



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE’S COURT AT NAIROBI

MILIMANI LAW COURTS

ELECTION PETITION NO. 24 OF 2017

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE ELECTIONS ACT 2011

AND

**IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)
PETITIONS RULES**

AND

IN THE MATTER OF THE ELECTIONS (GENERAL) REGULATIONS 2013

AND

**IN THE MATTER OF THE ELECTIONS (PARTY PRIMARIES & PARTY LIST)
REGULATIONS 2017**

**IN THE MATTER OF NATIONAL RAINBOW COALITION PARTY (NARC KENYA)
NOMINATION RULES 2016**

AND

**IN THE MATTER OF NOMINATION FOR MEMBER OF COUNTY ASSEMBLY IN
MANDERA COUNTY**

BETWEEN

SAMIRA ABDIRAHMAN HASSAN.....PETITIONER

VS

THE INDEPENDENT ELECTROL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

THE COUNTY ASSEMBLY OF MANDERA.....2ND RESPONDENT

THE CLERK MANDERA COUNTY ASSEMBLY.....3RD RESPONDENT

THE NATIONAL RAINBOW COALITION PARTY

(NARC KENYA).....4TH RESPONDENT

NASRA NOOR MOHAMMED.....5TH RESPONDENT

FATUMA ADOW JIBRIL.....6TH RESPONDENT

RUKIA ABDULLAHI ABDI.....7TH RESPONDENT

THE NOMADIC AGENDA.....1ST INTRESTED PARTY

NATIONAL COHESION AND

INTERGRATION COMMISION.....2ND INTRESTED PARTY

JUDGEMENT

By an amended petition filed on 24th October 2017 the petitioner sought for the following reliefs;

- a. An order to strike out the names of NASRA NOOR MOHAMMED, RUKIA ABDULLAHI & FATUMA ADOW JIBRIL from the Party List, Gender Top Up category of The National Rainbow Coalition Party (NARC KENYA) for Mandera County.
- b. An order to revoke the gazette Notice No. 8380 volume CXIX-No. 124 of 28th August 2017 issued by the 3rd Respondent declaring the 4th Respondent as validly nominated to Mandera County Assembly.
- c. An order directed to the 3rd Respondent to substitute the name of NASRA NOOR MOHAMMED and gazette that of SAMIRA ABDIRAHMAN HASSAN as validly nominated by The National Alliance Rainbow Coalition Party (NARC KENYA) Gender top up category in Mandera County Assembly.
- d. Costs of this petition
- e. Any other or further relief as this honorable court may deem fit and just to grant.

The basis of the petition is that the petitioner, together with the 5th , 6th and 7th Respondents are members of the 4th Respondent , The National Rainbow Coalition Party (NARC-Kenya) and sometimes in June 2017 the 4th Respondent NARC-Kenya party submitted to the 1st Respondent the petitioner's name together with the names of the 5th, 6th and 7th Respondents on the Gender Top Up List for nomination in Mandera County Assembly, that the 1st respondent subsequently published the submitted list in the Friday Nation Newspaper of 21.7.2017 and the Sunday and Standard Newspapers of 23.7.2017, in the submitted list by the 4th Respondent, *Nasra Noor Mohammed* the 5th Respondent appeared in position (1), Fatuma Aduwa Jibril the 6th Respondent appeared in position (2) , Rukia Abdulahi Abdi the 7th Respondent appeared in position (3) and Samira Abdirahman Hassan the petitioner appeared in position (4), the petitioner contended that the 4th Respondent NARC-K won two elective seats in Mandera County following the 8th August 2017 general elections and was allocated one (1) nomination slot by the 1st

Respondent and going by the gender top up list submitted by the 4th Respondent NARC –K the 5th respondent Nasra Noor Mohammed was gazetted as validly nominated to the Mandera County Assembly in the gender top up list as evidenced by Gazette Notice No. 8380, Vol CXIX published on 28th August 2017, the petitioner avers that the list submitted by the 4th Respondent NARC-K was faulty as it was marred with factual discrepancies since the information as submitted by the 5th, 6th and 7th Respondents who appeared in position 1,2, and 3 respectively on the gender top up list was false particulars as set out in paragraph 18 of the petition and paragraph 8 of the supporting affidavit to her petition particulars of discrepancies were set out as;

Nasra Noor Mohammed the 5th Respondent stated that she was Gabra while a search at the National Bureau Statistics reveals that she is Dagodia,

Fatuma Adow Jibril stated that she is Rendile while a search at the National Bureau of Statistics reveal that she is a Dagodia

Rukia Abdulahi Abdi stated that she is Oromo while a search at the National Bureau Statistics reveals that she is Dagodia

Based on the above discrepancies the petitioner averred that the 5th, 6th and 7th respondents lied about their ethnic backgrounds and canvassed as **Gabra, Rendile** and **Oromo** respectively in order to win ranks in the 4th Respondent's party list and misled the 1st Respondent IEBC that they are a disadvantaged group nationally which acts the petitioner avers amounted to fraud particulars in paragraph 20 of the petition among the particulars of fraud are;

Knowingly and willingly giving false information in document form, forwarding falsified documents to the 4th and 1st respondents

Forwarding falsified documents to the 4th and 1st respondents with the intention to unfairly acquire public office and in particular nomination into Mandera County Assembly

Unjustly and unfairly acquiring nomination into Mandera County Assembly

The petitioner further averred that the 5th Respondent was a nominee for County Women Representative NARCK-K party but failed to be cleared by the County Elections Manager for not being a Kenyan and not being a registered voter anywhere in Kenya, further the petitioner contended that the *Gabra* and *Rendile* community are located in Marsabit county and they have no origin in Mandera County and that out of the fraudulent and deceitful acts of the 5th, 6th and 7th respondents other more deserving party members of NARC-K party in Mandera County were overlooked among them the petitioner and that the most marginalized ethnic community in Mandera is the *Corner tribe* who only have a single MCA elected in Mandera County Assembly and the petitioner is from the *corner tribe* who in light of the legal provisions was more deserving for nomination since other than being a woman she is also from a marginalized community in Mandera County and due to the fraudulent acts of the 5th, 6th and 7th respondents she was unfairly placed and/or positioned in the 4th (position) in the 4th Respondents gender top up list, the petitioner further averred that Nasra Noor Mohamed, and Fatuma Adow Jibril the 5th and 6th respondents are both registered as voters in the same ward that Ashabito ward Mandera North Constituency which is in violation of the constitutional spirit and principle of equitable representation and the 7th Respondent Rukia Abdulahi Abdi is registered as a voter in Wajir County and not Mandera County, the petitioners amended petition was anchored on Article 100 and 90 of the constitution and on sections 34 of the Elections Act 2011 and further on The Elections(Party primaries and Party List) Regulations 2017, the petitioner's affidavit supported averments in the petition.

The petitioner filed a supplementary affidavit on 6th November 2017 annexing a subsequent gazette notice Vol. CXIX-No. 131 published on 6th September 2017 which amended the gazette notice of 28th

August 2017 both gazette notices being operative in the petition herein.

The 1st Respondent the IEBC filed their response to the amended petition on 19th October 2017 and their Replying affidavit on 7th November 2017 in which they admitted that they are mandated by Article 90(2) of the constitution and sections 35 of the Elections Act 2011 to receive party lists at least forty five (45) days before the date of the general elections, the 1st respondent admitted that the 4th Respondent (NARC-K) submitted a list for the gender top up list for Mandera County Assembly but the order of the nominees was as follows; Nasra Noor Mohammed the 5th respondent was in (position 1) , Fatuma Adow Jibril 6th Respondent (position 2) and Samira Abdirahman Hassan the petitioner (position 3) and the Rukia Abdullahi Abdi the 7th Respondent (positon 4) , the 1st Respondent averred that the 4th Respondent NARC-K was by dint of section 36(9) of the Elections Act 2011 only entitled to one (1) nomination slot having won two (2) elective seats in Mandera County Assembly and as a result the 1st respondent could only gazette one out of the 4 nominees submitted by the 4th Respondent (NARC-K) the 1st respondent was guided by priority and/or order in which the names of the nominees were submitted by the 4th respondent in accordance with section 36(8) of the Elections Act and priority was given to the 5th respondent whose name appeared first in the list of the nominees submitted by the 4th Respondent, the petitioner's name appeared as number (3) in the nomination list and as such she did not qualify for nomination as envisaged under section 36(8) of the Elections Act, the 1st respondent further averred that under Article 90(2) of the constitution the IEBC is mandated to conduct and supervise elections for the allocation of seats on the basis of proportional representation through nomination of candidates by political parties by use of party lists such as the one that was submitted by the 4th respondent NARC-K and that it was the prerogative of political parties to develop party lists and submit them at least forty five (45) days before the date of the general elections in accordance with section 35 of the Elections Act , the 1st Respondent as guided by section 34 (6) of the Elections Act as read with Regulations 55(2) of the Elections (General) Regulations 2012 as amended by Elections(General) (Amendment) Regulations 2017 reviewed the party lists within 14 days and required the political parties to resubmit the amended lists which the political parties subsequently resubmitted final amended lists in line with regulations 55(3) of the Elections (General) Regulations 2012 and the 4th Respondent (NARC-K) filed its final list on 20th July 2017 and subsequently the 1st Respondent published the said final party lists in Daily Nation for Friday 21st July 2017 and on Sunday 23rd July 2017 in both the Sunday Nation and the Standard Newspapers, and the petitioner never raised and/or brought any concern to the attention of the 1st Respondent after the publication of the said party lists, the 1st Respondent further aver that they have no power to make alterations to lists submitted by political parties and that in the decision to gazette a nominee, ethnicity of a nominee is not a consideration thus immaterial in the process, the 1st respondent reiterated that they were guided by provisions of section 36(8) of the Elections Act which requires that for purposes of Article 177 1) (c) of the Constitution *the respondent draws from the party list in order given by the political party thus the principle applied* in arriving at a decision that the 5th Respondent being the nominee who appeared first in the final list submitted by the 4th Respondent in the County Assembly of Mandera the 1st Respondent then proceeded to gazette the 5th respondent as a nominated member of the 2nd Respondent , the 1st respondent averred that the nomination of the 5th respondent and her subsequent gazzetment as the nominated member of the County Assembly was done in accordance with the Constitution, the Elections Act 2011 and Regulations under all other relevant statutes, the 1st respondent further averred that that this court lacks jurisdiction to hear and determine the amended petition and prayed for the dismissal of the same with costs.

In the 1st Respondent's Replying affidavit sworn by Salome Oyugi the manager political parties and Campaign Finance, the affidavit was filed on 7th November 2017 in which she reiterated averments in the response to the amended petition and annexed a final list of nominees to the gender top up list as submitted by the 4th Respondent which she annexed and marked as "S01" in which the 5th Respondent's name appeared at position one (1) on the list and the petitioner's name appeared at position (3) on the said list and by virtue of the 5th Respondent's name appearing at position one (1) and following the 8th August 2017 general elections the 1st respondent gazzetted the name of the 5th respondent in the gazette

notice published on 28th August 2017 in compliance with section 36(8) of the Elections Act as evidenced by the gazette notice was annexed and marked a “SO2”.

The 2nd and 3rd Respondents, The County Assembly of Mandera and The Clerk County assembly of Mandera filed a joint replying affidavit sworn by Mohamed Adan Khalif the Speaker of the County Assembly of Mandera, sworn on 6th November and filed on 8th November 2017 in which he averred that all the elected and nominated and gazetted members of County Assembly of Mandera including those nominated vide gazette notice dated 28th August 2017 and the gazette notice dated 6th September 2017 for the special seats were all sworn on 7th September 2017 and the 5th Respondent Nasra Noor Mohammed was among the eighteen(18) Nominated members of the Mandera County Assembly that were sworn in 7th September 2017, and that the 2nd Respondent, the County Assembly of Mandera is not involved in nominations of candidates to party list/party nominations and the said role legally belongs to the political parties and the Independent Electoral and boundaries Commission, but since the petition raises fundamental issues then the 4th Respondent NARC-K, the 5th respondent Nasra Noor Mohammed , Fatuma Adow Jibril the 6th respondent and Rukia Abdullahi Abdi the 7th Respondents are collectively and individually in breach of the constitution , the Elections Act and the Regulations thereunder and the 5th , 6th and 7th respondents respectively are in breach of the Elections Act and the penal code by giving false information and falsifying records while seeking party nomination thereby misleading NARC-K the 4th Respondent into submitting their names to IEBC (the 1st Respondent)

The 4th and 5th Respondents filed a joint response in which they denied allegations of fraud as set out in the petition and sought for dismissal of the petition with costs, they each also filed a Relying affidavit, the 4th respondent’s affidavit was sworn by Dr. Ambrose Nzomo the secretary General of NARC-K sworn on 2nd November 2017 and filed on the same date, in which he averred that the 4th respondent fronted candidates who participated in the 8th August general elections and the party won only two elective seats being MCA seats for **Kotulo ward Mandera South constituency** , and **Alungo Gof ward Lafey constituency** and based the two number won elected seats NARC-K qualified for only one (1) nomination slot NARC-K Kenya had a list of 6 nominees on the marginalized list and 4 nominees on the gender top up list for Mandera County, for the gender top up nominees the subject of the petition the list submitted by the 4th respondent was as follows;

- a. Nasra Noor Mohammed (5th respondent) female by gender and ethnicity Gabra
- b. Fatuma Adow Jibril (6th respondent) female by gender and Rendile by ethnicity
- c. Rukia Abdullahi Abdi (7th Respondent) female by gender and Oromo by ethnicity
- d. Samira Abdirahman Hassan(petitioner) female by gender and Corner tribe by ethnicity

The 4th Respondent averred that the list had equitable representation, and going by the list NARC-K only qualified for only one gender top up slot and even missed out on the marginalized slot and since the 5th respondent topped the gender top up list she was gazetted as the only NARC-K nominee on the gazette Notice No. 8380 Vol CXIX published on 28th August 2017 annexed as “AN2”, the petitioner was number (4) on the gender top up list and could as a result not have been nominated due to the circumstances stated above, and that Mandera County is a stronghold of marginalized groups where no one ethnic community is more marginalized than the other and that allegations of fraud as alleged by the petitioner are incorrect and false.

The 5th respondent Nasra Noor Mohammed swore her affidavit on 2nd November 2017 and filed on the same day, she averred that she was an active member of NARC-K the 4th respondent and she participated in the 8th August 2017 general elections, she submitted her detailed information to her party NARC-K for nomination to the Mandera County assembly under gender Top up category and her application for

nomination was successful and her names was among those forwarded to IEBC for nomination and gazetting, she reiterated the names of the nominees on the gender top up list as stated by the petitioner, the 1st respondent and the 4th respondent details in paragraph 6 of her replying affidavit, and following the outcome of the 8th August 2017 general elections she was gazetted by IEBC the 1st Respondent as a nominated member of the County Assembly of Mandera vide gazette notice dated 28th August 2017 for the gender top up seat category, she denied allegations of fraud levelled against her by the petitioner and sought for the dismissal of the petition.

The 1st interested party, The Nomadic Agenda filed their affidavit sworn by Abdimunim Abdirahman an honorable secretary of Nomadic Agenda pastoralist, which is a pastoralist organization registered as a Kenyan Community Based organization (CBO) in December 2005 as evidenced by a certificate of registration annexed as "AA1", the main objective of the interested party is Civic Education on constitutional making, good governance, human rights, advocacy for minority rights and enhancing electoral systems with issues on transparent and transformative leadership, he averred that the 5th 6th and 7th respondents misrepresented facts with a view of getting undue advantage, the interested party annexed annexure "AN4" a demand letter that it send to the IEBC and was received by IEBC on 1.9.2017 on which he attached the application for registration details for the 5th 6th and 7th respondents which indicates that they are all from Mandera East district an indication that they are residents of Mandera County.

The 6th, 7th Respondents and the 2nd interested party although served failed to file responses or replying affidavit to the petition.

On 27th November 2017, when the matter was set for hearing after pretrial conference the 4th and 5th Respondents filed an application seeking to have the names of the 2nd and 3rd respondents and the names of the 1st and 2nd interested parties struck out but which application was not canvassed for the obvious reasons that it was filed on the date of the hearing and after pre-trial conference hence it was in contravention with Regulations 15(2) of the Elections (Parliamentary and County Elections) Petitions Rules 2017 which provides that an election court shall not allow any interlocutory application to be made on conclusion of the pre-trial conference, if the interlocutory application could have by its nature been brought before the commencement of the hearing of the petition.

During the hearing the petitioner's Counsel Mr. Anyoka relied on the petition dated 27.9.2017 together with the supporting affidavit and amended on 19.10.2017 and a supplementary affidavit filed on 27.11.2017, both the supporting affidavit and supplementary affidavit were sworn by Samira Abdirahaman Hassan the petitioner, Counsel made oral submissions on the petition which reiterated averments in the petition and the supporting and supplementary affidavits as set out above in brief and urged the court to grant the reliefs as sought.

The 1st Respondent (IEBC) through Counsel Mukele S. sought to entirely rely on the response to the amended petition dated 18.10.2017 and filed on 19.10.2017 together with the replying affidavit sworn by Salome Oyugi on 7.11.2017.

Counsel Abdi for the 2nd and 3rd Respondents relied on their Replying affidavit sworn on 20.11.2017 and filed in court on 21.11.2017 and urged the court to make a just determination on the matter.

The Miss Njuguna Counsel for the 4th and 5th respondents relied on the respective affidavits sworn on 2.11.2017 by Dr. Nzomo for the 4th respondent and an affidavit sworn by the 5th respondent Nasra Noor Mohammed

Miss Mwae Counsel for the 1st interested party relied on the affidavit sworn on 9.11.2017 by Abdimunim Abdirahaman on 8.11.2017 and annexes thereto and reiterated averments in the affidavit in her submissions and urged the court to declare the nominations of the 5th respondent to Mandera County

Assembly on the gender top ups category on the NARC-K party list as null and void.

Based on the petition parties responses and affidavits it is not disputed that NARC-Kenya party fronted various candidates to contest for seats in the 8th August 2017 general elections and out of which the said party won two (2) MCA elective seats and was only entitled to one (1) nomination slot and only qualified for one gender to up slot and following the gender top up list that NARC Kenya submitted to the 1st respondent IEBC the name of the 5th Respondent as appearing on position one (1) was gazetted in the gazette notice dated 28th August 2017 as the nominated member of the County Assembly of Mandera, it is also not disputed that the names of the 6th, 7th respondents and the petitioners names appeared and were in fact submitted and published by the IEBC the 1st Respondent as appearing at position 2, 3 and 4 respectively and that the 5th respondent's name appeared in position one (1) on the 4th respondent's party list, parties did not file an agreed list of issues and none filed a separate list of issues, from the petition, responses and parties respective affidavits and oral submissions by Counsel for the petitioner and the 1st interested party which I have considered the issues for determination can be deduced as;

- i. Whether the 5th, 6th and 7th Respondents gave false information with regard to their ethnicity and whether centrality is a material consideration in nomination of gender top up seats
- ii. Whether the 5th Respondent is a registered voter in Mandera County
- iii. Whether the fact that the 5th and 6th Respondents are registered as voters in the same ward renders their inclusion in the gender top up nomination list of the 4th respondent a nullity
- iv. Whether the 5th Respondent was validly gazetted as a nominated member of the County Assembly of Mandera
- v. Whether the petitioner is entitled to reliefs sought
- vi. Who bears the costs

Whether the 5th, 6th and 7th Respondents gave false information with regard to their ethnicity and whether ethnicity is a material consideration in nomination of gender top up seats

The petitioner and the 1st interested party argued that the 5th 6th and 7th Respondents gave false information to the 4th Respondent NARC Kenya in order to gain undue advantage in the nomination list of the gender top up list of the 4th Respondent which was subsequently submitted to the 1st Respondent, in particular the petitioner and the 1st interested party argued that the 5th respondent *Nasra Noor Mohammed* presented herself as **Gabra** while statistics at the National Bureau indicates that she is **Dagodia** which is a majority clan in Mandera County, similarly the 6th respondent *Fatuma Adow Jibril* presented herself as **Rendile** while statistics from National Bureau indicates that she is **Dagodia**, the 7th Respondent *Rukia Abdi* presented herself as **Oromo** while the search at the National Bureau of Statistics indicates that she is **Dagodia** and that the petitioner being from **Corner tribe** a marginalized community was entitled for nomination since the 5th 6th and 7th respondents are from the majority ethnic clan. On this issue the 1st Respondent argued that ethnicity is not one of the consideration for nomination envisaged under the Elections Act 2011, a position held by the 4th and 5th respondents, while the 2nd and 3rd respondents urged the court to deal with the serious issues as raised regarding the submission of false information and render justice in the matter.

In section 34(5) of the Elections Act 2011 it is provided **that party lists are submitted in order of priority**, while under section 34(6) of the Elections Act, **the party list submitted shall be in accordance to the Constitution or nomination rules of the political party concerned** and section 34(7) **party lists submitted to the commission shall be valid for the term of parliament** and under section 34(8) **a**

person who is nominated by a political party shall be a person who is a member of the political party on the date of submissions of the party list by the political party, from the forgoing section 34(8) of the Elections Act it is not disputed that the 5th, 6th, 7th and the petitioner were members of NARC-Kenya the 4th respondent at the time that their names were included in the party list of the 4th respondent and submitted and that the criteria as envisaged under section 34(8) for one to qualify for nomination on the party list was met by all of them, under Rule 55(2) of the Elections (General) Regulations 2012 the 1st respondent reviewed the 4th respondent's party list and returned it to the 4th Respondent for amendment and which the 4th respondent complied and re-submitted a final list according to the 1st respondent on 20.7.2017 which list was published in the Friday Nation newspaper of 21.7.2017 and the Sunday Nation and Standard Newspapers of 23.7.2017.

In Article 90(2) (c) of the Constitution it is provided that except in the case of county assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya, as such my reading of the said constitutional provision is that ethnicity is not a factor for consideration in county assembly seats, further for gender top up seats the consideration is not *ethnicity* but the fact that one is a *female* or *male* (*gender*), as regards submission of false information by the 5th, 6th and 7th respondents on their ethnicity, it is trite law that whoever alleges must prove, the petitioner alleged that the said respondents gave false information, however other than the annexed copies from the National Bureau of statistics no affidavit was filed from the said National Bureau of Statistics or a witness from the said office was called to testify and prove that the annexed documents were authentic as such I find that the annexed documents may not suffice for purposes of this case considering that the standard of prove in election petition cases is higher than that in Civil cases, the onus was on the petitioner to convince this court which I find that she failed to, on the basis I do not find a basis to hold that the 5th, 6th and 7th respondents gave false information as regard their ethnicity and be as it may as stated above ethnicity is not one of the considerations for one to be considered for nomination in the gender top up category, the criteria is set out section 34(4) and (8) of the elections Act 2011, Article 81(b) and Article 177 (1) (b) of the Constitution.

Whether the 5th Respondent is a registered voter in Mandera County.

The petitioner averred that the 5th Respondent was not a registered voter in Mandera County, however the petitioner did not avail evidence to effect before court, one of the qualifications for NARC-K nominations from its rules for nominations for county assembly representatives among other qualifications one needs to be a registered voter in the ward he /she wishes to represent and requirements for nominations entail **proof of registration as a voter** which I find that all the 5th, 6th, 7th including the petitioner must have complied before being included in the party list by the 4th respondent and subsequently submitted to the 1st Respondent IEBC for publication and the subsequent gazettment of the 5th respondent as a nominated MCA of Mandera County from the said list, since the time the party list was submitted to the 1st respondent, then its subsequent publication in the daily newspapers of wide circulation to the 8th August 2017 general elections up until the 5th respondent's name was gazzetted as the nominated member of Mandera County Assembly, the petitioner never raised an issue with the list, on those basis then, I find that by the fact that the 5th respondents name was included in the party list for gender top up seats for Mandera County Assembly under NARC-K, she must have met the party requirements and qualification as set out in the 4th respondent nominations rules for member of the County Assembly as such she was a registered voter in Mandera County and no contrary evidence has been availed before court to lead to a contrary finding.

Whether the fact that the 5th and 6th respondents are registered as voters in the same ward renders their inclusion in the gender top up nomination list of the 4th respondent a nullity.

The petitioner argued that since the 5th and 6th respondents are both registered as voters in **Ashabito ward** Mandera County then their enlisting in the gender top up list violated article 100 of the Constitution on right to equal representation, on this issue I have considered the 4th Respondent's nomination Rules

for Members of the County Assembly and I have not seen a rule barring members who come from the same ward from applying for nomination slots, further in the Elections Party Primaries and Party lists) Regulations 2017 regulation 15 provides for application for nomination 15(1) *provides that an aspiring candidate shall submit to an Election board of their party a duly filled application in Form 3 set out the schedule together with*

- a. *A signed commitment to the political party's constitution, policies and principles,*
- b. a self-declaration form as prescribed under the Leadership and Integrity Act 2012 (No. 19 of 2012)
- c. *Copies of the person's national identity card or valid passport*
- d. *Copies of the candidates academic qualifications from the relevant institutions.*
- e. *Evidence of registration as a member of the a party and*
- f. Receipt or other evidence of payment of nomination fee

Regulation 20 (1) provides that *a party list shall contain the names of the persons who would stand elected if the party were to be entitled to all seats available, under Article 177(1) (b) and (c) in the case of county assemblies and shall alternate between male and female candidates*

Regulation 20(2) a party list submitted under sub regulation (1) shall ensure fair representation to take into consideration the principles of Article 81(b) and Article 100 of the Constitution.

Regulation 26 of the said regulations empowers the commission to reject party lists that do not conform to the law

While Article 81(b) provides that *the electoral system shall comply with the among other principles that not more than two-thirds of members of the elective public bodies shall be of the same gender*

Article 100 of the Constitution provides that parliament shall enact legislation to promote the representation in parliament of;

- a. women
- b. Persons with disabilities
- c. Youth
- d. Ethnic and other minorities
- e. Marginalized communities

Section 25 of the elections Act 2011 also provides qualifications for a person to be nominated as a member of the County Assembly

From the above cited provisions of the constitution and the Election Act, and regulations thereto there is no requirement that persons registered in the same ward in a county are not eligible for nomination and/or are barred from applying to be considered for nomination in the party lists as a such I find that the nomination of the 5th and 6th respondents by the 4th respondent on the gender top up party list did not violate any constitutional or legal provisions and none was cited I further find that for the issues in contention the main consideration for nomination on the gender top up category was gender.

Whether the 5th Respondent was validly nominated and gazzetted as a nominated member of the County

Assembly of Mandera

It is not disputed that the 1st respondent received a final party list for the gender top up category and published it in the Friday Nation Newspaper of 21.7.2017 and in the Sunday Nation and Standard Newspapers of 23.7.2017 in compliance with Regulation 54(8) of the Elections (General) Regulations 2012, and the said party list was submitted in compliance with section 35 of the Elections Act 2011 that is at least (45) days before the 8th August 2017 general elections, by virtue of the 1st respondent (IEBC) publishing the list as stated above was a confirmation that the 4th respondent's party list especially as relates to the gender top up category was in compliance with the law, after the publication the petitioner never raised any complaint with regards to the published list despite her name appearing at position (4) on the list. Based on the list submitted the name of **Nasra Noor Mohamed** the 5th respondent appeared at position one(1) and since the 4th respondent (NARC-K) was entitled to only one nomination slot following the August 8th 2017 elections, the 5th respondent's name was gazetted as the nominated member of the County Assembly for Mandera under the gender top up category, section 34(10) of the Elections Act 2011 provides *that the party list submitted shall not be amended during the term of the parliament or county assembly as the case may be for which candidates are elected* as such as regards the gender top up list as submitted by the 4th respondent for Mandera County the 5th respondent's names appeared and continues to appear in position (1), the 6th respondent's name appear in position 2, the 7th respondent's name appear in position 3 and the petitioner's name appears in position (4) the list remains so and valid for the current term of the County Assembly of Mandera it is not amenable to amendments and no valid reasons have been advanced to interfere with the list, based on the above I find that the 5th respondent's name having been submitted at position one (1) on the gender top up list of the 4th respondent NARCK and for her to have been subsequently gazetted as a nominated member of the County Assembly of Mandera her nomination and gazettelement was valid.

Whether the petitioner is entitled to reliefs sought

Before I address this issue I will first address the issue raised by the 1st respondent to the effect that this court lacks jurisdiction to entertain the amended petition, none of the parties addressed the issue during the proceedings however being a point of law I will nevertheless address it bearing in mind that jurisdiction is everything as was held in the case of; **The Owners Of Motor Vessel "Lillian S" vs Caltex Oil Kenya Ltd [1989] KLR 1** in which it was held that;

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

The dispute before court revolves around the inclusion of the 5th 6th and 7th respondents on the 4th respondent's (NARC-K) party list the issues for nomination and inclusion on party lists are governed by the Constitution, the Elections Act and Regulations and party regulation in The Elections (Party Primaries and Party lists) Regulations 2017

Regulation 20 (1) provides that *a party list shall contain the names of the persons who would stand elected if the party were to be entitled to all seats available under ...Article 177(1)(b) and (c) in the case of County Assemblies and shall alternate between male and female candidates*

20(2) a party list submitted under sub regulation (1) shall ensure fair representation to take into consideration the principles of Article 81(b) and Article 100 of the Constitution

Regulation 26 of the said regulations empowers the commission to reject party lists that do not conform to the law

While regulation 27 provides an internal dispute resolution mechanism in relation to party primaries and

party list to be determined within 90 days before the date of the general election

Since the dispute relates to inclusion of the 5th 6th and 7th respondents to the 4th respondent's party list the first port of call was the internal dispute mechanism as set out in Regulation 27 of the Elections (Party Primaries and Party lists) Regulations 2017.

In Article 88(4) of the Constitution the IEBC is responsible for conducting or supervising referenda and elections to any elective body or office established by the constitution and any other elections as prescribed by an Act of parliament and in, in particular Article 88(4) (e) for the settlement of electoral disputes , including to disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.

Section 74 of the Elections Act 2011 74(1) states that pursuant to Article 88(4)(e) of the constitution, the commission shall be responsible for the settlement of electoral disputes , including disputes relating to or arising from nominations but excluding election petition and disputes subsequent to the declaration of election results.

Further under section 40(1) of the Political Parties Act the tribunal shall determine;

- a. Disputes between the members of a political party
- b. Disputes between a member of a political party and a political party
- c. Disputes between political parties
- d. Disputes between an independent candidates and a political party
- e. Disputes between coalition partners
- f. Appeals from decision of the registrar under this Act
- g. Disputes arising out of party primaries

Section 40(2) notwithstanding subsection (1) the tribunal shall not hear or determine a dispute under paragraph a), b) (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms.

The issues raised by the petitioner in the case before court as stated earlier are that the 5th 6th and 7th respondents submitted false information to the 4th respondent (NARC-K) to gain undue advantage for nomination on the gender top up list, this list was received by the IEBC the 1st respondent and published in the newspapers of 21.7.2017 and 23.7.2017 in which the petitioner's names were published as appearing at position (4) and the names of the 5th 6th and 7th respondents appearing at position 1,2 and 3 respectively but the petitioner never raised an issue or lodged a complaint with her party as envisaged under Regulation 27 of the Elections (Party Primaries and Party lists) Regulations 2017, she further never lodged complaint with the 1st respondent the IEBC as envisaged under Article 88(4)(e) of the Constitution and section 74(1) of the Elections Act 2011, neither did she lodge a complaint with the political parties disputes tribunal as envisaged under section 40 of the political parties Act, the petitioner failed to exhaust the dispute resolution mechanisms as set out in the Constitution and the Election Act and the Political Parties Act, the issues complained of were pre-elections and not post-election of 8th August 2017, in **Peter Ochara Anam and 3 Others vs Constituencies Development Fund Board and 4 Others, Kisii High Court Petition No 3 of 2010**

The court held that;

“Jurisdiction we all know is everything and once raised it must be confronted from the onset and if

successful the court must down its tools

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

It has been stated constantly that where there exists sufficient and adequate legal avenue, a party ought not trivialize the jurisdiction of the court pursuant to the Constitution. Indeed, such a party ought to seek redress under the relevant statutory provision...”)

The petitioner did not exhaust dispute resolution mechanism as laid out in the statutes above mentioned.

However since I have already heard the petition I will proceed and determine it on merits, as to whether the petitioner is entitled to reliefs sought;

courts have held that in election disputes the burden of proof lies and remains with the petitioner throughout, this is as envisaged in section 107(1) of the Evidence Act cap 80 Laws of Kenya, and as was held in the case of **Raila Odinga V Independent Electoral and Boundaries Commission & 3 Others Supreme Court Petition No. 5 Of 2013**

With respect to the standard of proof in election dispute resolution, the standard is as laid down in section 83 of the Elections Act 2011 and which the court looked at in the case of **Hassan Mohammed Hassan & Anor V Independent Electoral & Boundaries Commission & 2 Others Election Petition (Garissa) No. 6 Of 2013**

Section 83 of the Election Act 2011 states that *no election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the constitution and in that written law or that the non-compliance did not affect the result of the election.*

The court in the above cited case held that the implication of section 83 of the Elections Act was that the court will not interfere with the free choice of voters unless the irregularities and malpractices proved by the petitioner are such that they actually interfere with the free choice of the voters.

In Raila Odinga V Independent Electoral and Boundaries Commission & 3 Others Supreme Court Petition No. 5 of 2013,

The court held that the standard of proof required in Election petitions is higher than the civil standard of balance of probabilities, but lower than the criminal standard of proof beyond all reasonable doubt.

The petitioner seeks to have the name of **Nasra Noor Mohammed , Rukia Abdulahi and Fatuma Adow Jibril** struck out from the party list , gender top up category of the National Rainbow coalition Party (NARC-K) for Mandera County, and an order to revoke the gazette notice No. 8380 VOL. CXIX NO. 124 of 28th August 2017 declaring the 5th Respondent as validly nominated to the Mandera County Assembly, and for an order directed at the IEBC to substitute the name of Nasra Noor Mohammed and gazette the name of the petitioner Samira Abdirahman Hassan as validly nominated by NARC-K, gender top up category Mandera County Assembly, having held that the party list was submitted as required by law and it is valid for term of the county assembly it is no amenable to amendment and no reason has been advanced to warrant the interference with the submitted party list by the 4th respondent with respect to the gender top up category, and having held that the 5th respondent was validly nominated and gazzetted, I find that the petitioner has not discharged the burden of proof and standard of proof as is required in election petitions, I find that the 5th Respondent was validly nominated by NARC-Kenya and subsequently gazzetted as the nominated member of the County assembly of Mandera on the gender top up category vide gazette notice No. 8380 VOL. CXIX NO. 124 of 28th August 2017.

Who bears the costs of the petition

In section 84 of the Election Act costs are awardable and they follow the cause.

The final orders are that;

1. The petition is dismissed
2. I hereby declare **Nasra Noor Mohammed** as validly nominated by NARC-Kenya and subsequently gazzeted in gazette Notice No. 8380 Vol. CXIX No. 124 of 28th August 2017 by IEBC as a Member of the County Assembly of Mandera on the gender top up category.
3. The petitioner shall bear the costs of the petition as follows; costs to the 1st respondent are capped at Kshs. 200,000/= ; costs to the 2nd , 3rd 4th and 5th Respondents are for each party capped at Kshs 100,000/=.
4. There shall be no costs awarded to the 6th and 7th Respondents and to the 1st and 2nd interested party.

Dated at Nairobi this 19th day of December 2017

E. Wanjala

Senior Resident Magistrate

In the presence of;

.....Court Assistant

.....for petitioner

.....for 1st Respondent

.....for 2nd and 3rd Respondents

.....for the 4th and 5th Respondents

.....for the 6th Respondent

.....for the 7th Respondent

.....for the 1st interested party

.....for the 2nd interested party