



REPUBLIC OF KENYA
IN THE RESIDENT MAGISTRATE'S COURT AT LAMU
THE ELECTIONS ACT, 2011
ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2017
ELECTION PETITION NO. 1 OF 2017

JANE NJERI KAMANDE.....PETITIONER

-VS-

ANTHONY NJOMO MANIA.....1ST RESPONDENT

PARTY OF DEMOCRATIC UNITY.....2ND RESPONDENT

ABDALLA MWARUA CHIKOPHE, THE RETURNING

OFFICER, LAMU WEST CONSTITUENCY.....3RD RESPONDENT

INDEPENDENT ELECTORAL

AND BOUDARIES COMMISSION.....4TH RESPONDENT

JUDGMENT

Introduction

1. August 8, 2017 was election day throughout Kenya. There was a nationwide election for President, Members of Parliament, Women Representatives, Senators, Governors and Members of County Assemblies. It was the second election held under the Constitution of Kenya 2010.

2. Following the voting, tallying and declaration of results many election petitions were filed countrywide challenging the election of the President, some Members of Parliament, a few Women Representatives, some Senators, many of the Governors and some Members of the County Assemblies. The election petition before this court was filed to challenge the election of Anthony Njomo Maina as the Member of County Assembly for Bahari Ward in Mpeketoni sub-county within Lamu County.

3. The petitioner, Jane Njeri Kamande is a voter. She seeks the following prayers from the court:

(a) A declaration that I.E.B. C's inclusion of Anthony Njomo Maina of P.D.U party name as a candidate and his participation in the general election of August 8, 2017 was a substantial breach of the Electoral Law, Election Act and the Constitution on account of illegal party hopping and hence invalid null and void ab initio.

(b) A declaration that the said Anthony Njomo Maina election as winner for the member of County Assembly in the General Election of August 8, 2017 is invalid, null and void ab initio on account of being incompetent and unqualified to be elected as such on a PDU ticket.

(c) A declaration that the said Anthony Njomo Maina committed an offence under the Election Act and ought to be disqualified from participating in an election.

(d) A declaration that Mr. Joseph Githuku Kamau – MCCP who garnered the highest votes was the validly elected Bahari Ward member of the County Assembly of Lamu.

(e) An order as to costs granted in favour of the Petitioner.

4. The petition was opposed by the 1st Respondent, Anthony Njomo Maina, the 2nd Respondent, Isaiah Gichu Ndirangu who is the chairperson of Party of Democratic Unity, Abdalla Mwarua Chikophe is the 3rd Respondent and the Returning Officer for Lamu West Constituency and the I.E.B.C.

5. The court held a Pre-trial Conference on October 10, 2017 and agreed on the modalities of how the trial will be conducted. Various applications were also dispensed with during the Pre-trial Conference. In other applications, court reserved its ruling and delivered it on October 17, 2017. Following a settling on how the trial would proceed, the parties signed a Pre-Trial Agreement on October 10, 2017 that was adopted by the court.

6. The hearing of the Petition commenced on November 6, 2017 when the 2nd Respondent applied to have a Replying Affidavit admitted on record. This was opposed by the Petitioner only. The court rejected this application and the hearing proceeded from November 6 to 8, 2017. It was scheduled to proceed for five days on a day-to-day basis but it ended earlier.

7. In the pre-trial agreement, parties agreed to file written submissions within two weeks of the end of the trial. The petitioner and the 2nd respondent filed their submissions but despite being given additional time, the 1st, 3rd and 4th respondents did not file submissions.

8. The judgment is set out as follows. The List of Agreed Issues comes immediately after this introduction. It is then followed by a summary of the petitioner's case. Thereafter is a summary of the respondents' case as presented. This is followed by a summary of the submissions as filed by the Petitioner and the 2nd Respondent. Then there is the case law and analysis of the issues raised. Under this section, the List of Agreed issues is tackled under three headings that is, jurisdiction, burden of proof and costs (at the end). The court then addresses the following outstanding issues – use of social media, section 83 of the Elections Act, Law Reform, counsel in the petition as well as the significance of the petitioner, the role of the court and finally the orders of the court.

9. The counsel on record are as follows:

Mr. Mogaka – at the Pre-Trial Conference and highlighting of submissions, Mr. Korir held his brief. During the trial Mr. Omwancha held Mr. Mogaka's brief.

Mr. Agonga – during the Pre-trial Conference and at the hearing Mr. Were held his brief.

Mr. Wetaba for the 2nd Respondent

Mr. Kadima – during the Pre-trial Conference and at the hearing, Mr. Were held his brief.

List of Agreed Issues

10. The parties framed the following as issues for the court to determine in this petition:

- (a) Whether the 1st Respondent breached section 28 of the Elections Act by party hopping to the Party of Democratic Unity (P.D.U) outside the timeline of 120 days.
- (b) Are the 2nd and 3rd Respondents required to forward the party list long before the party primary nominations as provided for under section 28 of the Elections Act?
- (c) Is the alleged party hopping by the 1st Respondent inclusion of the name and participation in the general election process subject of the present election petition?
- (d) Is there any evidence of fabrication of documentation as alleged by the petitioner with regard to any illegal party hopping which was done after the filing of the present petition?
- (e) Was the declaration by the 4th Respondent that the inclusion of the 1st Respondent's name as a member of the 2nd Respondent as a candidate and his participation of the election of August 8, 2017 a substantial breach of election law, Election Act and the Constitution of Kenya on account of illegal party hopping?
- (f) If the election (declaration) is a substantial breach, is the same rendered null and void ab initio?
- (g) Was the declaration of the 1st Respondent null and void ab initio on account of being incompetent or unqualified to be elected as the winner of M.C.A. – Bahari Ward Lamu West in the general election held on August 8, 2017 on a P.D.U ticket?
- (h) Did the 1st Respondent commit an offence under the Election Act and if so, should he have been disqualified from participating in the election on August 8, 2017?
- (i) Is this court the right forum for the petitioner in light of the allegation of party hopping?
- (j) Whether the election as conducted as free and fair.
- (k) Whether any illegalities if proven affect the outcome of the election as conducted by the 4th Respondent
- (l) What is the order as to costs in this petition?

Petitioner's Case

11. The petitioner, Jane Njeri Kamande ("Jane") was the first to testify in the petitioner's case. As part of her examination-in-chief, she informed the court that she lives in Mpeketoni in Bahari Ward where she works as business lady. Jane further informed the court that she registered as a voter at Lake Kenyatta Primary School and that she is a registered member of the Jubilee Party (J.P.); Jane presented her original party card. Jane confirmed that she filed the present petition as well as the supporting affidavit. She urged the court to adopt her supporting affidavit as evidence in this case.

12. In cross examination by Mr. Were on behalf of Mr. Agonga for the 1st Respondent, Jane told the court that all voters were issued with voter's cards. She said that she did not have her voter's card in court. She also admitted that her Jubilee Party Card did not have her photo or I.D. number on her Jubilee Party Card. Jane stated that she joined the Jubilee Party in February 2017. Though her signature on her I.D. and that on her supporting affidavit were different, Jane said it was her signature. Jane explained her main grievance in filing this petition is that Anthony Njomo was a member of two parties – Jubilee Party (J.P.) and Party of Democratic Unity (P.D.U). Jane said she was aware that Anthony Njomo resigned from the Jubilee Party on April 7, 2017 by a letter to the Registrar of Political Parties. Jane denied that Anthony Njomo was a member of the P.D.U because he took part in the Jubilee Party nominations which took place on April 26, 2017. Jane told the court that Anthony Njomo did not sign the results from Lake Kenyatta Primary School where the M.C.A party primaries took place but she said his agent, Peter Maina signed.

Jane said there was nothing to prove to the court that Peter Maina was Anthony Nomo's agent. She stated that it is not true that Anthony Njomo had a right to participate in the elections held on August 8, 2017.

13. In cross examination by Mr. Wetaba for the 2nd Respondent, Jane explained that this election dispute arose because Anthony Njomo hopped from one party to another which is against the law. Jane gave evidence that there was no dispute on the election results. She reiterated that the Jubilee Party nominations took place at Lake Kenyatta Primary School, Lakeside Primary School and Ngoi Primary School. Jane told the court that she did not participate in the Jubilee Party nominations but that she heard about them from other people and the boda boda riders. Jane said she heard from Anthony Njomo's agents that he participated in the Jubilee Party nomination process. She denied knowing Daniel Kinuthia and Mercy Kobia both of whom were the presiding officers at the Jubilee Party nomination. Their names appear on page 3 and 5 of her affidavit marked JNK-1.

14. Jane told the court that she was able to obtain the Jubilee Party nomination results which took place from Emmanuel Wanyoike whom she described as a Jubilee Party agent. She insisted that she knew she could write to the Jubilee Party and obtain the documents but she opted to use Emmanuel Wanyoike because he is more familiar with the party processes. Jane was friends with Anthony Njomo on Facebook but not anymore. Jane told the court that Anthony attended a Jubilee Party meeting on April 23, 2017. She said she could not prove that Anthony Njomo re-joined the Jubilee Party after resigning on April 7, 2017. Jane explained that she had information that Anthony Njomo joined on March 17, 2017 and that he was a member of two parties thought she did not lodge any complaints. Jane added that Anthony Njomo used posters bearing President Uhuru's photo and that he also posted these photos on Facebook. Jane referred to page 23 of her affidavit which shows a letter from Michael Kanja whose contents she said were true. Jane said she did not involve any Jubilee officials in this petition.

15. In cross examination by Mr. Were for the 3rd and 4th Respondents, Jane told the court she enjoined the Returning Officer and IEBC as respondents in this petition because they allowed Anthony Njomo to participate in the elections yet he was a member of two parties. Jane said that a complaint was filed between the nomination and election period. Jane told the court no complaint was raised between the voting day and the day the election results were declared. Jane confirmed that no complaint was raised after I.E.B.C prepared the results for the M.C.A Bahari Ward; though she said the losers registered their protest by refusing to sign the results. Jane said she did not raise any complaint when Anthony Njomo was presented with the certificate by I.E.B.C. Jane stated that no complaint was lodged after the nominations because Michael Kanja had filed a case with the I.E.B.C. Tribunal; though she explained that he never got a hearing.

16. In re-examination, Jane told the court that she has known Anthony Njomo for more than six years. She said he was an M.C.A in Bahari Ward from 2013 when he stood on a Farmer's Party ticket. Jane explained that it was the second time Njomo was opting to be part of the elections. Jane confirmed that Anthony Njomo participated in the Jubilee Party nominations on April 26, 2017 where he lost to Emmanuel Wanyoike. She told the court that Emmanuel was a witness in the case. Jane indicated that Anthony Njomo resigned from the Jubilee Party on April 7, 2017 but still took part in the Jubilee Party primaries where Peter Maina was his agent.

17. She said that Peter was a witness in the case before the court. She explained that no allegation had been raised that the documents annexed to her affidavit were forgeries neither was there any complaint that she filed the petition late. She referred to the annexures in her affidavit from Facebook where Anthony Njomo refers to himself as Jomo Baba Uhuru. Jane reiterated that Kanja raised a complaint about Anthony Njomo party hopping with I.E.B.C though it was dismissed without being heard. She explained the reason for its dismissal is that the hearing was in Nairobi at the I.E.B.C office in Nairobi and Kanja was in Mpeketoni.

18. Jane said that when Anthony Njomo lost the nomination process, he said he would run as an independent candidate. She further added that she was surprised when she found out Anthony Njomo was in P.D.U. Jane told the court she viewed this as a problem because he was in two parties and she said it is this fact that prompted her to file this case.

19. The petitioner's second witness, Michael Kanja Kagori ("Michael") told the court he lives in Zikomani, Bahari Ward Mpeketoni. He also stated that he is a farmer, businessman and a youth leader. He also said that he is a registered voter at Zikomani Primary School which is in Bahari Ward. Michael said as a youth leader he is involved with registered community based organizations. Michael stated that he supported Jane's petition and that he had sworn an affidavit in support of the petition. He asked the court to adopt his affidavit as evidence in this case.

20. In cross examination by Mr. Were holding brief for Mr. Agonga, Michael told the court that he voted on August 8, 2017. He said he did not use his voter's card but he told the court that his voter details can be verified by sending a text to 70000. Michael reiterated that he is a youth leader at Zikomani Primary School though he told the court he had nothing in court to prove this fact.

21. Michael stated that he supported Jane's petition because Anthony Njomo changed parties against the law in that he moved from the Jubilee Party to P.D.U after the Jubilee Party nominations. Michael asserted that he was sure Anthony Njomo took part in the Jubilee Party nominations on April 26, 2017. Michael told the court that he did not participate in the Jubilee Party nominations and that he is not a member of the Jubilee Party. Michael explained the basis of his knowledge was the fact that Anthony Njomo mobilized people in Zikomani. Michael said Anthony Njomo used Zikomani Primary School and Zikomani Playground to mobilize people.

22. Michael confirmed receiving a call from a lady who works at I.E.B.C though he could not recall the telephone number of the person who told him she works at I.E.B.C. Michael told the court that he never visited his service provider Safaricom to ask for call logs to demonstrate to the court that he received a call from I.E.B.C. Michael told the court that the lady from I.E.B.C asked him if he had filed a case with the I.E.B.C committee and he replied in the affirmative.

23. Michael said she told him that he was required to appear in Nairobi in support of the case he filed. He said he asked if the hearing could be moved to June 6, 2017 or if he could send a representative. He said she told him that he had to appear in person and that she would update him on the outcome. Michael explained that he tried to call her but he did not get through. Michael said that I.E.B.C. placed an advert in the Daily Nation on June 5, 2017 that his complaint would be heard on June 5, 2017.

24. Michael gave evidence that he knew about the outcome of the Jubilee Party nominations. He told the court that the only contestants were Emmanuel and Njomo. Michael said he found out a month later that Anthony Njomo moved parties when I.E.B.C cleared him to run on a P.D.U ticket. Michael said it was Abdalla Chikophe the returning officer who advised him to lodge a complaint.

25. He said he could not travel on June 4, 2017 from Mpeketoni and be in Nairobi on June 5, 2017 at 9am due to the hazards of travelling from Nairobi to Lamu by road. Michael said he was not aware of the outcome of his complaint until the petition was filed in Mombasa after August 8, 2017. Michael stated he filed the case in Mombasa because he never got a hearing before I.E.B.C. He said that the Mombasa case decision was that their case should be filed in the right forum. Michael told the court that when he learned Jane had filed this case, he decided to be a witness.

26. In cross examination by Mr. Wetaba, Michael said the lady told him that his case would be heard on June 5, 2017. He said he was surprised that his case was heard on June 6, 2017 when he had been advised that his case would be heard the day before. Michael admitted that he did not serve Anthony Njomo with his complaint; he said he did not do this because this is what Abdalla Chikophe advised him. He further admitted that based on the advisory note 2 on the complaint (on page 2 of annexure IGN-4 sworn by Isaiah Gichu Ndirangu), it was advisable for him to serve Anthony Njomo. But he added at the time when he filed the complaint, he was ignorant of this fact. Michael said he was surprised Anthony Njomo found out about the case and that he was able to get a lawyer to represent him at the hearing. Michael told the court he travelled to Nairobi from Lamu on June 3, 2017 when he went to the I.E.B.C. headquarters at Anniversary Towers. Michael said he heard about Njomo's party hopping on May 28, 2017. He said his affidavit annexed to the complaint is erroneously dated May 3, 2017 and that it should read June 3, 2017. Michael insisted he was being honest by being part of this case because Zikomani is his area.

27. In cross examination by Mr. Were for the 3rd and 4th Respondent, Michael explained that he was unable to attend the session at I.E.B.C. Michael said he did not file his complaint by the time Anthony Njomo was issued by I.E.B.C with a certificate. Michael confirmed that he did not file the complaint after the nomination list was issued by I.E.B.C or even after the declaration of the results by I.E.B.C. Michael informed the court that he had no issue with the voting, tallying and announcements of the results by I.E.B.C.

28. In re-examination Michael confirmed that there are many political parties in Kenya. Michael said he had an interest because he lives in Zikomani which is in Bahari Ward where Anthony Njomo was elected. Michael told the court that he took a step because Anthony Njomo lost in the Jubilee Party nominations and yet instead of vying as an independent candidate, he went into the elections as a member of another party. Michael explained that he first asked for advice from Abdalla Chikophe who told him to file his complaint with the I.E.B.C committee in Nairobi.

29. Michael told the court that he travelled to Nairobi on June 2, 2017 and went to the I.E.B.C office in Nairobi on June 3, 2017 where he filed his complaint along with the supporting affidavit. Michael said there was a typo on the affidavit. After filing the complaint Michael said he was advised that he would be called for the hearing and he thus began his journey back to Mpeketoni on June 4, 2017. Michael said that he received a call from a lady on June 4, 2017 as he arrived in Mpeketoni that he was required to be in Nairobi on June 5, 2017 for the hearing of his complaint.

30. Michael told the court that he saw the proceedings from the I.E.B.C committee which dismissed his case without giving him a hearing. Michael said he saw no response to his complaint from Anthony Njomo. He said in Mombasa he was directed to file his case in the right forum and that is when he decided to join Jane's petition. Michael said he had come to court because Anthony Njomo moved from one party to another.

31. The petitioner's third witness, Emmanuel Wanyoike Kimani. He told the court that he lives in the FTC area in Bahari Ward where he works as businessman who sells electronics. He told the court that he was in court to support Jane's petition against Anthony Njomo. He added that Anthony party hopped during the election processes specifically when he lost the Jubilee Party nomination and moved to P.D.U. Emmanuel testified that he and Anthony Njomo were the only contestants for the Bahari Ward nomination in the Jubilee Party. Emmanuel said he found out later that Anthony Njomo moved to P.D.U. He explained that he had stated all this in his affidavit and he asked the court to adopt his affidavit as evidence.

32. In cross examination by Mr. Were, Emmanuel said he did not take any action against Anthony Njomo when he found out about the party hopping. Emmanuel also said he was not aware if Jubilee Party took any action against Anthony Njomo. Emmanuel explained that on August 8, 2017 there were Jubilee Party agents during the election at Bahari Ward. He further explained that those vying for the Bahari Ward seat registered their protest by refusing to sign the results showing Anthony Njomo won.

33. Emmanuel said he saw Anthony Njomo's resignation dated April 7, 2017 and that he was not aware if Anthony Njomo re-joined the Jubilee Party after resigning. Emmanuel denied that Anthony Njomo won the vote in a clean way by standing as a candidate from P.D.U. Emmanuel referred to his affidavit filed in court on October 12, 2017 with an annexure showing that Anthony Njomo was a member of P.D.U and thus a member of two political parties.

34. In cross examination by Mr. Wetaba, Emmanuel said that he visited the Jubilee Party officers and obtained the nomination documents attached to Jane's affidavit. He said these documents were given to him by the Jubilee Party agents who were present at the Jubilee Party primaries at Lake Kenyatta Primary School, Lakeside Primary School and Ngoi Primary School. Emmanuel told the court there were 7 polling stations and he gave the remaining four as Lake Amu, Tewa Primary School, Umoja, Kiongwe. Emmanuel indicated that he was only able to obtain documents for the three polling stations that were annexed to Jane's affidavit.

35. He said as a person vying he had knowledge of the process and that he also attended a meeting at Mahrus Hotel in Lamu. Emmanuel stated that Jubilee Party had all the documentation for the nomination process and that he had nothing in court. He said that he visited the Office of the Registrar of Political Parties. Emmanuel said he never asked I.E.B.C when Anthony Njomo was registered as a candidate. Emmanuel said he never signed the results form because he had a problem with the election process though he confirmed he had no problem with the results.

36. In cross examination by Mr. Were, Emmanuel confirmed that he had no problem with the results from I.E.B.C from the election held on August 8, 2017. He said he was not satisfied with the results; thus, he registered his displeasure by refusing to sign the results form and becoming a witness in Jane's petition. Emmanuel told the court that a voter complained to I.E.B.C about the fact that Anthony Njomo was issued with a nomination certificate on May 27, 2017 but he did not. He said he did not register a complaint when Anthony Njomo submitted his self-declaration on May 27, 2017. Emmanuel said he did not take any action against Anthony Njomo because he expected I.E.B.C would do its job.

37. In re-examination, Emmanuel told the court that he has known Anthony Njomo since 2010. He said he supported Anthony Njomo who stood as a candidate in 2013 for the position of MCA under the Farmer's Party in 2013. Emmanuel confirmed that he and Anthony Njomo took part in the Jubilee Party primaries that took place on April 26, 2017. He clarified that they were the only two candidates for Bahari Ward in the Jubilee Party.

38. About the annexure's in Jane's affidavit with the results from the primaries at Lake Kenyatta Primary School, Emmanuel told the court that Peter Maina was Anthony Njomo's agent and Anastacia was his agent. Emmanuel confirmed that the resignation process from the Jubilee Party is clear set out; it requires a person to send a resignation letter to the Jubilee Party Secretary General and to the Registrar of Political Parties. Emmanuel told the court that Anthony Njomo's letter bearing the stamp from the Officer of the Registrar of Political Parties shows the date as May 8, 2017. Emmanuel pointed out that Anthony Njomo's resignation was received after the Jubilee Party primaries took place on April 26, 2017.

39. Emmanuel said that according to annexures to the affidavit by Isaiah Gichu Ndirangu, Anthony Njomo was a member of P.D.U on March 17, 2017. Emmanuel referred to his annexure in the affidavit filed in court on October 12, 2017 which is a letter from the Registrar of Political Parties dated September 6, 2017 showing that Anthony Njomo was a member of P.D.U as at June 2, 2017. Emmanuel asserted that he won the Jubilee Party primaries for Bahari Ward on April 26, 2017.

40. He said he discovered on social media that Anthony Njomo was standing on a P.D.U ticket. Emmanuel made reference to the annexures on Jane's affidavit which were extracts from Facebook. Emmanuel said he did not go to court because he had exhausted his campaign funds. He said that Anthony Njomo took part in the Jubilee Party nominations and lost; it was he – Emmanuel – who was the winner.

41. The fourth witness, Anastacia Kinanu Riungu told the court that she lives and works in Mpeketoni, Bahari Ward where she is a business lady. She told the court that she sells goods at Mpeketoni Market. She testified that she is a registered voter at Lake Kenyatta Primary School.

42. Anastacia told the court that she is interested in local politics and that she keenly followed the events leading to the general elections on August 8, 2017. She went on to state that she had come to court as a witness in support of Jane's petition. She asked the court to adopt her affidavit as evidence. Anastacia gave evidence that she was Emmanuel's campaigner and that she was also his agent at the Jubilee Party primaries. She said that there were two candidates who stood in Bahari Ward and she added that Emmanuel won. Anastacia said she met a man called Peter Maina who was Anthony Njomo's agent. She said that she has known Anthony Njomo since 2013.

43. In cross examination by Mr. Were on behalf of Mr. Agonga, Anastacia told the court that she had not proved with any documentation that Emmanuel appointed her as his campaigner. She did however sign documents as a Jubilee Party agent though she said the documents were not in court. Anastacia also

clarified that none of the other agents had badges or letters of introduction. She said that Emmanuel was issued with a nomination certificate by the Jubilee Party though she confirmed that she did not see the certificate in court.

44. She admitted that she was Emmanuel's agent at Lake Kenyatta Primary School, she signed the nomination form though she did not indicate on whose behalf she was signing. She told the court that after he lost, Anthony Njomo informed his followers on Facebook that he would vie as an independent candidate. Anastacia said that she did not know if Anthony Njomo told I.E.B.C that he was going to vie as an independent candidate. She said that he started associating himself with P.D.U and later (a month after the Jubilee Party primaries) she saw posters that Anthony Njomo was standing on a P.D.U ticket.

45. In cross examination by Mr. Wetaba, Anastacia said that her motive for being in court is because Anthony Njomo hopped from one party to another and therefore broke the law. She told the court that she had not carried out any investigations to prove this fact. Anastacia confirmed that she had not written to the Jubilee Party or I.E.B.C or P.D.U. She reiterated that Anthony Njomo moved from one party to another in less than 120 days. Anastacia said Anthony Njomo participated in the Jubilee Party nominations and then joined P.D.U.

46. She did say that the Jubilee Party had not raised any complaints against Anthony Njomo's actions. Anastacia said after the primaries, the Jubilee Party remained with all the documentation and she confirmed she did not give any documents to Emmanuel. Anastacia said there were 7 polling stations. She said on the page where she signed her name, the other names were for those vying for other positions and not just MCA. Anastacia then clarified that the four names including hers were for the MCA position at Bahari Ward. She told the court that she and Swabara were Emmanuel's agents and Esther and Peter were agents for Anthony Njomo. She said she could not remember all the agents' names. She said the nomination forms on page 5 and 6 of the annexures to Jane's affidavit had the Jubilee Party stamp.

47. In cross examination by Mr. Were, Anastacia blamed I.E.B.C for giving Anthony Njomo a nomination certificate and allowing him to participate in the general elections. She said I.E.B.C were at fault because they allowed Anthony Njomo to stand on a P.D.U ticket less than 120 days to the election. She added that the Returning Officer was also at fault for clearing Anthony Njomo less than 120 days to the election. Anastacia reiterated that she did not remain with any documentation after the Jubilee Party primaries and she did not know why only the results from three polling stations were brought to court. She said I.E.B.C did not follow due process by allowing Anthony Njomo to stand as a candidate. Anastacia said she did not know if the seven polling stations were gazetted in the Kenya Gazette.

48. In re-examination, Anastacia repeated the fact that she did not retain any documents after the Jubilee Party primaries which took place on April 26, 2017 for the positions of M.C.A, M.P, and Senator. She reiterated that she and Swabara were Emmanuel's agents at the primaries while Peter and Esther were Anthony Njomo's agents at Lake Kenyatta Primary School. Anastacia said she knew the petition was in court because Anthony Njomo hopped from one party to another after he lost the Jubilee Party nominations.

49. She said Anthony Njomo joined P.D.U on June 2, 2017. Anastacia said she was not given any identification during the nomination process indeed she said none of the agents were given. She said Emmanuel was presented with the nomination certificate. She said she was surprised when she saw the social media posts and posters showing Anthony Njomo was in P.D.U. Anastacia said the polling stations for the primaries were far apart and that she did not know all the agents. She said she did not know the reason for including the results of only three polling stations.

50. The fifth witness, Peter Maina Macharia told the court he lives in Mpeketoni in Bahari Ward. Peter said he earns a living from his retail shop and that he is a farmer. He added that he had come as a witness in support of the petition filed by Jane Njeri Kamande, in opposition to the election of Anthony Njomo Maina as the Member of County Assembly for Bahari Ward. Peter further informed the court that he has known Anthony Njomo from 2013 when he campaigned for him.

51. Peter stated that Anthony Njomo emerged victorious in that election and won the Bahari Ward election on a Farmer's Party ticket. Peter testified that he campaigned for Anthony Njomo in 2017 on a Jubilee Party ticket. Peter confirmed that the Jubilee Party nominations took place on April 26, 2017 and that he was an agent for Anthony Njomo during the primaries at Lake Kenyatta Primary School, one of the polling stations. Peter said he and Esther Wairimu were Anthony Njomo's agents and they signed the results. Peter gave evidence that Anthony Njomo lost the nomination. He said he knew Anthony Njomo was standing as an independent candidate but later Peter discovered he was standing on a Party of Democratic Unity ticket. Peter said that from April 26, 2017 he knew Anthony Njomo was standing as an independent candidate. He asked the court to adopt his affidavit as evidence in the case.

52. In cross examination by Mr. Were on behalf of Mr. Agonga, Peter said he is a member of Jubilee Party and a registered voter in Bahari Ward even though he had nothing to prove this in court. Peter said he did not sign his I.D. number on page 5 of the annexure on Jane Njeri Kamande's affidavit where he was an agent for Anthony Njomo. He said that the page does not show he was signing on Anthony Njomo's behalf.

53. Peter said Anthony Njomo did not present him any documentation to formalize the fact that Peter was his agent. Peter explained it was the same for every candidate that is, none of them were given formal appointments but there was a general consensus between the agents and the aspirants.

54. Peter explained that a meeting took place on April 23, 2017 where the aspirants and their agents attended. Peter referred to the annexure to his affidavit as proof that this meeting took place. The list shows Anthony Njomo as one of the aspirants though Peter explained that he did not see him sign in. He also said that the Anthony Njomo's signature on the list does not match the one on Anthony Njomo's affidavit sworn on September 25, 2017.

55. Peter stated that he saw Emmanuel being presented with the nomination certificate from the Jubilee Party. Peter explained that Anthony Njomo committed an illegality by hopping from one party to another in less than 120 days. Peter said he was not aware that Anthony Njomo resigned the Jubilee Party between end of April and early May. Peter said also that the nomination took place on April 26, 2017 for all those in Lamu West vying for Member of County Assembly and Member of National Assembly. Peter explained that the results of the Member of County Assembly were announced late in the night and immediately after this, he gave the result slip for Lake Kenyatta Primary School to Anthony Njomo. Peter said he did not make any report to any institution. He also said that Anthony Njomo had many campaigners.

56. In cross examination by Mr. Wetaba, Peter told the court that he voted at the party primaries at Lake Kenyatta Primary School. Peter told the court that he never made any inquiries into Anthony Njomo hopping to Party of Democratic Unity. He added that he does not consider that Anthony Njomo won fairly because he did not follow due process. Peter said he has not heard any complaints from the Jubilee Party.

57. Peter explained that it is his right to raise a complaint as a voter even though the party did not. He also said Anthony Njomo did not join the Party of Democratic Unity with the timelines set out in the law. Peter stated that it was not possible for Anthony Njomo to move parties within the 120 days required by the law. Peter said that Anthony Njomo paid him to campaign for him and that he (Peter) was owed nothing.

58. Peter described what happened on April 26, 2017 how voters arrived at 8:30am but voting started after 12:00pm and then it was halted because there were some challenges among which were shortage of papers (ballots). This was at Lake Kenyatta Primary School as seen on page 5 of the annexure to Jane Njeri Kamande's affidavit. Peter stated there were only two aspirants for Bahari Ward. Peter explained the challenges experienced were for the other positions and not for the M.C.A. ward.

59. In cross examination by Mr. Were, Peter said that Anthony Njomo ought to have been cleared by the Registrar of Political Parties and I.E.B.C He explained that his contention with I.E.B.C is that they

allowed Anthony Njomo to participate in the elections while he was a member of two political parties. Peter said I.E.B.C gave Anthony Njomo the green light to take part in the elections on May 28, 2017.

60. He said the office of the Registrar of Political Parties had not cleared Anthony Njomo at the time. Peter told the court that Anthony Njomo registered as a member of Party of Democratic Unity on June 2, 2017. Peter told the court he obtained this information from Emmanuel. Peter said he did not physically visit the I.E.B.C officers to verify if Anthony Njomo was a member of two political parties, though he stated that I.E.B.C registered him on two political parties and he won.

61. Peter stated that I.E.B.C played a role in Anthony Njomo winning the Member of County Assembly seat for Bahari Ward. Peter confirmed that Emmanuel never lodged a complaint while Michael lodged a complaint though no complaints were ever made to the Jubilee Party or the Registrar of Political Parties.

62. Peter said he complained on August 10, 2017 when the results were announced. He also said that none of the other contestants signed the form with the results as a form of protest. Peter referred to page 24 of Jane Njeri Kamande's affidavit. Peter explained the signatures on page 24 are Anthony Njomo's and the Jubilee Party officials. Peter told the court that I.E.B. C's processes were not transparent and it is this fact that brought them to court.

63. Peter stated that from his affidavit, Anthony Njomo's participation in the Jubilee Party primaries showed he should not have been a member of the Party of Democratic Unity because of the 120 days requirement. Peter explained that I.E.B.C should not have added Anthony Njomo as a candidate without checking with the Registrar of Political Parties. Peter said he did not see the nomination certificate given to Anthony Njomo by Party of Democratic Unity, but he saw Emmanuel given the Jubilee Party nomination certificate.

64. In re-examination, Peter said he is a registered voter at Bahari Ward and he explained this information can be verified by sending his I.D. number to 70000 – a number given by I.E.B.C for voters to check their registration status. Peter confirmed that he was Anthony Njomo's agent during the Jubilee Party primaries. Peter reiterated that the Jubilee Party held a meeting in Lamu County on April 23, 2017 which was an orientation meeting for the aspirants. Peter told the court that Anthony Njomo gave him the document (attendance list for the meeting held on April 23, 2017).

65. Peter said he never saw the minutes and he clarified that at the time, Anthony Njomo was a Member of County Assembly. Peter gave evidence that it was Emmanuel who won the Jubilee Party primaries and he witnessed Emmanuel being presented the Jubilee Party nomination certificate. Peter restated that he signed the declaration of the nomination results from Lake Kenyatta Primary School where he was an agent for Anthony Njomo on April 26, 2017.

66. Peter said that Anthony Njomo took part in the Jubilee Party primaries on April 26, 2017. Peter said he was with another agent. He said on May 28, 2017 he heard that Anthony Njomo was standing on a Party of Democratic of Unity ticket. Peter explained that Anthony Njomo posted on social media on April 28, 2017 that he would be running as an independent candidate and Peter said this was after he lost the nomination. Peter informed the court that he saw the posters showing that Anthony Njomo was running on a Party of Democratic of Unity ticket and he won.

67. Peter said he did not campaign for him because Anthony Njomo did not take right steps after he lost the Jubilee Party nomination. Peter stated that when he raised his complaints with I.E.B.C on August 10, 2017 he was directed to come to court. He said he came as Jane Njeri Kamande's witness and also because the voters need justice. Peter also explained that other candidates followed the process but Anthony Njomo was in two political parties. Peter concluded by saying that Anthony Njomo moved to the Party of Democratic Unity from the Jubilee Party in total disregard of the timeline stated in law which is 120 days.

The First Respondent's Case

68. There was only one witness for the first respondent and that is Anthony Njomo Maina. He gave his I.D. number and informed the court that he has two types of signatures and confirmed that he signed the affidavit adopted as his evidence in opposition to the petition. Anthony Njomo informed the court that he is serving his second term as the Member of County Assembly for Bahari Ward. He said in 2013 he won the seat on a Farmer's Party ticket and in 2017 he defended his seat on a seat from the Party of Democratic Unity.

69. He confirmed that he wrote his resignation letter on April 7, 2017 to Jubilee Party and that he copied this to letter to the Registrar of Political Parties; she received his letter on May 8, 2017. He also made reference to his letter to the Jubilee Party that was received and stamped; the letter is annexed to the affidavit sworn by Isaiah Gichu Ndirangu (for the 2nd Respondent). Anthony Njomo confirmed that the Party of Democratic Unity issued him with a Nomination Certificate on April 24, 2017.

70. Anthony Njomo testified that he completed annexure – ANM-1, dated April 7, 2017 at the P.D.U. office. He also added that though there is a faint letter it demonstrates that he submitted his resignation to the Jubilee Party who received his letter and stamped it on the right-hand side of the page. Anthony Njomo further testified that he was issued with a certificate by P.D.U for Bahari Ward. He said that he wrote to the Registrar of Political Parties and requesting for a status update confirmation. Anthony Njomo stated he received a response confirming that he is a member of P.D.U. He admitted that during the nascent stages of the Jubilee Party in March 2017, he considered running for M.C.A on a Jubilee Party ticket.

71. However, Anthony Njomo said he changed his mind when he realized that his opponents were ganging up to ensure that he was denied the chance the nomination ticket on the Jubilee Party. He confirmed that he resigned from the Jubilee Party within the time prescribed by law and that he never returned to the Jubilee Party. Anthony Njomo also denied stating that he would run on a Jubilee Party ticket. He gave evidence after receiving the P.D.U nomination ticket he prepared himself to campaign and that included making posters.

72. Anthony Njomo confirmed that I.E.B.C gave him the green light to take part as a candidate in the election and he won the Bahari Ward seat. Consequently, following his victory, I.E.B.C issued him with a certificate on August 10, 2017. Anthony Njomo explained that Emmanuel Wanyoike also took part in the election and he emerged fourth. Anthony Njomo told the court that no one has challenged the number of votes he got. He asked the court to dismiss the petition and award him costs because he has suffered being taken to court first in Mombasa and also, being sworn in as a Member of County Assembly a month after his fellow members as a result of being dragged to court.

73. In cross examination on behalf the Petitioners, Anthony Njomo reiterated that he lives in Mpeketoni Town. He also said he was the incumbent M.C.A for Bahari Ward before the 2017 elections and that he defended his seat which he won. Anthony Njomo stated again that he stood on a Farmer's Party ticket in 2013. He explained that he remained a member of the Farmer's Party all through until he moved to the Jubilee Party which Anthony Njomo said he joined legally. He told the court that if he had been given prior notice, he would have brought documentation to the court to prove how he moved from the Farmer's Party to the Jubilee Party. He informed the court that he had nothing to show the court this as at the time he was testifying.

74. Anthony Njomo confirmed that the document dated April 7, 2017 is a form and his resignation letter. He confirmed that it bears no stamp to support the fact it was received by the Jubilee Party. Anthony Njomo told the court that he did not have the original letter of resignation but he said it was received at the Jubilee Party headquarters. Thereafter he presented the same letter to the Office of the Registrar of Political Parties who received it on May 8, 2017. He referred to his membership verification form dated March 17, 2017 annexed to the affidavit sworn by Isaiah Gichu Ndirangu. He said Isaiah advised him to resign from the Jubilee Party. Anthony Njomo said he completed the form for P.D.U to verify his details from and insisted that by completing this form, he was not a member of P.D.U. Anthony Njomo was emphatic that he became a member of P.D.U on April 8, 2017 though he had no proof to show that P.D.U received his resignation letter.

75. Anthony Njomo said he received a direct nomination ticket from P.D.U for the Bahari Ward M.C.A. position. He explained that he was aware that Isaiah, as P.D.U chairman forwarded his details to I.E.B.C and Anthony Njomo stated he confirmed that he was a candidate from the I.E.B.C website in July 2017. Anthony explained that he submitted his details to take part in the Jubilee Party primaries in early March 2017. He was at pains to inform the court this is the reason his name was on the ballot for the Jubilee Party primaries that took place even though he did not take part.

76. Anthony Njomo said he heard from some people that his name was on the ballots but he was categorical that he was not interested in the Jubilee Party primaries. He said he heard that Emmanuel Wanyoike won the Jubilee Party ticket for Bahari Ward. He confirmed that in his affidavit, Anthony Njomo wanted the Jubilee Party to be enjoined in the proceedings in this case.

77. Anthony Njomo told the court that became aware through a newspaper advertisement that Michael lodged a case against him at the I.E.B.C. He said he instructed his lawyer to defend him and he knew that Isaiah attended the proceedings though he could not recall the date. Anthony Njomo confirmed he knew Peter Maina Macharia as the owner of a shop he frequently visited.

78. He said they had known each other for four years and in 2013, Peter supported Anthony Njomo when he stood as a candidate for Bahari Ward. Anthony Njomo was unequivocal that he resigned from Jubilee Party. He denied having any campaigners or agents. He denied taking part in the Jubilee Party primaries. He denied any knowledge of the documentation presented to the court showing he was part of the primaries at specific polling station in Bahari Ward. He denied attending a meeting of the Jubilee Party aspirants on April 23, 2017 since he denied being a member of the Jubilee Party.

79. Anthony Njomo confirmed that he has a Facebook account where he uses the moniker Njomo Baba Uhuru. He denied that the social media pages in the annexure of Jane Njeri Kamande are his. He denied writing the posts he denied any link on the Facebook page to the P.D.U poster with reference to the Kikuyu saying. He said with reference to the Jubilee Party poster that the only claim he can make is that the photo is his. He stated that he knew Sarah Wambui as his neighbour but that he did not mention her name in his social media posts. Anthony Njomo admitted that he never responded to anything about the social media in his affidavit. He denied that he stood on a Jubilee Party ticket and that when he lost he joined P.D.U outside of the time stipulated by law.

80. Mr. Wetaba had no questions to ask.

81. Anthony Njomo explained that I.E.B.C acted within the parameters of the law by clearing him so he could take part in the election. He said he was ignorant on whether Emmanuel made a complaint to I.E.B.C. Anthony Njomo stated that he did not know that Emmanuel contested the declaration of results that he won the Bahari Ward seat. Anthony Njomo said Emmanuel was 4th in the election on August 8, 2017 which according to Anthony Njomo was free, fair and proper.

82. In re-examination Anthony Njomo said that his resignation from the Jubilee Party can be seen in the letter dated April 7, 2017 which was stamped on the bottom right side. He referred to the Jubilee Party manifesto that states one way a member can resign is by sending a letter. He confirmed his name was on the I.E.B.C website as a candidate. Anthony Njomo denied appointing Peter and Esther as party agents.

83. He said he was ignorant of a Jubilee Party meeting held on April 23, 2017 at Mwanarafa and that the signatures showing he attended any such meeting look like two different signatures. Anthony Njomo denied posting any messages on social media that were presented to the court. He said it is possible for a person to have more than one social media account. He denied illegally taking part on the Jubilee Party primaries and then running as a candidate in on a ticket from P.D.U. Anthony Njomo told the court that the election process was free, fair and credible and that he was declared the winner; he confirmed that I.E.B.C did its job. He asked the court to dismiss the petition with costs.

The Second Respondent's Case

84. The second respondent, Isaiah Gichu Ndirangu testified that he is the Chairperson of P.D.U, a position he has held since 2008. Isaiah confirmed that Anthony is a member of P.D.U and that he stood and won the Bahari Ward seat as an M.C.A during the general election held on August 8, 2017. Isaiah informed the court he swore an affidavit on September 8, 2017 in opposition to the petition. He made reference to the annexures to his affidavit. He denied fabricating any documents and instead insisted that the petitioner should have carried out due diligence on any of the documents attached.

85. In cross examination by Mr. Omwancha for the petitioner, Isaiah explained that P.D.U was formed in 2007 and even though he had no documents in court to show its establishment, Isaiah said the documentation relating to the formation of P.D.U is in the public domain. He further explained that P.D.U has a governing body and that he is one of the officials though he had nothing in court to show he is the chairman.

86. However, Isaiah made reference to the fact he is chairman by saying that he signed all documents related to this petition as Chairman of P.D.U. He referred to a verification form annexed to his affidavit and explained it is a form used for anyone who wishes to be a member of P.D.U. Isaiah stated that the word 'applicant' does not appear on the verification form but he was categorical that Anthony Njomo became a member of P.D.U on March 17, 2017. Isaiah told the court that he wrote a letter on March 17, 2017 to Anthony Njomo in response to Anthony's verification form. Isaiah told the court that using the verification form, he telephoned the Office of the Registrar of Political Parties and established that Anthony Njomo was a member of the Jubilee Party. Isaiah gave evidence that at the time, he did not have a resignation letter from Anthony Njomo; but he reiterated that Anthony Njomo applied and became a member of P.D.U on March 17, 2017. He made reference to annexures IGN-1 and IGN-2 to prove that P.D.U received Anthony Njomo's application but kept it in abeyance.

87. Isaiah informed the court that when Anthony Njomo came to their office, they issued him with a form which he referred to 'Resignation of a Member of a Party'. Isaiah went on to say that Anthony Njomo completed this form and served it on the Registrar of Political Parties. Isaiah said that he wrote a letter to Anthony Njomo on April 8, 2017 confirming him as a member of P.D.U. He said that as P.D.U he forwarded Anthony Njomo's name to I.E.B.C in compliance with section 28 of the Elections Act. He denied that Anthony Njomo became a member after he moved from the Jubilee Party.

88. When cross examined by Mr. Were on behalf of Mr. Angonga for Anthony Njomo, Isaiah confirmed that Anthony Njomo participated in the general election after obtaining clearance from I.E.B.C and P.D.U. Isaiah stated that I.E.B.C accepted Anthony Njomo's nomination certificate issued by I.E.B.C and that is why he stood as a candidate. Isaiah further stated that I.E.B.C is mandated to give the green light to a candidate so that they can be on the ballot and in Anthony Njomo's situation, he was given the green light by both P.D.U and I.E.B.C. Isaiah told the court they received no complaints and no one challenged the final results from I.E.B.C that Anthony Njomo won.

89. In cross examination by Mr. Were on behalf of Mr. Kadima for the 3rd and 4th Respondents, Isaiah told the court that P.D.U prepared a party list which was the nomination list and forwarded it to I.E.B.C; Anthony Njomo's name was included in this list. Isaiah said that the petitioner did not raise any complaint or challenge the declaration by I.E.B.C on August 10, 2017 that Anthony Njomo won the M.C.A position for Bahari Ward.

90. In re-examination, Isaiah confirmed that there was a condition attached to Anthony Njomo's application to join P.D.U; he referred to it as a suspension. Isaiah said that anyone can verify the details of membership for any member of P.D.U. Isaiah clarified that he wrote a letter on April 8, 2017 to confirm that Anthony Njomo's membership held in suspense had been allowed. He confirmed that P.D.U does not use stamps to show letters are received, they prefer to write letters. Isaiah stated one of his duties is to forward the names of the members to I.E.B.C.

91. Isaiah further clarified that he asked Anthony Njomo to resign on March 17, 2017 and that Anthony Njomo resigned on April 7, 2017. He explained completing the Verification Form does not give a person an automatic right to membership. Isaiah said no organ at P.D.U sits to admit members.

The 3rd and 4th Respondents' Case

92. Abdalla Mwarua Chikophe ("Abdalla") is the 3rd Respondent is the only witness and he also represents the 4th Respondent. He testified that he is an employee of I.E.B.C where he works as the Constituency Elections Co-ordinator in Lamu West. Abdalla told the court that during the elections held on August 8, 2017, he was the Returning Officer for Lamu West Constituency. Abdalla said he has worked with I.E.B.C from 2010. In regard to this case, Abdalla told the court that he made a declaration that Anthony Njomo Maina was the winner for the M.C.A Bahari Ward seat.

93. Abdalla testified that he issued a certificate to Anthony Njomo on May 28, 2017 and after he declared Anthony Njomo the winner on August 10, 2017, he issued him with the certificate attached to Anthony Njomo's affidavit. Abdalla informed the court that he wished to adopt his affidavit sworn on October 13, 2017 together with the 4th Respondent's response dated September 22, 2017 as evidence. Abdalla asserted that he carried out his duties as prescribed in the Elections Act when he declared Anthony Njomo as the winner. Abdalla stated that the petitioner had not presented any evidence to I.E.B.C that Anthony Njomo engaged in party hopping. Abdallah further stated that disputes arising from party hopping were within the purview of the Dispute Resolution Committee of the I.E.B.C.

94. Abdalla explained that he was aware that a gentleman filed a dispute with the I.E.B.C on June 2, 2017. He went on to further explain that gentleman informed him that Anthony Njomo was cleared but he had been involved in party hopping. Abdalla said he called the Legal Department within I.E.B.C who told him to advise the gentleman to file his complaint in the Dispute Resolution Committee of the I.E.B.C. Abdalla gave evidence that the results of the election for Bahari Ward had not been challenged.

95. He said he signed Form 36B and as he did so the person who came second after Anthony Njomo in the election instructed Abdalla to issue him with the certificate, citing the fact that Anthony Njomo's inclusion was improper. Abdalla told the court that he did not do what the gentleman suggested instead he advised him to file a case in court. Abdalla said he issued Anthony Njomo with the certificate. He said Anthony Njomo informed him he was not gazetted and then later Abdalla found out about this petition when I.E.B.C was served.

96. When cross examined by Mr. Omwancha on behalf of Mr. Mogaka for the petitioner, Abdalla told the court that I.E.B.C held a pre-nomination meeting for all aspirants on May 23, 2017 at Mwanarafa Hall. The purpose of the meeting was to brief the aspirants on the documentation to present and to agree on a schedule on how this would be achieved. He said the aspirants were given a checklist as a guide. Abdalla went on to say on May 28, 2017, Anthony Njomo presented himself and after going through the processes of verifying everything was in accordance to the check list, Abdalla cleared him. He said he came to Lamu on May 20, 2017 but that as I.E.B.C they were not involved in the Jubilee Party primaries.

97. Abdalla explained that he did not know if Anthony Njomo took part in the Jubilee Party primaries. Abdalla said when he received the complaint he advised the person to take it to the I.E.B.C Dispute Resolution Committee and he said the process of notifying the parties is by advertisement and then the parties are called. Abdalla told the court that he knew about the provision which states that parties must submit their lists not less than 120 days before the election. Abdalla went on to state that he did not know when P.D.U submitted their list to I.E.B.C. He said he did not have the information with him in court.

98. In cross examination by Mr. Were on behalf of Mr. Angonga, Abdalla said he was aware that I.E.B.C received the party list from P.D.U with Anthony Njomo's name as a candidate for Bahari Ward. Abdalla confirmed that Anthony Njomo's name was on the ballot during the election held on August 8, 2017. Abdalla informed the court that no queries were raised and the list of names was displayed at the I.E.B.C. office as well as published in the paper. Abdalla said he verified Anthony Njomo's details and found that they were in order.

99. When cross examined by Mr. Wetaba, Abdalla testified that any member of the public can request for information from I.E.B.C. He said that Anthony Njomo met with Emmanuel Wanyoike on May 23, 2017 during the pre-nomination meeting held on May 23, 2017. Abdalla stated that Anthony Njomo's name

was in I.E.B. C's electronic system and one possibility it may have reached there is through the party list submitted by P.D.U. Abdalla explained that once a person is cleared the electronic system prints out a paper similar to a ballot that bears the names of the candidate together with a photo.

100. Abdalla further explained that there was plenty of time for complaints between the time candidates were cleared and the election date. Abdalla clarified that he presided over a free and fair election. Abdalla also clarified that any person who submitted their name less than 120 days to the election would not have been in the I.E.B.C electronic system. Indeed, according to Abdalla, the fact that Anthony Njomo was included as a candidate means that his name was submitted within the 120-day period as stipulated by law. Abdalla said there were no complaints about the posters.

101. In re-examination, Abdalla explained that paragraphs 4 and 15 of his affidavit sworn on October 13, 2017 referring to an Amended Petition was a typing error. He admitted that it is his Replying Affidavit referring to the election of Anthony Njomo in Bahari Ward. Abdalla told the court that the results were verified before a declaration was made that Anthony Njomo is the winner. Abdalla asked the court to strike out the petition costs stating that any dispute should have been dealt with by the I.E.B.C. Resolution Committee. He said any aggrieved party missed their chance when I.E.B.C dismissed the complaint. Abdalla said this court was not the proper forum to address the issue of party hopping.

Summary of Submissions

102. At the close of the hearing, the parties agreed to file and highlight submissions; they agreed to file their submissions and come back to highlight them on November 21, 2017.

The Petitioner's Submissions – A Precis

103. A summary of the petitioner's submissions is that the participation of Anthony Njomo as a candidate for M.C.A for Bahari Ward is void ab initio. The petitioner asserts this view for the following reasons:

- a) Anthony Njomo breached section 28 of the Elections Act; he moved from the Jubilee Party to P.D.U in less than 120 days before the election.
- b) His move according to the Petitioner disqualified him from participating from the elections. Therefore, according to the Petitioner it was wrong for the 3rd Respondent to clear him as a candidate on May 28, 2017 and declare him as the winner and M.C.A for Bahari Ward on August 10, 2017. Similarly, it was wrong for the 4th Respondent to allow Anthony Njomo to participate as a candidate. The 2nd Respondent according to the Petitioner aided the 1st Respondent in breaching section 28 of the Election Act.

104. The petitioner hinges her case on section 28(1) of the Election Act and Article 103(1)(e) of the Constitution. Section 28 of the Elections Act provides:

28. Submission of party membership lists

(1) A political party that nominates a person for an election under this Act shall

submit to the Commission a membership list of the party—

(a) in the case of a general election, at least one hundred and twenty days before the date of the election; and

(b) in the case of a by-election, forty-five days before the date of the byelection.

(2) The Commission shall publicize the membership lists as received from political parties.

Article 103(1)(e) of the Constitution states:

(1) The office of a member of Parliament becomes vacant—

(e) if, having been elected to Parliament—

(i) as a member of a political party, the member resigns from that party or is deemed to have resigned from the party as determined in accordance with the legislation contemplated in clause (2); or

(ii) as an independent candidate, the member joins a political party;...

The marginal note of Article 103 reads, “Vacation of office of Member of Parliament”. This petition is concerns the election of a Member of County Assembly. Thus, Article 103 is irrelevant to this petition in this court’s view and will not be relied on.

105. The Petitioner relies on three cases. The first is **Maendeleo Chap Chap & 2 others vs. IEBC and another [2017] eKLR**, the second is **Council of County Governors vs. Attorney General and another [2017] eKLR** and the third is **Benjamin Leonard MacFoy vs. United Africa Company Limited 3 All F.R. 1169**.

106. In **Maendeleo Chap Chap and 2 others vs. IEBC and another [2017] eKLR** decided by Judge Mwita, the petitioner relies on this case which was decided before the general election to demonstrate the purpose and function of section 28 and Article 103 of the Constitution. It is the petitioner’s view that these sections exist to instil discipline within political parties and their members. Specifically, section 28 of the Elections Act was designed to cure the dreaded mischief of “party hopping” by members of political parties who are disgruntled and dissatisfied with their party. Judge Mwita stated that the other reason behind section 28 of the Elections Act and Article 103(1)(e) of the Constitution is to allow I.E.B.C to prepare for the general elections and to meet its timelines.

107. In **Council of County Governors vs. Attorney General and another [2017] eKLR** is decision by Judge Mativo in the Constitutional and Human Rights Division of the High Court sitting in Nairobi. In the petition, the Council of Governors filed a case challenging the constitutionality of section 28 of the Elections Act. In making his decision, Judge Mativo crystallized the intent of the petitioner in the case before him when he stated (at paragraph 23)

...The provision in question advances a compelling state interest to manage the electoral process efficiently as opposed to the individual interests of the petitioners who seem to be interested in looking for an opportunity to shift party allegiance after loosing nominations. A law aimed at promoting the legitimate state interest in fair, honest and orderly elections is in my view consistent with the provisions of the Constitution that require elections to be credible...

I associate and fortify myself with this view by Judge Mativo on the purpose of section 28 of the Elections Act.

108. In **Benjamin Macfoy vs United Africa Limited (1961) 3 All F.R. 1169**, the petitioner relies on this case to show that Anthony Njomo’s participation in the general election was void. Therefore, his declaration as the winner of Bahari Ward as an M.C.A is void.

The First Respondent

109. Mr. Were held brief for Mr. Agonga for the 1st Respondent during the hearing od this case, that is from the Pre-trial Conference and during the hearing. Mr. Were was present when the trial ended and he expressed a desire to highlight submissions. The agreement on the manner and mode as well the timeline for filing submissions was agreed that the pre-trial conference on October 10, 2017. These were to be

filed within two weeks of the conclusion of the trial as indicated in the Pre-trial Agreement which the parties present signed on October 10, 2017. Parties in court agreed that they would highlight submissions on November 21, 2017 and time allocation was done. On that day Mr. Wetaba holding brief for Mr. Were made an application for an extension of time for Mr. Were on behalf of Mr. Agonga to file submissions in two weeks. The court granted the application and allowed Mr. Were until November 30, 2017 to file submissions. This was not done; indeed no submissions were filed for the 1st Respondent.

The 2nd Respondent's Submissions – A Precis

110. The 2nd Respondent filed their submissions and authorities on time. The essence of their submissions may be summarized as follows:

- (a) Inconsistency in the petitioner's documentary evidence in the 1st Respondent's participation in the Jubilee Party primaries for Bahari Ward on April 26, 2017.
- (b) Resignation of the 1st Respondent from the Jubilee Party.
- (c) Electronic evidence submitted by the petitioner.
- (d) The burden of proof.
- (e) Whether the threshold of evidence presented to the court meets the standard that the 1st Respondent's win should be nullified.
- (f) Costs of the suit.

111. The 2nd Respondent relied on four cases. The first is **Fatuma Zainabu Mohamed vs. Ghatu Dennitah & 10 others [2013] eKLR**. The second case is **Steven Kariuki vs. George Mike Wanjohi and 2 others [2013] eKLR**. The third case is **Joel Nyabuto Omwenga & 2 others vs. I.E.B.C and another [2013] eKLR** and the fourth case is **Charles Ong'ondo Were vs. Joseph Oyugi Magwanga & 2 others [2013] eKLR**.

112. The 2nd Respondent relied on **Fatuma Zainabu Mohamed vs. Ghati Dennitah & 10 others [2013] eKLR** decided by Judge Muriithi, to guide the court on what factors to consider that materially affect election results. The 2nd Respondent makes reference to the authorities pointing to support his position that any irregularities would not affect the result because the 1st Respondent won by a large margin. In the case of **Steven Kariuki vs. George Mike Wanjohi and 2 others [2013] eKLR** decided by Judge Kimondo, the 2nd Respondent relied on this case for the court to take note on what the burden of proof is in an election case.

113. In relation to the petitioner's case in this court, the 2nd Respondent as stated in the submissions directed the court to draw a parallel that the petitioner's allegations against Anthony Njomo party hopping were not proved according to the standard of election cases in Kenya. In **Joel Nyabuto Omwenga & 2 others vs. I.E.B.C and another [2013] eKLR** decided by Hon. Anthony Mwiggi, is relied on by the 2nd Respondent to prove that the Petitioner has no case given the irregularities do not affect the results. The parallel drawn in the petitioner's case before this court is that Jane Njeri Kamande ought to have raised her objection to Anthony Njomo participating as a candidate before the general election and not belatedly after he was declared the winner by the 3rd Respondent on behalf of the 4th Respondent.

114. The 2nd Respondent further relied on **Charles Ong'ondo Were vs. Joseph Oyugi Magwanga and two others [2013] eKLR** as an authority that the petitioner's evidence in any petition ought to be cogent, credible and consistent evidence.

115. The 2nd Respondent holds the view that the petitioner in the case before this court has not met this threshold and therefore it ought to be dismissed. There is one other case annexed though this is not mentioned in the submissions. It is from the **Political Parties Disputes Tribunal – Complaint No. 218 of 2017 – Kennedy Achoki vs. Charles Mongare Ongoto & 2 others** (unreported). The 2nd Respondent relies on this case to show that the Jubilee Party had gazetted specific places as polling stations. It is worth noting that the Jubilee National Elections Board and the I.E.B.C were interested parties in this case. Though Anthony Njomo in his affidavit stated that he wanted the Jubilee Party to be enjoined in the proceedings before this court, this never happened.

The 3rd and 4th Respondents

116. Mr. Were held brief for Mr. Kadima for the 3rd and 4th Respondents from the pre-trial conference until the trial concluded. He had signed the pre-trial agreement that parties on the mode, manner and the timelines by which the submissions were to be made. Mr. Were also expressed his indication to highlight submissions. Parties agreed to come to court to highlight their submissions on November 21, 2017. On that day, Mr. Wetaba held brief for Mr. Were and therefore Mr. Kadima. He applied on Mr. Were's behalf for more time to file submissions and asked for two weeks. The court granted him until November 30, 2017 to file submissions. This was not done.

117. Nevertheless, the submissions of the 1st, 3rd and 4th Respondents having not been filed despite leave being granted, the court has gone ahead to write the judgment in this petition.

Significant Dates and the Timeline of Events in this Petition

118. There are significant dates in this petition that this court feels ought to be presented to be able to get a lay of the land regarding the sequence of events that occurred:

- (a) March 17, 2017 – Anthony Njomo visits P.D.U and is issued with a membership card.
- (b) April 7, 2017 – Anthony Njomo resigns from the Jubilee Party.
- (c) April 26, 2017 – The Jubilee Party holds its primaries in Lamu West; Emmanuel Wanyoike is declared the winner.
- (d) April 28, 2017 – Anthony Njomo announces on social media that he will vie as an independent candidate.
- (e) May 8, 2017 – The office of the Registrar of Political Parties stamps Anthony Njomo's resignation letter.
- (f) May 28, 2017 – I.E.B.C clears Anthony Njomo as a candidate to vie for Bahari Ward as a member of the county assembly.
- (g) June 2, 2017 – Michael Kanja travels from Lamu to the I.E.B.C headquarters in Nairobi to lodge a complaint against the candidature of Anthony Njomo.
- (h) June 6, 2017 – The complaint lodged by Michael Kanja against Anthony Njomo is dismissed by the I.E.B.C Tribunal.
- (i) August 8, 2017 – The second general election under the Constitution 2010 is held.
- (j) August 10, 2017 – Anthony Njomo is declared the winner of the Bahari ward M.C.A seat.
- (k) August 23, 2017 – This petition is filed at Lamu Law Courts.

(l) October 10, 2017 – Pre-trial conference takes places with regard to this petition.

(m) November 6 – 8, 2017 – The hearing of this petition is held and concluded.

Case Law And Analysis

119. With regard to the agreed issues by counsel for the respective parties, this court has classified them into three groups. These are:

- i. The jurisdiction of this court (issue 9).
- ii. Burden of proof (issues 1, 2, 3, 4, 5, 6, 7, 8, 10 and 11).
- iii. Costs of this petition (issue 12)

This court will address these three points below.

Jurisdiction of the Court

120. Issue 9 was framed as follows, “Is this court the right forum for the petitioner in light of the allegation of party hopping?” The Supreme Court in **Moses Mwigigi and 14 others vs. I.E.B.C & 5 others [2016] eKLR** definitively expressed the cases that are presided over by an election court. The esteemed judges held that an election by the ballot and an election by nomination are elections and therefore, any dispute arising from this ought to be settled by the respective election court. Therefore, the petitioner has have come to the right forum. The Supreme Court judges held and (and I quote at length):

...[114] By virtue of legislation as envisaged under Article 87 of the Constitution, the Election Court is recognized as the Judiciary’s forum of resolution of electoral disputes. “Election Court” is defined in the Elections Act as: the Supreme Court in exercise of the jurisdiction conferred upon it by Article 163 (3) (a); or the High Court in the exercise of the jurisdiction conferred upon it by Article 165 (3) (a) of the Constitution, and the Resident Magistrate’s Court as designated by the Chief Justice in accordance with Section 75 of the Act. Appeals from the High Court on election matters lie to the Court of Appeal, by virtue of Section 85 A of the Elections Act; while appeals therefrom lie to the Supreme Court, if admitted by the latter, pursuant to Article 163 (4) (a) or (b).

[115] The Elections Act confers jurisdiction upon Magistrates Courts to determine the validity of the election of a member of a County Assembly; Section 75 (1A) of the Act provides that:

“A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate’s Court designated by the Chief Justice.”

[116] The Act, in addition, provides for the appropriate remedies that Courts may grant, in the following terms (Section 75):

“(3) 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.”

[117] It is clear to us that the Constitution provides for two modes of ‘election’. The first is

election in the conventional sense, of universal suffrage; the second is ‘election’ by way of nomination, through the party list. It follows from such a conception of the electoral process, that any contest to an election, whatever its manifestation, is to be by way of ‘election petition’...

121. It is not lost on this court that at various stages, the petitioner and her witnesses tried to get answers from the institutions in place on Anthony Njomo’s candidature. This is shown in the chronology of events cited elsewhere in this judgement starting from March 17, 2017 when Anthony Njomo was issued with a P.D.U membership card. Initially according to the annexures to Jane’s (the petitioner) affidavit from Anthony Njomo’s social media pages, he said he would run as an independent candidate.

122. When Jane’s witness - Michael Kanja - confirmed that Anthony Njomo was standing on a P.D.U ticket, he lodged a complaint with I.E.B.C. However, this door was shut in his face. It is inconceivable for any person who has not lived or travelled to Lamu to understand that one cannot be summoned the day before for a meeting the following day in Nairobi at 9am. Even then Michael told the court that his request to have the hearing on June 6, 2017 was rejected and thus, his complaint was thrown out; according to him without him being accorded a fair hearing. The door was shut in Michael’s face but he remained undaunted.

123. He filed a petition in the Constitutional and Judicial Review of the High Court in Mombasa. That petition was struck out on September 8, 2017 by Judge P.J. Otieno who said that his court lacked jurisdiction to hear the case. Yet again this door was shut in his face. Nevertheless, this court was gazetted as an election court to hear cases arising from the election of members of county assembly in Lamu County. It is this lifeline that the petitioner and her witnesses reached out for to be able to bring their case to the court. Therefore, this court as a duly gazetted election court in Lamu County has the jurisdiction to hear this petition.

124. Emmanuel Wanyoike told the court that he and the other candidates who participated in the Bahari Ward election as candidates registered their protest that Anthony Njomo won by refusing to sign the I.E.B.C result sheet.

125. Regulation 79 of the Election (General) Regulations, 2012 outlines in detail the steps to be taken by the Presiding Officer – in this case – the 3rd Respondent when the candidates refuse to sign the declaration. Regulation 79(1), (2), (2A) is produced below:

Candidates, etc. to sign declaration

(1) The presiding officer, the candidates or agents shall sign the declaration in respect of the elections.

(2) For purposes of subregulation (1), the declaration for—

(a) Presidential election results shall be in Form 34A set out in the Schedule; and

(b) National Assembly, County women representatives, Senator, Governor and county assembly elections shall be in Forms 35A, 36A, 37A, 38A, and 39A set out in the Schedule.

(2A) The presiding officer shall—

(a) immediately announce the results of the voting at the polling station before communicating the results to the returning officer;

(b) request each of the candidates or agents present to append his or her signature;

(c) provide each political party, candidate, or their agent with a copy of the declaration of the results; and

(d) affix a copy of the declaration of the results at the public entrance to the polling station or at any place convenient and accessible to the public at the polling station.

(3) Where any candidate or agent refuses or otherwise fails to sign the declaration form,

the candidate or agents shall be required to record the reasons for the refusal or failure to sign.

(4) Where a candidate or an agent refuses or fails to record the reasons for refusal or failure to sign the declaration form, the presiding officer shall record the fact of their refusal or failure to sign the declaration form.

(5) Where any candidate or agent of a candidate is absent, the presiding officer shall record the fact of their absence.

(6) The refusal or failure of a candidate or an agent to sign a declaration form under subregulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under subregulation (2)(a).

(7) The absence of a candidate or an agent at the signing of a declaration form or the announcement of results under subregulation (2) shall not by itself invalidate the results announced.

(8) After complying with the provisions of this regulation, the presiding officer shall, as

soon as practicable, deliver the ballot boxes, and the tamper proof envelopes to the returning officer who shall take charge thereof.

126. Abdalla Mwarua Chikophe as the Returning Officer for Lamu West did not record the reasons or rebut what Emmanuel Wanyoike stated in cross examination that he did not sign Form 36B a copy of which is annexed as page 24 to the affidavit sworn by Jane Njeri Kamande. Abdalla did not fulfil the requirements of Regulation 79 of the Election (General) Regulations, 2012 to write the reasons why the other candidates and their agents did not sign Form 36B.

Burden of Proof

127. In addressing the question of burden of proof, the court will consider separately the issues agreed upon by counsel. Issue 1 was framed as “Whether the 1st Respondent breached section 28 of the Elections Act by party hopping to the Party of Democratic Unity (P.D.U) outside the timeline of 120 days.” Jane in her petition stated that Anthony Njomo took part in the Jubilee Party nominations held on April 25th and 26th, 2017 in Lamu West County. Jane further states that Anthony Njomo was second meaning that he did not secure the Jubilee Party ticket.

128. Jane annexed various documents to prove to the court how Anthony Njomo hopped from the Jubilee Party to P.D.U in less than 120 days. Some of these documents are results from three polling stations to show Anthony Njomo took part in the Jubilee Party primaries, pages from his social media website and a poster showing Anthony Njomo vying on a P.D.U ticket. The second witness Michael Kanja Kagori gave evidence that he made efforts to lodge his complaint with I.E.B.C Committee that Anthony Njomo moved parties in less than 120 days.

129. The third witness Emmanuel Wanyoike told the court that he won the Jubilee Party primaries in which he contested for the Jubilee Party nomination ticket for Bahari Ward and he won. He told the court he conducted a search which showed that Anthony Njomo was a member of P.D.U. Emmanuel said he registered his protest about the 3rd and 4th Respondent declaring Anthony Njomo the winner by refusing to sign the results form with the results.

130. On the Respondents' part, Anthony Njomo in his affidavit annexed a letter of his resignation with altered dates. He did not provide an explanation to the court why the dates were altered on the letter that is stamped received by the Office of the Registrar of Political Parties on May 8, 2017. He also annexed an unclear copy a resignation letter and made no effort to produce a clear copy. He then annexed his Certificate of Nomination by P.D.U dated April 24, 2017 and a letter from the Registrar of Political Parties showing he is a member of P.D.U dated August 24, 2017.

131. His last annexure is his certificate issued to him by I.E.B.C. Anthony Njomo in his testimony did not persuade the court that he did not move to P.D.U after he lost the Jubilee Party nomination. He said that he did not take part in the Jubilee Party primaries. Anthony further said that the ballot papers for the Jubilee Party primaries for Bahari Ward were printed long before he resigned. In response to the social media posts, Anthony Njomo said they were not his posts.

132. He did not explain how the name on his P.D.U poster matches that on the social media posts. The courts have pronounced themselves on the fact that the evidentiary burden shifts in election petition cases. The standard of proof is also higher than in civil cases but lower than in criminal cases which is beyond reasonable doubt. Anthony Njomo did not sufficiently explain how it is that Peter Macharia was at one of the polling stations as his agent during the Jubilee Party primaries.

133. The 2nd Respondent Isaiah Gichu Ndirangu told the court that Anthony Njomo applied to be a member of P.D.U on March 17, 2017 but his application was kept in abeyance. Thereafter, Anthony Njomo was confirmed as a member of P.D.U on April 8, 2017. Isaiah told the court that Anthony Njomo became a member of P.D.U on March 17, 2017.

134. He said that despite him becoming a member on March 17, 2017, Anthony's application was kept in abeyance. He said that Anthony was given the form to complete it being his resignation form. Isaiah also did not explain the alteration in dates or why it was necessary to wait from March 17, 2017 to April 7, 2017 before admitting Anthony Njomo as a member of P.D. U dated April 8, 2017. He also did not explain why P.D.U waiting another two weeks to issue Anthony Njomo with the Nomination Certificate.

135. The 3rd and 4th Respondents' role as explained by the 3rd Respondent was to clear Anthony Njomo as a candidate to participate in the elections on May 28, 2017 and to announce him as the winner on August 10, 2017. The 3rd Respondent insisted that the election held in Bahari Ward was credible, free and fair. But if an election is a process and not an event, then the 4th Respondent in particular should look just beyond the day of voting (August 8, 2017) and the day when the results are announced on August 10, 2017 in order to make an accurate deduction that the elections were credible, free and fair.

136. Indeed, from the foregoing what this court is able to deduce is that Anthony Njomo saw the possibility of not succeeding in the Jubilee Party primaries. To hedge his bets, he made forages into P.D.U and this is how he came to be issued with a membership card and indeed become a member of P.D.U. However, he kept his cards close to his chest and even participated in the Jubilee Party primaries held on April 25th and 26th 2017. When he lost to Emmanuel Wanyoike, he first declared that he would pursue the Bahari Ward as an independent candidate; hence his posting on social media on April 28, 2017.

137. But he had second thoughts about this move and decided that it would be better to stick with P.D.U and it is at this point that he took his letter to the Office of the Registrar of Political Parties on May 8, 2017. It was a gamble on his part and for some time it seemed that he was able to overcome all the hurdles that came his way. He however, underestimated the dogged determination of those who pursue justice. They never rest. That is how Anthony Njomo ended up having to defend this petition. In summary, the petitioner has successfully discharged her burden of proof. This court finds that Anthony Njomo moved parties in less than 120 days contrary to what is required by law.

138. Issue 2 was framed as a question – “Are the 2nd and 3rd Respondents required to forward the party list long before the party primary nominations as provided for under section 28 of the Elections Act?” The

starting point in addressing this issue is the law. Section 28 of the Elections Act.

139. Additionally, the Elections (General) Regulations, 2012 states the requirements to be met by the political party for a person who intends to be a candidate as an M.C.A. Regulations 13 to 14 gives guidance to the political party nominating the candidate on what steps to take to ensure that the party list being submitted to I.E.B.C meets the threshold requirements. This is from Regulation 34 to 37 which is a guideline for the candidate.

140. Most importantly political parties are required to comply with the provisions of the Elections (Party Primaries and Party Lists) Regulations, 2017. The purpose of these regulations was to ensure that parties first conducted their party primaries before forwarding the party lists. However, the regulations make allowances for those political parties that have only one candidate for the position not to hold a party primary. This is Regulation 16(2); indeed regulation 16 answers issue question and is produced in full below:

16. (1) A party primary shall be conducted in accordance with the nomination rules and procedures of the party and the candidate who obtains the highest number of votes shall be declared the party nominee for the position.

(2) Where only one aspiring candidate applies to be nominated in any elective position, no party primary shall be conducted.

(3) An Election Board shall in writing certify and declare the aspiring candidate under sub regulation (2) as the party nominee.

(4) Upon conclusion of the party primary, the authorized party officials shall certify the list of nominees and submit it to the Commission.

(5) Upon receipt of the list by the Commission, the list shall not be altered.

Thus, in answer to the issues 2, the party list is to be presented after the party primary has been conducted. This requirement is independent of section 28 of the Elections Act; the process of submitting the party lists is not dependent on section 28 of the Elections Act.

141. It only becomes relevant where the candidate seeks to move to another party within the 120 days before an election is held. It is not lost on the court that the 2017 election cycle was the first time that political parties were holding party primaries. Many of the parties held their primaries well after the 120-day window was closed under section 28 of the Elections Act and some candidates were forced to bow out of the elections process. Others opted to stand as independent candidates. There were lessons learned and in the next election cycle perhaps the political parties will opt to hold their party primaries in good time.

142. In the case of the 2nd Respondent, Isaiah as Chairperson of P.D.U told the court that Anthony Njomo was issued with direct nomination as M.C.A for Bahari Ward on a P.D.U ticket. He annexed Anthony Njomo's nomination certificate dated April 24, 2017. Can it then be that Anthony Njomo chose to participate in the Jubilee Party primaries to see if he would get a better outcome and therefore stand a better chance of retaining his seat? Anthony Njomo told the court that he never participated in the Jubilee Party primaries. He said that he made the decision to resign from the Jubilee Party but his name was already on the ballot for the primaries.

143. The petitioner on the other hand through her testimony, annexures and the witnesses in support of her affidavit discharged this burden of proof. Peter Maina Macharia was emphatic that he campaigned for Anthony Njomo. He even said he was an agent at one of the polling stations where the party primaries took place.

144. Jane Njeri Kamande the petitioner annexed pages from social media posts by Anthony Njomo

referring to the fact that he had lost the Jubilee Party primary held on April 26, 2017. Anthony Njomo in his testimony told the court that he stood as an M.C.A in Bahari Ward and won on a P.D.U ticket. It is clear to this court that he moved from the Jubilee Party to P.D.U within the 120 days to the election contrary to what is provided for in section 28 of the Elections Act.

145. The 3rd Respondent's role before the election was limited to fulfilling the requirements of Elections (General) Regulations, 2012 specifically regulations 41 to 43 which the 3rd Respondent testified to the court he carried out on May 28, 2017. He was satisfied that Anthony Njomo was validly nominated to stand as a candidate for the Bahari Ward for the position on M.C.A.

146. The 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th and 11th issues are as follows and will be dealt with together because they touch on the similar points.

147. On the third issue, that is, "Is the alleged party hopping by the 1st Respondent, inclusion of the name and participation in the general election process subject of the present election petition?" The answer to this question is yes, because an election is a process and not an event as is so often repeated. Judge Emukule (Rtd) in **Karanja Kabage vs. Joseph Kiuna Kariambegu Nganga & 2 others [2013] eKLR** re-stated what the Supreme Court in its advisory opinion observed when he said:

the Supreme Court in Advisory opinion No 2 of 2012 In the matter of the Gender Representation in the National Assembly and Senate [2012] eKLR where that Court acknowledged that elections are not an event but a process: a continuum. The learned Judges, when considering the jurisdiction over presidential election disputes stated thus –

"It is clear to us, in unanimity, that there are potential disputes from Presidential elections other than those expressly mentioned in Article 140 of the Constitution. A Presidential election, much like other elected-assembly elections, is not lodged in a single event; it is, in effect, a process set in a plurality of stages.

Article 137 of the Constitution provides for "qualifications and disqualifications for election as President" – and this touches on the tasks of agencies such as political parties which deal with early stages of nomination; it touches also on election management by the Independent Electoral and Boundaries Commission (IEBC).

Therefore, outside the framework of the events of the day of Presidential elections, there may well be a contested question falling within the terms of the statute of elections, or of political parties. Yet still, the dispute would still have clear bearing on the conduct of the Presidential election".

148. Democracy Reporting International, an independent non-profit organization in its Briefing Paper published in January 2015 reiterated the position above as follows:

...Elections are not one-off events every four or five years: They are part of a cyclical process that is generally divided into the pre-election period (approximately 18 to 3 months before elections), the election period, which comprises three months before elections up until election day and the post-elections period, the period comprised between election day to the start of the new cycle...[1]

149. On the 4th issue that is, "Is there any evidence of fabrication of documentation as alleged by the petitioner with regard to any illegal party hopping which was done after the filing of the present petition?" The starting point in answering this question is section 107 of the Evidence Act which provides:

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

150. The case law supporting this view is drawn from **Joho vs. Nyange & Another (2008) 3 KLR (EP) 500**, decided by Justice Maraga (as he then was) and the Supreme Court of Kenya decision in **Raila Odinga & Others Vs. The Independent Electoral and Boundaries Commission & Others, (Supreme Court Election Petition No. 5 OF 2013) [2013] eKLR**. Justice Maraga stated an important principle that is often quoted on the burden of proof because it crystallizes the direction an election court should take when considering the burden of proof. He said:

...The burden of proof in election petitions lies with the petitioner as he is the person who seeks to nullify an election. While the proof has to be done to the satisfaction of the Court, it cannot be said that the standard of proof required in election petitions is proof beyond reasonable doubt. Like in fraud cases, the standard of proof is higher than on a balance of probabilities and where there are allegations of election offences a very high degree is required...

151. The honourable judges of the Supreme Court of Kenya in **Raila Odinga & Others Vs. The Independent Electoral and Boundaries Commission & Others, (Supreme Court Election Petition No. 5 OF 2013) [2013] eKLR** stated at paragraph 195:

...There is, apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the Court to determine whether a firm and unanswered case has been made...

152. In relation to the petitioner's case there is no evidence presented by herself or any of the witnesses that documents were fabricated after this petition was filed. However, considering the shifting of the evidential burden, the 1st and 2nd Respondent left glaring holes in their affidavits and their testimony before this court.

153. The 1st Respondent did not explain how the alterations on the date of his resignation form which is dated April 7, 2017. The 2nd Respondent (Isaiah) testified that he issued the resignation form to the 1st Respondent (Anthony Njomo) when he applied to be a member of P.D.U on March 17, 2017. His explanation that Anthony Njomo's application for membership was accepted on April 8, 2017 was not plausible enough to discharge the burden of proof. It is also not clear to this court why if the 1st Respondent was issued with a Nomination Certificate from P.D.U and thus not a member of the Jubilee Party, why the Petitioner and her witnesses used all the available legal means to challenge Anthony Njomo's nomination.

154. It is certainly not for lack of time or wanting to spend hard-to-come-by resources that the petitioner's second witness (Michael Kagori) travelled to Nairobi from Lamu on June 2, 2017 to lodge a complaint with I.E.B.C. It is not for sheer joy that he then filed a constitutional petition in Mombasa High Court that was eventually struck out. Nevertheless, in strict answer to the question there was nothing to show that the documents were fabricated after the petition was filed.

155. The fifth issue "Was the declaration by the 4th Respondent that the inclusion of the 1st Respondent's name as a member of the 2nd Respondent as a candidate and his participation of the election on August 8, 2017 a substantial breach of election law, the Election Act and the Constitution of Kenya on account of illegal party hopping?" As always, this court is guided by law and the decisions from the superior courts. In the 2013 election cycle the courts had occasion to address this issue.

156. The 6th, 7th, 9th, 10th and 11th issues are dealt with below. It is important to note that the courts have

already pronounced themselves on the possibility of going before an election court after an election on what on the face of it appears to be a nomination dispute. Judge Majanja in **Election Petition No. 13 of 2013 (Machakos) – Alfonse Mulandi Wolile and another vs. Mutula Kilonzo Junior and 2 others [2013] eKLR** gave the parameters in which this possibility will occur. He said at paragraph 36:

...The conclusion to be drawn from the legal provisions and the cases I have cited is that a party who is aggrieved by the nomination process is entitled to elect whether or not to invoke the nomination dispute resolution process before the election or wait for the election to take place and thereafter file a petition. In this latter case, such party will of course not just be challenging the conduct of the nomination exercise but will have an additional burden of demonstrating that such a pre-election process went to the root of the election itself and materially affected its result. It will be up to the court to make up its mind on the evidence as a whole whether there was substantial compliance with the law as to elections or whether the act or omission affected the results. (See in *Re Kensington North Parliamentary Election case [1960] 2 All ER 150*). However, once the pre-election procedure is invoked and a decision made either by the Court or Committee, the decision may operate as an estoppel on record...

157. In that case before Judge Majanja both the IEBC Committee and the High Court had dealt with the matters raised in the election petition before him extensively. Therefore, it is distinguishable from the petition before this court. In the petition before this court Jane (the petitioner) and her witnesses demonstrated to the court that they were not given a hearing before the Committee and the High Court. Michael Kanja told the court that his complaint was dismissed and, it emerged during the hearing that Michael Kanja filed a constitutional petition at the high court in Mombasa. It was struck out because the court lacked jurisdiction. Thus, there is no estoppel against the petitioner, Jane Njeri Kamande that prevents this court from handling this petition.

158. As persuasive authority, Judge Majanja quoted the Indian case of **Gopal Ramji Dhenge v The Returning Officer, Lakhani (1964) 66 BOMLR 542** to show that in other jurisdictions as well, election petitions have been decided on the basis of a nomination process, after candidate has been elected. He said (and I quote at length):

The case of an election petition being determined on the basis of the nomination process is illustrated by the Indian case of Gopal Ramji Dhenge v The Returning Officer, Lakhani (1964) 66 BOMLR 542 where the returning officer disqualified a candidate for the election on the ground that his proposer was disqualified because the proposer had subscribed as proposer to four nomination papers filed by the same candidate. One of the candidates who had been proposed was therefore disqualified. Eleven other candidates were cleared. Seven of the candidates later withdrew leaving four to contest the elections. The 3rd respondent was declared the winner having garnered 3,479 votes. The petitioner who was a voter filed the petition to challenge the results of the election on the grounds that the rejection of the nomination paper of one of the candidates was wrong and illegal. While upholding the petition, the court stated, "It is then contended that the decision to the effect that the nomination was wrongly rejected is not enough to show that the result of the election is affected and that in that sense, the petitioner has failed to prove that the election itself is liable to be set aside. In our opinion, so far as the effect of rejection of nomination paper of a candidate who is eligible to contest is concerned, it is now well-settled that it is not predictable as to what the result would have been if the candidate whose nomination paper is wrongly rejected were in the arena of contest We have, therefore, come to the conclusion that the petitioner has a right to challenge the improper rejection of a nomination paper of a candidate at the election, that the rejection of the nomination of respondent No. 9 was improper and unauthorized and that it has materially affected the result of the election."

159. Thus, the principle emerging from the decision above by Judge Majanja is that it is possible for an election petition case to be filed in court that arises from out of a nomination process. However, there is a caveat; these are that for the court to handle it properly as an election petition case, the matters being raised must not have been handled by the IEBC Committee or the High Court.

160. What about the issue of breaching section 28 of the Elections Act? (Rtd) Judge Emukule in **Election Petition 12 of 2013 (Nakuru) – Karanja Kabage vs. Joseph Kiuna Kariambegu Nganga & 2 others [2013] eKLR** said at paragraph 2.03

...The contention raised by the Petitioner poses quite a dilemma to the Election Court. Where a candidate raises a complaint regarding a malpractice or potential breach of the electoral law and the complaint is not addressed by the electoral body, primary elections are held without the complaint being conclusively determined does the candidate's remedy lie in an Election Petition" To answer this question, it is necessary to establish what precisely is the mandate of the electoral body, that is the IEBC in relation resolution of primary election disputes...

161. He then considered the constitutional provisions in Article 84 and 88(4) of the Constitution in light of the petitioner's prayer to find that the 1st Respondent had not been validly nominated because during the nomination exercise, he violated the Electoral Code of Conduct. Judge Emukule in reaching a finding that he could not grant this prayer said at paragraph 2.18:

...Therefore, where a matter raised in an election petition filed after the declaration of the results is one which should, properly have been raised earlier and determined by another body then the court lacks jurisdiction to determine in the course of an Election Petition. The only exception is, where there is a breach of a mandatory provision of the law – for example the registration and election of a non-citizen. Though the power to disqualify such a candidate rests with the Third Respondent, the court would interfere to right the wrong on the grounds of illegality...

(Emphasis mine)

162. In the petition before this court, the petitioner and her witnesses have established that the action by Anthony Njomo (1st Respondent) of moving from the Jubilee Party to P.D.U within 120 days is in breach of section 28 of the Elections Act. It is in essence an illegality and therefore, this court sitting as an election court has the right to interfere as stated by Judge Emukule. If an illegality occurred and there was a breach of section 28 of the Elections Act, then the election as conducted in Bahari Ward for the member of county assembly was not free and fair. Indeed, I find his inclusion as a candidate given the illegality of breach of section 28 of the Elections Act affected the outcome of the election held by I.E.B.C.

163. In **Election Petition 8 of 2013 (Nairobi) – Kituo cha Sheria vs. John Ndirangu Kariuki and another [2013] eKLR**, Judge Kimondo presided over an election petition case similar in some respects to that facing the petitioner in this court. There are however, three significant differences, the first is that the petitioner was not an individual but a non-governmental organization. The second was that it involved a sitting member of parliament and not a member of the county assembly and the third is that the petitioner in Judge Kimondo's case did not exhaust the legal mechanisms available to challenge the 1st Respondent's nomination. Instead it went straight to the high court.

164. In his own words, this is what Judge Kimondo said:

...

[29] The petitioner does not challenge any aspects of the conduct of elections on 4th March 2013. It does not challenge the 1st respondent's win. When one unpacks the petitioner's case, it fundamentally impeaches the nomination of the 1st respondent by the 2nd respondent to contest the Embakasi Central seat. As I will discuss shortly, elections are not an event but a process. In that long process starting from registration of voters, nomination of candidates to the actual election, the Constitution and the law have anointed independent organs, besides the Courts, to deal with specific electoral disputes...

[32] A parallel can be drawn. In the equivalent continuum of a national assembly election, there are various independent state actors and institutions with jurisdiction to settle nomination disputes. They include the IEBC under the Independent Electoral and Boundaries Commission Act and the Ethics and Anti-corruption Commission under the Ethics and Anti-corruption Act. For example article 88 (4) (e) that I cited earlier bestows on the IEBC jurisdiction to hear and resolve nomination disputes. This is reinforced by section 74 (1) of the Elections Act. The petitioner here did not seek redress, for example, from the IEBC on nomination of the 1st respondent...

[33] ... The petitioner tacitly concedes that it never sought such remedies at any of those steps manned by independent constitutional bodies, or that those bodies failed to give it redress.

165. The principle this court gleans from these decisions by (Rtd) Judge Emukule, Judge Majanja and Judge Kimondo is that where there is a breach of law that occurred during the nomination process, that materially affect the result and these issues have not been ventilated by any other constitutionally mandated bodies to their conclusion, then the election court has the mandate to hear the petition filed.

166. The 8th issue – “Did the 1st Respondent commit an offence under the Election Act and if so, should he have been disqualified from participating in the election on August 8, 2017?” The Election Act, 2011 as revised and amended in preparation for the general elections 2017 does not have any offences. Rather as part of law reform in the period leading up to the elections, Parliament passed the Election Offences Act. According to its heading the Election Offences Act, 2016 is described as “an Act of Parliament for election offences; and for connected purposes”. The act provides for all kinds of offences except those touching specifically on a breach or offences by a candidate who is vying for a post.

167. However, this does not mean that Anthony Njomo’s actions are acceptable. Anthony Njomo is in breach of section 28 of the Elections Act for moving from the Jubilee Party to P.D.U. What it does mean, is that the Director of Public Prosecution can make a determination on the type of charge Anthony Njomo should face.

168. I have also looked at the Code of Conduct in the Election Act, 2011 and there is no reference to the action that ought to be taken by a candidate who moves parties in less than 120 days. A possible recourse would be chapter 6 of the Constitution on Leadership and Integrity as well as the Leadership and Integrity Act which Anthony Njomo – as a state officer - subscribed to by virtue of being the incumbent M.C.A for Bahari Ward before the 2017 general election. But even now, Anthony Njomo as the elected M.C.A. for Bahari Ward is bound by the Leadership and Integrity Act and thus, the mechanisms provided for in this Act are available to be able to determine if an offence was committed even if it is not captured in the Election Act.

On the use of Social Media

169. At the Pre-Trial Conference on October 10, 2017 the advocates in court entered into a Pre-Trial Agreement. The agreement is a summary of what the parties agreed to on how the trial will be conducted and it is based on rule 15 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017. The agreement in part 3(b) reads:

(a) The exhibits on record are allowed as follows:

(a)...

(b) (a) above is not applicable in the case of electronic evidence but parties have agreed in line with section 78A of the Evidence Act to have electronic evidence admitted.

170. On the issue of the use of Facebook posts as evidence, I wish to state briefly as follows. The advocates in this petition signed a Pre-Trial Agreement. It was signed by all the advocates who attended the pre-trial conference on October 10, 2017 and each party in this suit was represented. This is

highlighted in response to the submissions made by the 2nd Respondent on the admissibility of electronic evidence. Indeed, during the pre-trial conference, the court record reflects Mr. Wetaba as saying, “I have read the provisions of section 78A – Evidence Act and in the circumstances, we allow the electronic evidence as filed.” It is on this basis it was admitted and remains on record. That is the basis on which the court considered them as evidence because they were not contested by the respondents.

171. Still on the issue of relevance and inference to be drawn from social media, the Honourable Justice Stephen EstCourt, QC from the Supreme Court of Tasmania wrote an article in Law Letter Spring/Summer 2016 titled “Using Social Media in Civil Litigation” [2]. He shared the following pointers to lawyers who seeking to rely on social media in court:

...In a nutshell, when you tender the Facebook screenshot no question as to its authenticity arises as a threshold question. The only question is relevance. At no time does the judge in a jury trial determine that the document is or is not authentic because that is not a question for him or her.

He or she may, however, determine that, on examining it, no reasonable inference as to authenticity is open, and thereby conclude that it is not relevant. Analytically, the exercise is the same where the tribunal of fact is a judge. As an extreme example, if the asserted Facebook post looks more like a family photo album of someone else’s family, then no reasonable inference as to authenticity will be open and the document therefore is not relevant.

In deciding relevance, that is, in deciding whether the tribunal of fact could reasonably infer that the otherwise relevant document was authentic, the tribunal of law is explicitly authorised by s 58(1) [of the Evidence Act] to ask what inferences as to authenticity are available from the face of the document itself. If it looks like a duck and it walks like a duck and it quacks like a duck then it is sufficiently authentic to be relevant, and thus admissible as a duck.

So, you could in theory tender the screenshot in opening your case by handing it up. If it looks like a Facebook page in the claimant’s name containing the claimant’s photograph as a profile picture or cover photo, then that should be enough to have it admitted.

If the claimant in his or her evidence denies that the post is his or hers, and is not genuine, then the issue will play out like any other disputed issue of fact. If the claimant denies he or she posted it, then that claim will be tested by cross-examination. “Who had access to your account? How was your account hacked? Who knew your password? When was it hacked? What about the posts either side of that post?” If the tribunal is a judge alone, then he or she will reserve the question of authenticity or the weight to be given to it, or if you have a jury, then it will be told how to consider those questions.

On the other hand, if you seek to tender it through the claimant in the ordinary course of cross-examination, then the claimant’s denials could possibly be ruled on during the trial if there is an objection based on a total lack of authenticity robbing the document of relevance.

However, the question is never one of you somehow having to formally prove the document. It is, in effect, akin to a reverse onus situation or a shifting of the burden of proof. You produce the screenshot and, unless the claimant can satisfy the judge that the material is not genuine, then it will go into evidence.

(Emphasis mine)

172. I raise this even though the at the time of the pre-trial conference none of the parties raised or contested the production of the social media posts in this petition. However, out of abundant caution and to be able to address the issue raised on admissibility in Mr. Wetaba’s submissions, I found it necessary to

consider this as an issue of admissibility under similar provisions of the Evidence Act.

Section 83 of the Elections Act as read with Article 81 of the Constitution

173. Though not clearly articulated, the petitioner's view is that the election of Anthony Njomo as M.C.A of Bahari Ward was not in line with Constitution. The 2nd Respondent asserts the view that section 83 of the Elections Act is what should guide this court. In **Balancing the Scales of Electoral Justice – Resolving Disputes from 2013 Elections in Kenya and the Emerging Jurisprudence** edited by Dr. Collins Odede and Dr. Linda Musumba, a publication of the Judiciary Training Institute (2016), there is a chapter dedicated to section 83 of the Elections Act. It is titled, **“A New Dawn Postponed: The Constitutional Threshold for Valid Elections in Kenya and Section 83 of the Elections Act”** by Heidi Evelyn and Waikwa Wanyoike. At page 81, the authors make this observation on the origins of Section 83 of the Elections Act:

... Section 83 is contained in the Elections Act was passed in 2011, purportedly to incorporate the changes to the law governing elections reflected in the 2010 Constitution, which had just been promulgated the year before...Neither the independence Constitution nor the 1969 Constitution addressed the standard that an election had to meet to be considered valid...

174. After giving a laser-like analysis and thorough discourse on the jurisprudence that emerged from the Court of Appeal and the Supreme Court following the 2013 touching on section 83 of the Election Act, the authors conclude on page 112 with this poignant reflection which is instructive for the petition before this court:

...As a starting point, it may be said that the constitutional election threshold requires that the electoral process be respected and conducted in accordance with the constitutional principles of a free and fair election. All aspects of the election process must be impartial, inclusive, transparent, accountable, free of undue influence, and deterring of corruption and malpractice...

(Emphasis mine)

175. The principle highlighted above was developed more recently in the Supreme Court in the majority decision in Presidential Petition No. 1 of 2017, the judges said:

...[211] In our respectful view, the two limbs of section 83 of the Elections Act should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the section can void an election. In other words, a petitioner who is able to prove that he conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election.

176. Jane Njeri Kamande, the petitioner in this case finds herself in the first limb by virtue of the fact that Anthony Njomo breached section 28 of the Election Act by moving from the Jubilee Party to P.D.U in violation of the law.

Law Reform

177. From the above, it seems that there is a need to revise the Election Offence Act to include crimes specifically touching on the conduct of the candidates. It is not in this court's view a herculean task. Parliament already took the first step by introducing order into the way nominations are carried out, to prevent party hopping after a candidate fails to secure their ticket of choice in the 120-day window.

178. Going forward, there also needs to be a better way for I.E.B.C to be able to verify that a candidate has breached the 120-day time limit set out in section 28 of the Election Act even where the political party submits their lists. One way could be to have the candidates take on the responsibility of submitting documentation to this effect. In this way, the onus and the burden rests with the candidate and not with the I.E.B.C. It is food for thought for those involved in the law reform process of the election cycle.

Counsel

179. This court would like to appreciate the efforts of counsel who participated in this petition at various stages and made it possible for the pre-trial and hearing to proceed as it did. Many thanks go to Mr. Korir and Mr. Omwancha who appeared on behalf of the firm of Messrs Mogoka, Omwenga & Mabeya Advocates for the petitioner. The court also thanks Mr. Were who appeared on behalf of Mr. Agonga from Messrs Abdul Agonga & Associates Advocates for the 1st Respondent. Mr. Were also appeared on behalf of and Mr. Kadima for Messrs on behalf of the 3rd and 4th Respondent from Messrs Kadima and Company Advocates. The court thanks Mr. Wetaba for the 2nd Respondent for his industry, professional courtesy and constant preparedness while handling this petition.

The Petitioner

180. Little in our system is often said in a positive way about the petitioner who was not a candidate in an election petition case. Indeed, the trend of a voter challenging a petition in Kenya emerged in 2013; prior to this it was always a candidate who lost that filed an election petition. There are many reasons why a petitioner would file a petition but I will borrow a leaf from Judge Richard Mawery. He presided over **In the matter of the Representation of the People Act, 1983 and in the matter of the Mayoral Election for the London Borough of Tower Hamlets between Andrew Erlam & 3 others -vs- Mohammed Luftur Rahman and John Williams.**

181. Under the law governing elections in the UK, there are strict requirements on the threshold to be met by someone other than the candidate who wishes to challenge an election. One it that there must be four petitioners. In the case before him, the four petitioners, due to the prohibitive costs if they lost (£2 million), could not afford to hire a solicitor to represent them against the respondent who was declared winner in the election despite numerous electoral malpractices. Here is how Judge Mawery described the petitioners:

...

[643] To bring an election petition as a private citizen requires enormous courage. If things go wrong and the petition is dismissed, the Petitioners face a potentially devastating bill of costs which, unless they are very fortunate, may well bankrupt them. There is no access to public funding: Parliament has left the policing of fair and democratic elections to the chance that concerned citizens will become involved at their own expense. Whether that is an appropriate and sufficient way to protect democracy is open to question...

[649] The four Petitioners, then, have shown exemplary courage in bringing and persevering with this Petition. They have endured a difficult, exhausting and anxious eleven months.

[650] And they have been vindicated...

The same description above applies to the petitioner, Jane Njeri Kamande in this petition.

Appreciation

182. I wish to thank the team at the Judiciary Committee on Elections Secretariat led by the indefatigable Hon. Lilian Arika assisted by Hon. Paul Mayova for the research support. I also thank Halima Bunu an erstwhile, efficient and hard-working court assistant who sat with me during the trial as well as the Executive Officer at Lamu Law Courts, Mr. Johnstone Osoma for ensuring the back-office activities

related to this petition went on smoothly.

The Role of an Election Court

183. I believe it is important to consider in a dispassionate manner, the role of an election court. In reaching a determination in this election petition, this court is guided by this particular statement by the Supreme Court of Kenya in **Raila Odinga and others Vs Independent Electoral and Boundaries Commission and 3 others Nairobi, Petition No. 5 of 2013 [2013] e KLR** where the esteemed judges said:

...The essence of that provision [Article 159(2)(d)] is that a Court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone, and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case and conscientiously determine the best course...

(Emphasis mine).

This is exactly what this court has done while hearing this petition.

184. Before concluding, I wish to touch on two criticisms on setting aside an election levelled at election courts. In his judgment, Judge Richard Mawery **In the matter of the Representation of the People Act, 1983 and in the matter of the Mayoral Election for the London Borough of Tower Hamlets between Andrew Erlam & 3 others -vs- Mohammed Luftur Rahman and John Williams** made the following observations which I fully associate myself with:

[18] ...The criticism is usually voiced in terms of ‘unelected judges unseating democratically elected politicians’, the obvious implication being that this process is itself undemocratic...

[19] There are two answers to this criticism. First the resolution of disputed elections by the courts is not a power the judges have arrogated to themselves. It is a task laid upon them by Parliament...The reason is obvious: if, as Parliament believed, and has continued to believe, politicians cannot be trusted to resolve election disputes fairly, then who is left but the judiciary? Election courts have thus lasted from 1868 to the present...

[20] The second reason is that the criticism itself begs the question. If a candidate is elected in breach of the rules for elections laid down in the legislation, then he cannot be said to have been ‘democratically elected’. In elections, as in sport, those who win by cheating have not properly won and are disqualified. Nor is it of any avail for the candidate to say ‘I would have won anyway’ because cheating leads to disqualification whether it was necessary for the victory or not...[3]

(Emphasis mine).

185. Here in Kenya, similar sentiments were expressed by Judge Musinga (as he then was) in **Manson Oyongo Nyamweya vs. James Omingo Magara & 2 others [2009] eKLR**. Judge Musinga said:

...it must be borne in mind that in auditing an electoral process to determine whether the results as declared in an election ought to be disturbed, the court is not dealing with a mathematical puzzle and its task is not just to consider who got the highest number of votes. The court has to consider whether the grounds as raised in the petition sufficiently challenge the entire electoral process and lead to a conclusion that the process was not transparent, free and fair. It is not just a question of who got more votes than the other. It cannot be said that the end justifies the means...

(Emphasis mine)

I associate myself with the sentiments expressed above in reaching a decision in this petition.

Orders

The orders of the court are:

- (a) A declaration is hereby issued I.E.B.C's inclusion of Anthony Njomo Maina of P.D.U. party as candidate and his participation in the general election on August 8, 2017 was a substantial breach of Electoral Law, Election Act and the Constitution on account of illegal party hopping and hence invalid null and void ab initio.
- (b) A declaration is hereby issued that the said Anthony Njomo Maina election as winner for the member of County Assembly in the general election of August 8, 2017 is invalid, null and void ab initio on account of being incompetent and unqualified to be elected as such on P.D.U. ticket.
- (c) A declaration is hereby issued that Anthony Njomo Maina committed an offence under the Election Act and ought to be disqualified from participating in an election.
- (d) A declaration is hereby issued that Mr. Joseph Githuku Kamau – MCCP who garnered the highest votes was validly elected as Bahari Ward member of the County Assembly of Lamu.
- (e) Regarding costs, costs are awarded of Kshs 500,000/- to be paid to the petitioner as follows the 1st and 2nd Respondent are to jointly pay costs capped at Kshs 250,000/- and the 3rd and 4th Respondents are to jointly pay costs capped at Kshs 250,000/-.
- (f) A certificate of this determination in accordance with section 86 of the Elections Act shall issue to the Independent Electoral and Boundaries Commission and Speaker of the Lamu County Assembly.

Dated and Delivered in Lamu this 18th day of December 2017.

NJERI THUKU

PRINCIPAL MAGISTRATE

In the presence of:

Court Assistant.....

Petitioner.....

1st Respondent.....

2nd Respondent.....

3rd Respondent.....

4th Respondent.....

[1] See Domestic Election Observation – Key Concepts and International Standards, http://democracy-reporting.org/newdri/wp-content/uploads/2016/03/dri-mm-bp_52_domestic_election_observation_2015-

[01.pdf](#)

[2] Justice Estcourt *delivered at the Australian Insurance Law Association Workers' Compensation Masterclass, Hadley's Orient Hotel, Hobart, Friday, 19 August 2016.*

[3] In the matter of the Representation of the People Act, 1983 and in the matter of the Mayoral Election for the London Borough of Tower Hamlets between Andrew Erlam & 3 others -vs- Mohammed Luftur Rahman and John Williams.