek the following orders of the Court:

- (i) A declaration that the nomination list of Murang'a County does not comply with articles 100 (b), (d) and (e) and 177 of the Constitution of 2010,
- (ii) A declaration that the 1st Respondent exceeded its powers by failing to have due regard to 3rd Petitioners original party list and consequently irregularly and illegally omitting the 1st and 2nd Petitioners whose names were forwarded to the 1st Respondent.
- (iii) A declaration that the Petitioners rights as envisaged under Article 177 of the Constitution of 2010 have been grossly infringed and violated by the 1st Respondent.
- (iv) A declaration that the purported removal of 1st and 2nd Petitioners names from the list of Murang'a County Assembly was unlawful null and void ab initio.
- (v) A declaration and an order that the 1st and 2nd Petitioners be included the Gender top-up list to represent Gatanga Constituency Murang'a County.
- (vi) That costs of this Petition be borne by the Respondent.

1ST RESPONDENT RESPONDS

The 1st Respondent response is that pursuant to a complaint against the 1st Respondent in the **Political Parties Dispute Tribunal No. 480 of 2017 Agnes Ndunge Mutwiri Vs Jubilee Party** challenging the nominations Party list published for Murang'a County, Jubilee Party resubmitted another list and the names of the 1st and 2nd Petitioners were not in the list resubmitted. That therefore the 1st Respondent did not consider the 1st and 2nd Petitioners as nominees to the Murang'a County Assembly under **Article 177 (c) of the Constitution** because their name were not in the list presented for consideration.

The first Respondent further response is that Jubilee Party, the 2nd Respondent, prepared and submitted to the 1st Respondent a Party List of all persons who would stand elected if the party were entitled to all the seats pursuant to **Regulations 55 of the Elections (General) Regulations**, which states that the process of preparations of the Party List is an internal affair of the Political Party, which ought to proceed in accordance with the National Constitution, the Political Party Constitution and the nomination rules..

Further response is that following the General Elections of 26.8.2017, Jubilee Party garnered 13 slots

which were the slots available for allocation to the party members presented by the party for nominations in Murang'a County. Subsequently the 1st Respondent allocated the seats as envisaged in **Section 36(8) of the Elections Act** which provides that:-

*“for purposes of **Article 177 (1)(c) of the Constitution** the Commission shall draw from the list under subsection 1(f) 4 special seats members in the **order given by the party**”.*

In so doing the 1st Respondent applied the formula as governed by **Regulation 56(2)** that provides that:-

“the formula for allocation of seats to the respective political parties from the party list shall be number of seats won by the political party divided by the total number of seats multiplied by available seats for allocation in the respective house”.

That Jubilee Party qualified for 4 seats in the Marginalized List. The Respondent consequently applied the rule on priority as provided for in **Section 36(8) of the Elections Act** which provides that:-

“for purposes of Article 177(1)(c) of the Constitution, the Commission shall draw from the list under subsection (1)(f) 4 special seats members in the order given by the party.”

That therefore the listed first four individuals as presented by Jubilee Party were the individuals who were gazetted members of County Assembly of Murang'a.

Further that the Law gives no room to the Respondent to hand pick individuals to the special list. The 1st Respondent maintained that the 1st and 2nd Petitioners may not have been nominated to the various positions which they were made to believe as their names were not in the list re- submitted to the Respondent for consideration.

The 1st Respondent prays that the Petition be dismissed with costs.

2nd Respondent Response

The 2nd Respondent was served and filed a response on 31st October 2017 and stated that the 2nd Respondent received numerous applications from thousands of interested party members for consideration. The first list was submitted to the 1st Respondent for consideration. After consideration and nominees gazette, there was a complaint filed at the Political Parties Dispute Tribunal.

The 2nd Respondent was ordered to constitute another Party List. The 2nd Respondent appealed against the decision of PPDT being **Election Nomination Appeal 31 of 2017 Jubilee Party Vs. Agnes Ndunge Mutwiwa**. The appeal was allowed. The Petitioners did not make this disclosure and are deliberately misleading the Court.

The 2nd Respondent further response is that the list submitted to the 1st Respondent contained all categories of persons required by Law to be nominated. The list was inclusive where all the special interests groups and necessary categories were considered and nominated. Further that after submission of the Party list to the 1st Respondent, the 1st Respondent applied the criteria within legal bounds to pick the nominees.

That therefore the 3rd Petitioner had no mandate whatsoever to come up with a list as purported in the Petition and the 2nd Respondent prays that the Petition be dismissed with costs.

The Petitioners filed issues namely whether Murang'a County nominations were conducted in accordance Article 100 and 177 (1)(a), (b) and (c) of the Constitution of 2010., whether Murang'a County Assembly is a representation of each constituency in Murang'a County, whether Murang'a County nomination list comprises of persons with disability, any other special interest, marginalised persons and Ethnic diversity

in Murang'a, and whether the Democratic party qualified to nominate a representative to the The County Assembly and whether the Assembly has nominees that are related.

Petitioners Submissions

The Petitioner's submissions are that the Petitioners have aspirations founded on the national values and principles of governance under Article 10 of the Constitution which are binding on all persons and institutions' whenever the Constitution or any law is applied. The relevant values and principles of governance in this petition include human dignity, equity, social justice, inclusiveness, equality, human rights, non discriminations and protection of marginalized among others. And that Article 91 of the Constitution imposes the obligation on political parties to respect the rights of all persons to participate in the political process including minorities and marginalized groups. Further that Murang'a County Assembly falls short of the Constitutions tenets of inclusivity by lacking a true representation of women representing ethnic minorities and persons with disabilities.

Further that the nominations process conducted by the Respondents was undemocratic, lacked inclusivity and this aggrieved the Petitioners. That the list cannot stand in light of decision of **Rose Wairimu Kamau Vs. IEBC (2013) eKLR** where the Court ruled that nominations to the party list to the County level must reflect the diversity of the communities of the concerned County. In **Isaack Osman Sheikh Vs. IEBC & 2 Others (2014) eKLR** the Court of Appeal highlighted the importance of preventing the paruation of ethnic hegemony to the exclusion of minorities in preparation of party list. Though Article 92 of the Constitution does not require that the County Assembly Party list reflect regional and ethnic diversity the Court of Appeal held that such list can be interfered with where the requirements of intra-county ethnic or regional balance and diversity are flouted by parties. That the Kamba community is a minority⁷ in Murang'a County and only the 2nd Petitioner had applied to represent the Kamba in the gender top up list and the nomination list of 8th August 2017 does not reflect the Kamba ethnicity under gender top up.

Further that according to Article 90 (2) of the Constitution the 1st Respondent had the mandate to supervise the conduct of the party list arrived at by the 2nd Respondent. That the Petitioners appeared in the party list published on 21st July 2017 as numbers 27 and 35 out of 38 in the general list comprising of both male and female candidates. That in the female candidates list they appeared as numbers 14 and 18 of the ladies and further that they represent Gatanga Constituency.

Further submissions of the Petitioners is that in case of **Commission for Implementation of the Constitution Vs. the Attorney General (2013) eKLR** that special interest include ethnic minorities, the youth, the blind, the deaf, the physically disabled, religious minorities, linguistic or cultural minorities and visual minorities. That the final list of 28th August 2017 sites one Mwangi Cathyrm Wanjiku under the marginalised list to represent ethnic minority yet she is from the dominant ethnicity which is the Kikuyu ethnicity. Further that in the final list there was a nominee from Democratic Party namely Milkah Gathoni Ngari. That the Democratic Party did not qualify to have a nominee in the Murang'a County Assembly and that the 1st Respondent included a nominees from the Democratic Party to unfairly take up Petitioners nominations slots int eh gender party list of 28th August 2017.

Further that the final list was arrived at through nepotism in that it comprised of two nominees who were sisters namely Elizabeth Gathoni Mwangi and Ngugi Lucy Nyambura who appeared as number 2 and 5 out of 19 in the gender top up list published on 28th August 2017 to the detriment of the Petitioners. That the Petitioners rights to participate in public and political life were defeated.

1st Respondent's submissions

The submissions of the 1ST Respondent, are that pursuant to a complaint against the Respondent in the Political Parties Dispute Tribunal No. 480 of 2017 Agnes Ndunge Mutwiri Vs Jubilee Party challenging the nominations Party list published for Murang'a County, Jubilee Party resubmitted another list and the

names of the 1st and 2nd Respondents were not in the list resubmitted. That therefore the Respondent did not consider the Petitioner as a nominee to the Murang'a County Assembly under **Article 177 (c) of the Constitution** because her name was not in the list presented for consideration. That pursuant to **Regulations 55 of the Elections (General) Regulations**,

“the effect is that the process of preparations of the Party list is an internal affair of the Political Party, which ought to proceed in accordance with the National Constitution, the Political Party Constitution and the nomination rules”.

That it is clear that a Political party is responsible to prepare and submit to the Respondent a Party list of all persons who would stand elected if the party were entitled to all the seats.

Further that the Jubilee Party garnered 13 slots which were the slots available for allocation to the party members presented by the party for nominations in Murang'a County. Subsequently the Respondent allocated the seats as envisaged in **Section 36(8) of the Elections Act** which provides that *“for purposes of Article 177 (1)(c) of the Constitution the Commission shall draw from the list under subsection 1(f) 4 special seats members in the order given by the party”.*

The Respondent applied the formula as governed by **Regulation 56(2)** that provides that

“the formula for allocation of seats to the respective political parties from the party list

shall be number of seats won by the political party divided by the total number of seats multiplied by available seats for allocation in the respective house”.

That Jubilee Party qualified for 4 seats in the Marginalised List

The Respondent consequently applied the rule on priority as provided for in Section 36(8) of the Elections Act which provides that

“for purposes of Article 177(1)(c) of the Constitution, the Commission shall draw from the list under subsection (1)(f) 4 special seats members in the order given by the party.” Further that listed first four individuals as presented by the party were the individuals who were gazetted members of County Assembly of Murang'a. Further that the Law gives no room to the Respondent to hand pick individuals to the special list. The 1st and 2nd Petitioners may not have been nominated to the various positions which they were made to believe as their names were not in the list submitted to the Respondent for consideration. The 1st Respondent prays that the Petition be dismissed with costs. Costs to the Respondents.

The 2nd Respondent was served and filed response on 31st October 2017 and stated that the 2nd Respondent received numerous applications from thousands of interested party members for consideration and the discretion was on the 2nd Respondent to come up with a criteria on how best they could pick the nominees. That the 3rd Petitioner had no mandate whatsoever to come up with a list as purported in their nomination. That there was a complaint filed at their Political Dispute Tribunal and an order was issued that the 2nd Respondent to constitute a Party List.

That an appeal was lodged against that decision and the appeal being Election Nomination Appeal 31 of 2017 Jubilee Party Vs. Agnes Ndunge Mutwiwa an appeal was allowed. That the Petitioners did not make the disclosure and are misleading the Court. Further that the list submitted contained all categories of persons required by Law to be nominated. The list was inclusive where all the special interests groups and necessary categories were considered and nominated. The final list is attached. The 2nd Respondent prays that the Petition be dismissed with costs.

ISSUES FOR DETERMINATION

Having considered the Petition, Responses of the Respondents the issues for determination are

1. whether the Respondents acted contrary to the Law governing Party List Nominations
2. whether the Petitioners discharged the burden of prove
3. whether this court has jurisdiction to grant relief sought

Whether the Respondents act contrary to the Law governing Party List Nominations

The Petitioners contend that Murang'a County Assembly falls shot of the Constitutions tenets of inclusivity by lacking a true representation of women representing ethnic minorities and persons with disabilities, that the nominations process was undemocratic, lacked inclusivity and intra-county ethnic or regional balance and diversity. That 2nd Petitioner had applied to represent the Kamba in the gender top up list and the nomination list of 8th August 2017 does not reflect the Kamba ethnicity under gender top up.

Further contention is that the Petitioners appeared in the party list published by 1st Respondent on 21st July 2017 as numbers 27 and 35 out of 38 in the general list comprising of both male and female candidates. That in the female candidates list they appeared as numbers 14 and 18 of the ladies and further that they represent Gatanga Constituency.

That the final list of 28th August 2017 sites one Mwangi Cathyrm Wanjiku under the marginalised list to represent ethnic minority yet she is from the dominant ethnicity which is the Kikuyu ethnicity. Further that in the final list there was a nominee from Democratic Party namely Milkah Gathoni Ngari and Democratic Party did not qualify to have a nominee in the Murang'a County Assembly and that the 1st Respondent included a nominees from the Democratic Party to unfairly take up Petitioners nominations slots in the gender party list of 28th August 2017.

That the final list was arrived at through nepotism in that it comprised of two nominees who were sisters namely Elizabeth Gathoni Mwangi and Ngugi Lucy Nyambura who appeared as number 2 and 5 out of 19 in the gender top up list published on 28th August 2017 to the detriment of the Petitioners. That the Petitioners rights to participate in public and political life were defeated.

The 2nd Respondent response to the Petition is that selection of members for nomination was done in a fair and justifiable manner and all categories of persons required by law to be included were factored. That selection of members for nomination conformed to Electoral Laws, Rules and regulations. That it was conducted in a transparent, accountable, inclusive and participatory, non discriminative and credible approach.

To determine whether Murang'a County assembly falls short of Constitutional tenets this court will proceed to consider process on nominations was flawed by the 2nd Respondent. Selection of members for nomination is the sole responsibility of a Political Party under Article **90(2)(a) of the Constitution** read with **Section 31 of the Elections Act, and Section 34(4)and (5) of the Elections Act 2011**. The same provisions of the law impose an obligation upon the Political Party to submit the list of selected nominees to IEBC.

Article **90(2)(a) of the Constitution** requires that 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 registration. **Section 31 of the Elections Act, 2011** states that a person qualifies to be nominated by a political party for ... county elections for the purposes of Articles 97, 98, 137, 177 and 180 of the Constitution if that person is selected in the manner provided for in the constitution or rules of the political party concerned relating to members of that party who wish to contest presidential, parliamentary and county elections; and subject to subsection (4), the party certifies the nomination to the Commission. **Section 34(4) of the Elections**

Act provides that 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. **34(5) of the Elections Act.** The party lists under subsections (2), (3) and (4) shall be submitted in order of priority to the Commission at least forty-five days before the date of the general election pursuant to **Section 35 of Elections Act.**

Section 36 of Elections Act provides for allocation of special seats and states;-

(1) A Party list submitted by a political party under -

(e) Article 177(1)(b) of the Constitution shall include a list of the number of candidates reflecting the number of wards in the county.

(f) Article 177(1)(c) of the Constitution shall include eight candidates, at least two whom shall be persons with disability, two of whom shall be person representing a marginalized group.

(2) A party list submitted under subsection (1)(a), (c) (d),(e), and (f) shall contain alternates between male and female candidates in the priority in which in they are listed.

(3) The party list referred to under subsection 1(f) shall prioritise a person with disability, the youth and any other candidate representing a marginalized group.

(5) The allocation of seats by the Commission under Article 97(1)(c) of the Constitution will be proportional to the number of seats won by the party under Article 97(1)(a) and (b) of the Constitution.

(6) The allocation of seats by the Commission under Article 98(1) (b) (c) and (d) of the Constitution shall be proportional to the number of seats won by the party under Article 98(1)(a) of the Constitution.

(7) For purposes of Article 177(1)(b) of the Constitution the Commission shall draw from the list under subsection(1) (e) such number of special seat members in the order given by the party, necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender.

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

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

Article 177(1)(a) of the Constitution states that a county assembly shall consist of members elected by the registered voters of the wards constituting a single member constituency on the same day of the general election ...

(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 an Act of Parliament and

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

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

Section 34(6) of the Elections Act provides and states that:-

The party lists submitted to the Commission under this section shall be in accordance with the Constitution or nomination rules of the political party concerned and **Section 34(10) of the Elections Act** states that a party list submitted for purposes of subsections (2),(3),(4) and (5) shall not be amended during the term of Parliament or the county assembly, as the case may be, for which the candidates are elected.

The law above cited makes it clear that generation of party lists is the sole duty of the political parties and the purpose of party list is to inject equity and inclusivity. In the case of **Commissioner for Implementation of the Constitution Vs. AG & Another [2013] eKLR** the Court of Appeal held that,

“The Legal framework for the nomination of candidates to the Senate, National Assembly and County Assembly was intended to inject equity,rationality, objectivity and inclusivity into the nomination process.... as concerns nominations of members of National Assembly, Senate and County Assembly the exercise of discretion by Political parties was required to promote gender equity and also regional diversity in accordance with the provisions of Article 90 of the Constitution of Kenya. The requirement for the lists to reflect the regional and ethnic diversity of the people of Kenya meant that to ensure that no ethnic group or region of the Country dominates the list provided by the parties”.

The 1st Respondent submitted that due process was allowed and the list of nominated members in the Murang’a county Assembly was reflects equity, inclusivity, regional balance and diversity.

The 2nd Respondent submitted it conformed with **Article 90(2)** of the Constitution which states that the IEBC 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 registration.
 - (b) Except in the case of the seats provided for under Article 98(1),(b), each party list comprises the appropriate number of qualified candidate and alternates between male and female candidates in the priority in which they are listed; and
 - (c) except in the County assembly seats each party list reflects the regional and ethnic diversity of the people of Kenya.
- (3) The seats mentioned in clause (1) shall be allocated to political parties in proportion to the total number of seats won by candidates of the political party at the general election.

That the 1st Respondent submits that on 17th August 2017 the 2nd Respondent resubmitted party list as directed by the Political Parties Dispute Tribunal. The 1st Respondent accepted the party list in line with decision of **National Gender and Equality Commission Vs. Independent Electoral and Boundaries Commission & Another [2013] eKLR** the Court held that:

“IEBC is obliged in accepting the party list to ensure that the provisions of the Statute are adhered to Regulations 55(2) of the General Regulations which empowers IEBC to ensure that the party lists comply with the requirements of the Constitution , the Elections Act 2011 and the Regulations “.

The Petitioners names were not listed in both the gender top up list and marginalized groups list that were resubmitted to the 1st Respondent on 17th August 2017 affirming its authority that local leadership built consensus on the list for Murang'a County. The 1st Respondent pursuant to **Regulations 54(8) of the Elections (General) Regulations 2012** published the final party list on 23rd July 2017 by which the Commission invited aggrieved parties to file complaints before the Commission and the Political Parties Disputes Tribunal for purposes of settlement of any disputes.

The 1st Respondent further submit that in the elections held on 8th August the electorate of Murang'a County voted 28 County "Assembly members elected on a Jubilee Party ticket. Pursuant to Section 36(9) of the Elections Act No. 24 of 2011 the allocation of seats by the Commission under Article 177 (1)(b) and (c) of the the Constitution shall be proportional of the number won by the party under Article 177(1) (a) of the Constitution. Vide Gazette Notice No.5735 of 12th June 2017 the Commission at page 2795 published the formula for allocation of seats to the respective Political Parties. This was the number of seats won by a Political Party divided by the total number of seats multiplied by available seats for allocation in the respective house. In compliance with the Constitution and Section 36(4) of the Elections Act the 1st Respondent nominated 13 members for their gender top up categories and 4 members of marginalized seats category in the order of priority from the party list of the Jubilee Party that was made available to the Commission on 19th July 2017.

The 1st Respondent reiterated that 1st Respondent acted according to the law. The 1st and 2nd Petitioners names did not appear on the final party list as submitted by the 2nd Respondent on 19th July 2017 which list was subsequently published on 23rd July 2017. That the Petitioners names could not be considered by the 1st Respondent.

The 1st Respondent contends that the 1st and 2nd Petitioners were made to believe that their names were in the list resubmitted by the 2nd Respondent to the 1st Respondent.

This court has also considered the 1st respondent submissions that demonstrate the extent to which the 1st Respondent conformed to the law on Party List nominations and saw to it that Party list nomination for Muranga County Assembly included the number of special seats necessary to ensure that no more than two thirds of the membership of the assembly is of the same gender and that eight special seats, at least two of whom represented persons with disability, two youth and two representing marginalized groups as stipulated under **Article 177 (1) (b) and (d) of the Constitution**. In that regard this court agrees with the 1st Respondent that 1st Respondent acted within the law in considering the List presented by the 2nd Respondent

Burden of proof

The legal burden and evidential burden of proof of breaches of the law complained of and of allegations made against other parties in this Petition lies on the Petitioners. In this Petition the 1st and 2nd Petition applied to be nominated in Jubilee Party on 30.6.2017 and the 1st Petitioner's name appeared in the IEBC nomination list under the Gender top category as No. 27 while the name of the 2nd Petitioner appeared under special interest category as No. 35. This court has perused the copy of list attached to the Petition as proof of nomination. This court is satisfied that the names of the 1st and 2nd Petitioners appear as No. 27 and No. 35 respectively. However the List was disputed in the **Political Parties Dispute Tribunal Complaint No. 545 of 2017. Zaituni Abdalla Kabocho Vs. Jubilee Party**. The Judgment of the PPDT is annexed to the Petition. The PPDT judgment decreed that the list did not reflect the ethnic diversity of the people of Murang'a and directed Jubilee Party to reconstitute Muranga County Assembly (Gender) Party List to reflect the ethnic diversity of Murang'a County. The Party list was disputed before the Political Parties Dispute Tribunal PPDT 480 of 2017 (**Agnes Ndunge Mutwiri Vs. Jubilee Party**) where the Party was directed to reconstitute the list that had been submitted to the 1st Respondent. The decision of the PPDT was overturned in **Election nomination Appeal 31 of 2017 Jubilee Party Vs. Agnes Ndunge Mutwiwa** [2017 eKLR].

The 1st and 2nd Petitioners claim is that the 3rd Petitioner was mandated by Jubilee party to come with a list of members that would represent Gatanga Constituency. The 3rd Respondent swore an affidavit that he was mandated to come up with a new list. That the 3rd Respondent forwarded a list with names of the 1st and 2nd Respondents to Jubilee Party. That 2nd Respondent resubmitted a list containing the names of 1st and 2nd Petitioner to IEBC.

The 1st and 2nd Petitioners are aggrieved against the 1st and 2nd Respondents because their names were not selected for nomination as per the list resubmitted by the 3rd Petitioner whereas the names of Mwangi Cathyrn Wanjiku under the marginalised list to represent ethnic minority was selected yet she is from the dominant ethnicity which is the Kikuyu ethnicity. That a nominee from Democratic Party namely Milkah Gathoni Ngari unfairly took up Petitioners nomination slots in the gender party list of 28th August 2017 and through nepotism two nominees who were sisters namely Elizabeth Gathoni Mwangi and Ngugi Lucy Nyambura were nominated to the detriment of the Petitioners. The Petitioners were not nominated to Murang'a County Assembly hence loss of rights to participate in the political process and having a County Assembly lacking a true representation of women representing ethnic minorities and persons with disabilities.

Under **section 107 to 112 of the Evidence Act** the Petitioners are under obligation to present cogent and credible evidence in support of contested facts and allegations against the Respondents. In **Election Petition No.13 of 2013 Lydia Mathia Vs. Naisura Lesuda and IEBC**, the Petitioner alleged breaches of the law that governs Party List nominations and the Court stated that the Petitioner is required by Law to adduce sufficient facts to support her claims; secondly when that is done the Court will have to consider whether it is satisfied that the Petitioner adduced sufficient evidence to support the facts and the Court must also bear in mind that election laws can be infringed especially through incompetence, malpractice or fraud attributable to the responsible electoral body. However, it rests on the person who alleges to produce the necessary evidence.

This position was settled by the Supreme Court of Kenya In **Raila Odinga –Vs- IEBC & 3 Others, Election Petition No.5 of 2013** where the Supreme Court held that a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable doubt. The Court said;

“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary. This emerges for a long standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse acta: all acts are presumed to be done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority’s departures from the prescriptions of the law.”

In considering whether the Petitioners discharged the burden of prove, the court points out that from record, the 1st and 2nd Petitioners filed documents that prove they were registered voters of Jubilee Party and therefore qualified for nomination under **Section 25 of the Elections Act, 2011** which states that;

Unless disqualified under subsection (2), a person qualifies for nomination as a member of a county assembly if the person—

(a) is registered as a voter;

(b) satisfies any educational, moral and ethical requirements prescribed the Constitution and this Act; and

(c) is either—

(i) nominated by a political party; or

(ii) an independent candidate supported by at least five hundred registered voters in the ward concerned.

The Petition and the responses afore stated also prove that the 1st and 2nd Petitioners met the criteria of nomination under **Section 34(8) of the Elections Act** provides for eligibility for nomination and states that:-

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

From the court record the Petitioners and the 2nd Respondent did not file an accurate and authentic record of membership of Jubilee Party as required under **Section 17(1)(a) of the Political Parties Act No. 11 of 2011** which states that:

A political party shall maintain at its head office and at each of its county office in the prescribed form, an accurate and authentic record of a register of its members in a form prescribed in the Second Schedule.

The register according to the **Second schedule of the Political Parties Act** is expected to contain membership of the party including identification details, region, ethnicity, gender and county as conclusive evidence of membership. The register is cogent and credible evidence. Failure to produce the register denied this court the opportunity to scrutinize identification details, ethnic, relation details and gender issues complained of by the 1st and 2nd Petitioners.

The 1st and 2nd Petitioners complained that they were not selected in the list resubmitted by the 1st Respondent to the IEBC. Under **Section 31 of the Elections Act, 2011**

A person qualifies to be nominated by a political party for ... county elections for the purposes of Articles 97, 98, 137, 177 and 180 of the Constitution if that person is selected in the manner provided for in the constitution or rules of the political party concerned relating to members of that party who wish to contest presidential, parliamentary and county elections; and subject to subsection (4), the party certifies the nomination to the Commission.

The Petitioners neither produced a copy of the constitution of Jubilee Party or the rules of selection for nomination nor pointed out the breaches of those rules as prove that they were unfairly omitted from being selected. This would have been credible and cogent evidence before this court. The 1st and 2nd Petitioners demonstrated in the Petition and submissions that they were active paid up members of Jubilee Party. Their names were in the first Party list nominations for publication. There is no issue in the manner in which they were proposed for nominations in the first list. They met the criteria for nomination but they did not prove breaches of rules for selection for nomination in Jubilee Party.

As regards the assertion that 3rd Petitioner was mandated by 2nd Respondent to compile a new list of nominees, there is no documentary evidence of authority shown to this court to make a party list on behalf of Jubilee Party. Party list are made on the basis of Political Parties Constitutions and or rules of the party. From the Petition and the submissions of Petitioners there is no evidence to prove that 3rd Petitioner had authority from the 2nd Respondent to compile a party list. The 2nd Respondent expressly denied in the response and submissions filed herein that 2nd Respondent gave authority to 3rd Petitioner to draw the new list in issue. This court brings to mind Article **90(2)(a) of the Constitution** which requires that 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 registration, and, **Section 34(4) of the Elections Act** which provides that 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 and (5) The party lists under subsections (2), (3) and (4) shall be submitted in order of priority to reiterate that Party Lists is Constitutional mandate of the Political Party concerned through the mechanism set down in the Political Party's constitution or by building consensus in cases of mergers or coalitions with other political parties.

In the opinion of this court, the Petitioners have not presented cogent evidence before this court in support of allegation that the 3rd Petitioner had authority from the 2nd Respondent to make a Party list for nominations of the 1st and 2nd Petitioners and others. In further opinion of this court, a Political party entrusting an individual to single handedly prepare a Party list would be acting in breach of the Constitution and processes of the law on party list nominations. This court admits the 2nd Respondents assertion that it did not give authority to the 3rd Petitioner to prepare a Party list. By the same breath that the 1st Respondent rightly acted on the party list received from Jubilee Political Party.

The Law on Resolution of Disputes Arising from Nominations

The next issue to determine is whether the Petitioners followed the law on resolution of disputes arising from nominations?

Article 88 (4) of the Constitution outlines the mandate of the Independent Electoral and Boundaries Commission in the following terms:

“The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for-

a. The continuous registration of citizens as voters;

b. The regular revision of the voters' roll;

c. The delimitation of constituencies and wards;

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

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

f. The registration of candidates for election;

g. Voter education

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

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

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

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

The Elections Act was enacted as an Act of Parliament to provide for the conduct of elections to the office of the President, the National Assembly, the Senate, county governor and **county assembly; to provide for the conduct of referenda; to provide for election dispute resolution and for connected purposes. Part VII** of this Act is titled “**ELECTION DISPUTES RESOLUTION**” and **Section 74**

provides that:

1. Pursuant to Article 88(4) (e) of the Constitution, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.

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

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

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

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

- a. The continuous registration of citizens as voters;
- b. The regular revision of the voters' roll;
- c. The delimitation of constituencies and wards in accordance with the Constitution;
- d. **The regulation of the process by which parties nominate candidates for elections;**
- e. **The settlement of electoral disputes, including disputes relating to or arising from nominations, but excluding election Petitions and disputes subsequent to the declaration of election results;**
- f. The registration of candidates for election;
- g. Voter education;
- h. The facilitation of the observation, monitoring and evaluation of elections;
- i. The regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;
- j. The development and enforcement of a code of conduct for candidates and parties contesting elections;
- k. The monitoring of compliance with the legislation required by Article 82(1)(b) of the Constitution relating to nomination of candidates by parties;

Similar provisions are found in the **Political Parties Act** was enacted as an Act of Parliament to provide for the registration, regulation and funding of political parties, and for connected purposes. On this basis, **Section 39 (1)** of the Act establishes a Tribunal to be known as the **Political Parties Disputes Tribunal**. The jurisdiction of the Tribunal is provided for under **Section 40** of the said Act as follows:

“The Tribunal shall determine—

- a. disputes between the members of a political party;*
- b. disputes between a member of a political party and a political party;*
- c. disputes between political parties;*
- d. disputes between an independent candidate and a political party;*
- e. disputes between coalition partners; and*
- f. appeals from decisions of the Registrar under this Act.*

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

From the court record the Petition and submissions of the Petitioners do not demonstrate that the Petitioners filed complaints with IEBC PPDT as requirement of the law. According to the Petitioners the original party list was disputed in the **Political Parties Dispute Tribunal Complaint No. 545 of 2017, Zaituni Abdalla Kabocho Vs. Jubilee Party** and in the **Political Parties Dispute Tribunal PPDT 480 of 2017 (Agnes Ndunge Mutwiri Vs. Jubilee Party)** where the decision of the PPDT was overturned in **Election nomination Appeal 31 of 2017 Jubilee Party Vs. Agnes Ndunge Mutwiwa) [2017 eKLR]**. There is no material presented before this court to prove that the Petitioners utilized the available legal recourse for them by raising complaints with the IEBC or the PPDT. This court proceeds to consider whether it has jurisdiction to grant the reliefs sought.

Jurisdiction of this court in disputes revolving around questions of nominations to County Assemblies,

The issues complained of by the Petitioners in the case before this court are similar to issues raised in **Constitutional Petition No.83 Of 2015 Between Isaiah Gichu Ndirangu 1st Petitioner and 2 others, And IEBC 1st Respondent and 4 others** The 1st and 2nd Petitioners are Kenyan citizens while the 3rd Petitioner, Party of Democratic Unity (hereafter “PDU”), is a registered political party. They instituted the Petition against the 1st Respondent, the Independent Electoral and Boundaries Commission (hereafter “**the Commission**”), a constitutional commission established under **Article 88** of the **Constitution** and charged with administering elections and for related purposes. ; the 2nd Respondent, the chairman of the Commission, who is responsible for the smooth operation of its functions and is accountable for its actions; the 3rd Respondent, Jane Jepkorir, an adult female, presently serving as a nominated member of the Nandi County Assembly; the 4th Respondent, the Speaker of the Nandi County Assembly and the 5th Respondent, the National Rainbow Coalition (hereafter “NARC”), a political party registered as such under the **Political Parties’ Act**.

The Petitioners’ Case was that under statutory and constitutional guidelines, Party list nominations in every County Assembly ought to include the number of special seats necessary to ensure that no more than two thirds of the membership of the assembly is of the same gender and that eight special seats, at least two of whom shall represent persons with disability, two youth and two representing marginalized groups as stipulated under **Article 177 (1) (b) and (d)** of the **Constitution**. According to the Petitioners, after the General Elections of March, 2013, the Commission illegally and un- procedurally allocated a special seat to NARC in the Nandi County Assembly to the detriment of the 3rd Petitioner. Further, the Commission gazetted a purported nominee of NARC for allocation of a special seat in the Nandi County Assembly on the basis of a letter which did not meet the requirements of a Party List as is by law required, and which letter clearly stated that the said nominee was in fact a member of PDU.

The Court set to determine jurisdiction to handle disputes arising from Party list Petitions and as was held in **The Owners Of Motor Vessel “Lillian S” vs Caltex Oil Kenya Ltd [1989] KLR 1** the court said:

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

In **Macharia and Another vs Kenya Commercial Bank Ltd and 2 Others Civil Application No. 2 of 2011** the Supreme Court stated thus:

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

Following those decisions The Petitioners needed to prove they filed a complaint with IEBC as required of them under **Article 88 (4)** of the **Constitution** as read with section 74 of the Elections Act. **Article 84 of the Constitution** outlines the mandate of the Independent Electoral and Boundaries Commission in the following terms:

“The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for-

l. The settlement of electoral disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;

...

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

The **Elections Act** was enacted as an Act of Parliament to provide for the conduct of elections to the office of the President, the National Assembly, the Senate, county governor and **county assembly; to provide for the conduct of referenda; to provide for election dispute resolution and for connected purposes.** Part VII of this Act is titled “**ELECTION DISPUTES RESOLUTION**” and **Section 74** provides that:

2. Pursuant to Article 88(4) (e) of the Constitution, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.

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

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

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

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

-
- l. The continuous registration of citizens as voters;*
 - m. The regular revision of the voters' roll;*
 - n. The delimitation of constituencies and wards in accordance with the Constitution;*
 - o. The regulation of the process by which parties nominate candidates for elections;***
 - p. 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;***
 - q. The registration of candidates for election;*
 - r. Voter education;*
 - s. The facilitation of the observation, monitoring and evaluation of elections;*
 - t. The regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;*
 - u. The development and enforcement of a code of conduct for candidates and parties contesting elections;*
 - v. The monitoring of compliance with the legislation required by Article 82(1)(b) of the Constitution relating to nomination of candidates by parties;*

The Petitioners in this Petition did not present before this court any material credible and cogent evidence as prove that they filed complaints with IEBC or the Political Parties Disputes Tribunal established under **Section 39 (1)** of the **Political Parties Act**, as *an Act of Parliament to provide for the registration, regulation and funding of political parties, and for connected purposes* with mandatory powers under **Section 40** to determine disputes between a member of a political party and a political party.

The Petitioners being members of Jubilee Political Party were grieved by the political party's preparation and submission of party list nominations and were under a mandatory obligation to must file a complaint with the IEBC or PPDT. **In Constitutional Petition No.83 Of 2015 Between Isaiah Gichu Ndirangu 1st Petitioner and 2 others, And IEBC 1st Respondent and 4 others**, the Court stated at para 49 of the decision...

"...that the Legislature intended to enact legislation to govern electoral matters and the resolution of any related disputes therein. Section 74 (1) of the Elections Act and Section 4 of the Independent Electoral and Boundaries Commission Act as reproduced above makes it explicit that the Commission shall be responsible for settling disputes arising from or relating to nominations. It therefore follows that where any person has a dispute relating to or arising from any nominations, the first port of call is ideally the Commission. The next question then that begs for an answer is whether the Petitioners utilized the Commission's dispute resolution port as required of them before approaching this Court... Parliament in its wisdom, being well aware of the existence of the judicial arm of the Government, enacted statutes that made provisions for settling disputes arising from or relating to nominations and elections. In the said enactments, the Legislature anticipated the existence of such disputes and that is why it created necessary and specialized dispute resolution fora.

The Petitioners in the Petition before this court failed to prove that they utilized the available specialized Commission's dispute resolution port as required of them before approaching this Court. They have not

proved that they came to this court in the correct way. In **Peter Ochara Anam and 3 Others vs Constituencies Development Fund Board and 4 Others, Kisii High Court Petition No 3 of 2010** the Court held that:

“..it is not uncommon in this country for a statute to provide the procedure through which proceedings founded under the statute are to be handled...It only provides a procedure to be followed when dealing with the disputes under the Act...The petitioners have a right to come to this court on whatever matter and howsoever but that must be done in the correct way. ...”

The Court went on to state:

“I do not think that it is right for a litigant to ignore with abandon a dispute resolution mechanism provided for in a statute and which would easily address his concerns and rush to this court under the guise of a constitutional petition for alleged breach of constitutional rights under the bill of rights...”

“... Coming to court by way of a constitution petition is not excepted either much as the Constitution is superior law to the statute aforesaid. In view of this provision and there being no allegations or evidence that the petitioner exhausted these remedies, in bringing this petition, the petitioners have deliberately avoided the procedure and remedy provided for under the Act... It has been stated constantly that where there exists sufficient and adequate legal avenue, a party ought not trivialize the jurisdiction of the court pursuant to the Constitution. Indeed, such a party ought to seek redress under the relevant statutory provision...”

The same reasoning is found in the case of **The National Gender and Equality Commission vs The Independent Electoral and Boundaries Commission and Another [2013] eKLR** it was held that:

“Section 34(6) of the Elections Act, 2011 specifically provides that, “The party lists submitted to the Commission under this section shall be in accordance with the Constitution or the nomination rules of the political party concerned.” This role does not extend to directing the manner in which the lists are prepared as these are matters within the jurisdiction of the parties but in considering the lists, the IEBC must nevertheless be satisfied that the lists meet constitutional and statutory criteria... in the event there is a dispute in the manner in which the parties conduct themselves in conducting their internal elections then recourse may be had by the aggrieved party members, inter alia, to the Political Parties Disputes Tribunal established under section 39, Part VI of the Political Parties Act, 2011 or to the High Court in appropriate circumstances... 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 lists comply with the Constitution, laws and regulations and in each case to ensure that the special interests are represented in the said lists.” (Emphasis added)

The issue raised in this Petition is also similar to issue raised in **Republic vs Speaker of County Assembly of Nyandarua and Another Exparte David Mwangi Ndirangu, Miscellaneous Application No.414 of 2013** the National Alliance (TNA) Party of Kenya was entitled to nominate members to the County Assembly of Nyandarua as prescribed by law and pursuant thereto the foregoing, TNA submitted its list of nominees to the County Assembly of Nyandarua to the Commission as by law required. The Applicant averred that on the 15th day of March 2013, the Commission published in the Daily Nation Newspaper the names of individuals whose names were submitted to them by Political Parties and wherein the Applicant was included in the said list as having been nominated by TNA to the County Assembly of Nyandarua. Further, on the 21st day of May, 2013, the Commission’s Dispute Resolution Committee published in the “Daily Nation” Newspaper the amended nominees to County Assembly Special Seats list of the political parties to various County Assemblies and the Applicant’s name was once again in the said list alongside others nominated by TNA to the County Assembly of Nyandarua. Being dissatisfied with the publication of the party list in the Newspaper by the Commission, proceedings were instituted to bar and or challenge the afore stated list. Complaints were then made to the Commission’s Dispute Resolution Committee which sufficiently deliberated on the matter and gave a well-reasoned

determination. Still being dissatisfied by the said verdict of the afore stated Dispute Resolution Committee, the Applicants filed **JR No. 218 of 2013** and **Petition 238 of 2013** wherein the complaints were adequately canvassed and considered judgments given after all the parties were heard by a three (3) Judge bench, which, in a well-reasoned ruling, dismissed the application.

Similarly in **Narc Kenya and Another vs Independent Electoral and Boundaries Commission Another, Election Petition No.12 of 2013**, the 2nd Petitioner raised a complaint over the nomination of the 2nd Respondent with the dispute resolution committee of the Commission. The Committee heard the complaint and dismissed the same in its decision of 7th June, 2013. The Petitioner not being satisfied with the outcome filed **Judicial Review No.203 of 2013** challenging the nomination of the 2nd Respondent as the gender top up nominee for Garissa County for NARC Kenya party. The point is that the first port of call was the Commission.

In conclusion, this court has highlighted the jurisprudential approach the courts have taken, which is the correct one, in addressing disputes in regard to party list nominations. It is now settled law that where Petitioner's allege violation (s) of the Constitution and various electoral laws in regard to the nominations; their first port of call was the Commission's Dispute Resolution Committee. Arising from this jurisprudence Courts ought not to characterize Constitutional issues raised in Petitions as nomination/election disputes. Such characterization would go against the electoral laws and the Constitution which was tailored in such a manner that it intended to have a **special dispute resolution mechanism for electoral disputes, nominations being one of them.**

The Petitioners in this Petition ignored the specialized mechanism of handling disputes arising from nominations. There is no evidence in this Petition that both Petitioners file a complaint with 1st Respondent or with PPDT. Decisions of the Political Parties Dispute Tribunal filed herein are of complaints lodged by other persons not Petitioners herein. The IEBC and PPDT was their first port of call. The Petitioners did not prove to this court that they lodged complaints with IEBC or PPDT. They failed to prove that both Respondents failed to discharge their constitutional mandate under Articles 100 (b), (d) and (e) and 177 of the Constitution of 2010. For those reasons and others stated in the judgment;

This court declines to issue a declaration that the nomination list of Murang'a County does not comply with articles 100 (b), (d) and (e) and 177 of the Constitution of 2010.

By the same breadth the court declines to issue declarations that the Petitioners rights as envisaged under Article 177 of the Constitution of 2010 have been grossly infringed and violated by the 1st Respondent, and, that the purported removal of 1st and 2nd Petitioners names from the list of Murang'a County Assembly was unlawful null and void ab initio.

This Court having set out the law on preparation and submission of party list nominations and having stated that duty lies with the political party concerned and any complaints against the Political party be filed with IEBC or PPDT, declines to issue a declaration that the 1st Respondent exceeded its powers by failing to have due regard to 3rd Petitioners original party list and consequently irregularly and illegally omitting the 1st and 2nd Petitioners whose names were forwarded to the 1st Respondent.

The Petitioners did not enjoin other persons mentioned in the Petition. The persons are currently serving members in Murang'a County Assembly. By failing to join them in this Petition the persons adversely mentioned were denied Constitutional rights to participate and be heard in this Petition. This omission to join them is fatal in that a court of justice cannot make adverse orders against a person before giving that person a chance to be heard. Such orders, reliefs or prayers would violate fundamental freedoms and rights of such persons and this would occasion a grave failure of justice.

The question of jurisdiction is answered in the negative. This court lacks jurisdiction to grant a

declaration and an order that the 1st and 2nd Petitioners be included in the Gender top-up list to represent Gatanga Constituency Murang'a County. The upshot is that this Petition is hereby dismissed with costs to the Respondents.

M.W. WACHIRA (MRS)

Chief Magistrate

4.12.2017

Judgment dated, delivered and signed in open court in presence/absence of MH/B.....for the Petitioners and M for the 1st Respondent and M.....for the 2nd Respondent.

M.W. WACHIRA (MRS)

Chief Magistrate

4.12.2017

Right of appeal within 28 days explained.

M.W. WACHIRA (MRS)

Chief Magistrate

4.12.2017