



**United Democratic Movement & another v Independent Electoral
and Boundaries Commission & 2 others (Election Petition Appeal
E017 of 2023) [2023] KECA 1338 (KLR) (10 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1338 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
ELECTION PETITION APPEAL E017 OF 2023
DK MUSINGA, S OLE KANTAI & LA ACHODE, JJA
NOVEMBER 10, 2023**

BETWEEN

UNITED DEMOCRATIC MOVEMENT 1ST APPELLANT

SOKOREY MAALIM ISAAKOW 2ND APPELLANT

AND

ABDOW BISHAR MAALIM 1ST RESPONDENT

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 2ND
RESPONDENT**

ABDIWELLY HAJI BUKU 3RD RESPONDENT

*(Being a preliminary objection challenging this Court's jurisdiction to hear and determine
an appeal from the Ruling of the High Court of Kenya (Prof. Sifuna, J.) dated 17th
August 2023 in Garissa Election Petition Appeal No. E005 of 2023 as Consolidated with
Election Petition Appeal No. E002 of 2023 and Election Petition Appeal No. E004 of 2023)*

RULING

1. Before this Court is a preliminary objection which in its very nature challenges the jurisdiction of this Court to hear appeals from elections involving members of county assemblies. The preliminary objection was raised in an appeal filed by the United Democratic Movement (the UDM Party) against the ruling delivered by the High Court (Prof Sifuna, J) on August 17, 2023 in Garissa Election Petition (Appeal) No E005 of 2023 as consolidated with Election Petition (Appeal) No E002 of 2023 and Election Petition (Appeal) No E004 of 2023.
2. The pertinent facts culminating in the appeal and the preliminary objection are well documented in two Election Petitions filed at the Resident Magistrates' Court at Mandera by Abdiwelly Haji



- Bukura (Election Petition No E007 of 2022) and Suban Ahmed Abdinoor (Election Petition No E006 of 2022). The respondents in the two petitions were the Independent Electoral and Boundaries Commission (the IEBC), the UDM Party, and Abdow Bishar Maalim in their respective capacities as the 1st to 3rd respondents. The two petitions were consolidated, with Election Petition No E007 of 2022 being designated as the lead file. We now proceed to lay a factual background of the two petitions.
3. Abdiwelly Haji Bukura and Suban Ahmed Abdinoor described themselves in their respective petitions as bonafide life members of the UDM Party. The Party, vide a publication that was carried in the Star Newspaper between 13th to May 15, 2022, invited its bonafide members to apply for party lists nominations to the National Assembly, Senate, and County Assembly. On May 17, 2022, Abdiwelly Haji Bukura and Suban Ahmed Abdinoor applied to be considered for nomination to the Mandera County Assembly in the marginalized category of Persons With Disabilities (PWDs).
 4. On June 23, 2022, the UDM Party, through its Secretary General, submitted to the IEBC its party list as certified by the Office of Registrar of Political Parties. It was contended that the party list did not, at all times, include the name of Abdow Bishar Maalim (the 3rd respondent), who it was averred was not even a registered member of the UDM Party. Fast forward to July 23, 2022, the UDM Party submitted an amended party list to the IEBC, which list was subsequently published in the Standard Newspaper on July 27, 2022 and was also uploaded on the IEBC website. According to the two petitioners, the list remains on the IEBC website unaltered to date. In the party list published in the Standard Newspaper on July 27, 2022, both Abdiwelly Haji Bukura and Suban Ahmed Abdinoor had been nominated by the UDM Party to represent PWDs in the Mandera County Assembly. The party list contained eight nominees, but the names relevant to this discourse are the following: Bishar Hussein Farah (No1)-Youth; Suban Ahmed Abdinoor (No2)- PWD; and Abdiwelly Haji Bukura (No3)-PWD.
 5. The IEBC, through Gazette Notice No 10712 of September 9, 2022, published the list of nominated Members of County Assemblies (MCAs), which included the name Abdow Bishar Maalim as No 1 in the marginalized list, allegedly representing the youth in the Mandera County Assembly. The final UDM Party marginalized list as published by the IEBC was as follows: Abdow Bishar Maalim - Youth; Sokorey Maalim Isaakow - Special Interest; and Bishar Hussein Farah – Youth. The omission of Abdiwelly Haji Bukura and Suban Ahmed Abdinoor from the party list and the inclusion of Abdow Bishar Maalim in the said list constituted the gravamen of the two petitions. It was contended that as at the time of publication of the party list in the Standard Newspaper on July 27, 2022, Abdow Bishar Maalim was not a bonafide member of the UDM Party; that his name was not in the UDM party list for Mandera County Assembly which was published in the Standard Newspaper on July 27, 2022; and that in the publication contained in the Standard Newspaper on July 27, 2022, his name appeared as a nominee for Jubilee Party for the Isiolo County in position No 3 under the marginalized group nominees.
 6. It was contended that the inclusion of Abdow Bishar Maalim in the list of nominated members of county assemblies had unlawfully altered the party list for Mandera County as had been published in the Standard Newspaper on July 27, 2022. The omission of the petitioners' names and/or the alteration of the party list had disenfranchised and prejudiced their rights contrary to the Constitution, the Political Parties Act, the Elections Act, the Elections (General) Regulations, 2012, and the Elections (Party Primaries and Party Lists) Regulations, 2017. Abdow Bishar Maalim was eventually sworn in as an MCA, Mandera, on September 22, 2022.
 7. The key issues identified and proposed for the Election Court's determination in the two petitions were: whether the IEBC could alter the UDM party list submitted to it and published on July 27, 2022 in the Standard Newspaper; whether the IEBC could gazette the name Abdow Bishar Maalim in Gazette Notice No 10712 of September 9, 2022 despite him not being a member of the UDM Party;



and whether the court should revoke the name of Abdow Bishar Maalim in Gazette Notice No 10712 of September 9, 2022 and direct the IEBC to publish an amended list containing the correct names as submitted by the UDM Party and published in the Standard Newspaper on July 27, 2022.

8. The orders sought in both petitions were:
 - i. a declaration that the nomination of Abdow Bishar Maalim was not conducted in accordance with the Constitution, the Elections Act, the Political Parties Act and all applicable laws and was therefore invalid, null and void;
 - ii. a declaration that the gazette of Abdow Bishar Maalim as a nominee of the UDM Party in position No 1 under the marginalized list youth category is null and void, Abdow Bishar Maalim having been fraudulently included in the Gazette Notice;
 - iii. the fraudulent and illegal nomination of Abdow Bishar Maalim to the Mandera County Assembly be revoked; the IEBC be ordered to cancel and remove Abdow Bishar Maalim from position No 1 and instead reinstate Suban Ahmed Abdinoor and Abdiwelly Haji Bukura as No2 and No 3 respectively under the marginalized list to Mandera County to represent PWDs;
 - iv. an order directing the IEBC to correct Gazette Notice No 10712 of September 9, 2022 and publish an amended gazette notice reflecting the names of the petitioners as submitted by the UDM Party and approved by the IEBC in the original party list uploaded on the IEBC website; and
 - v. that the IEBC and Abdow Bishar Maalim be condemned to pay the costs of the petition.
9. The UDM Party in its response to both petitions largely joined issues with Abdiwelly Haji Bukura and Suban Ahmed Abdinoor. It contended that Abdow Bishar Maalim was not a member of its party until he purported to register on September 11, 2022, merely 2 days after the gazette of the list of nominated members of the county assemblies by the IEBC. For context purposes, it was contended that as per the records maintained by the Registrar of Political Parties, Abdow Bishar Maalim became a member of the UDM Party on September 11, 2022 at 1.47pm. The UDM Party maintained that Abdow Bishar Maalim was not a registered member of the party as at the time it submitted its party list to the IEBC; and that he did not pay any registration or nomination fee as required under the party's Election and Nomination Rules. In sum, therefore, the argument by the UDM Party was that its party list for nomination of the various positions to Mandera County as published by the IEBC was a forgery, and that the two petitioners were entitled to the orders sought in the consolidated petitions.
10. The IEBC, through its response dated November 4, 2022, maintained that it conducted its role in the regulation of the process by which parties nominate candidates as envisaged under Article 88 (4) of the Constitution to the required standard. It contended that it had no role whatsoever in the internal procedures and processes of political parties, and that its role was limited to ensuring that the lists submitted by political parties complied with the Constitution and other applicable laws; that the party list is gazetted in accordance with the law; and that each party was allocated slots on priority basis from the final lists submitted by the political parties themselves.
11. It was further contended that the IEBC has no role in how parties arrive at the party lists and that it followed the order of priority of the lists submitted to it by political parties. As far as the gazette of list of the nominees for the various seats for Mandera County Assembly is concerned, it maintained that it fully complied with the law. It sought a declaration from the Election Court that it discharged its constitutional mandate as enshrined in the Constitution, the Elections Act and the regulations made thereunder.



12. Before focusing on the response by Abdow Bishar Maalim to the consolidated petitions, it is important to point out that he had filed a Preliminary Objection before the Election Court challenging the competence of the petition filed by Abdiwelly Haji Bukura for his failure to comply with the provisions of Section 78 of the [Elections Act, 2011](#) as far as deposit for security for costs is concerned. Abdiwelly Haji Bukura on the other hand filed an application seeking enlargement of time within which to deposit security for costs. The preliminary objection and the application for enlargement of time were heard by way of written submissions and vide a ruling delivered on November 23, 2022, the preliminary objection was dismissed while the application for enlargement of time was allowed.
13. Abdow Bishar Maalim would thereafter file an application for enlargement of time within which to file a response to the petition by Abdiwelly Haji Bukura. One of the reasons adduced for the delay in filing his response to the petition was the hope that his preliminary objection would determine the petition in his favour. The Election Court, vide a ruling dated December 13, 2022, allowed extension of time within which Abdow Bishar Maalim was required to file his response to the petition by Abdiwelly Haji Bukura.
14. Turning to his response in respect of the consolidated petitions, Abdow Bishar Maalim contended that he was a duly registered and bonafide life member of the UDM Party. He maintained that his nomination was subsequent to his application to be considered for party list nominations as an MCA, Mandera, representing the youth.
15. He further contended that he was not an official of the UDM Party and was therefore not involved in the preparation of party lists, which was a preserve of the political parties. He maintained that his nomination was in conformity with Articles 90 and 177 of the [Constitution](#), Sections 36 and 37 of the [Elections Act](#), and Regulation 55 of the [Elections \(General\) Regulations, 2012](#).
16. On February 2, 2023, Hon. Wasike delivered his judgment in the consolidated petitions. He declared that Abdow Bishar Maalim had not been validly elected and his election was nullified. Further, the court having perused the nomination priority list published in the Standard newsletter on July 27, 2022 noted the order of the nominees to be
 - (1) Bishar Hussein Farah - Youth,
 - (2) Suban Ahmed Abdinoor - PWD then
 - (3) Abdiwelly Haji Bukura – PWD.

It was noted that Bishar Hussein Farah had already been nominated to the Mandera County Assembly and that his nomination was not contested. The petitioners had also not challenged the nomination of Sokorey Maalim Isaakow, who had been nominated to the Mandera County Assembly to represent Special Interest, although nominated under the wrong category. In the circumstances, the next person in the order of priority was Suban Ahmed Abdinoor. Consequently, the learned Magistrate declared Suban Ahmed Abdinoor as validly elected. In addition, it was held that the party list published in the Standard newspaper of July 27, 2022 was the valid party list and it would be the list available for use by the UDM Party in the event vacancies arise under the marginalized category in the Mandera County Assembly. The learned magistrate thus ordered the IEBC to issue and publish a Gazette Notice to reflect Suban Ahmed Abdinoor as the duly nominated MCA, Mandera, to represent PWDs under the marginalized category.

17. Aggrieved and dissatisfied with part of the judgment of the Election Court, Abdow Bishar Maalim, Abdiwelly Haji Bukura, and the UDM Party filed separate appeals to the High Court of Kenya at Garissa being Election Petition (Appeal) Nos. E002, E004, and E005 of 2023 respectively. The three



appeals were consolidated, Election Petition (Appeal) No E002 of 2023 being designated as the lead file.

18. The grounds in support of the appeal by Abdiwelly Haji Bukura mirrored to a great extent the grounds of appeal in the appeal by the UDM Party. We shall therefore set out the grounds in these two appeals together. The learned Magistrate was said to have erred in law and in fact by, *inter alia*: failing to direct the IEBC to correct the Gazette Notice No 10712 of September 9, 2022 and publish an amended gazette notice reflecting the correct party list as submitted by the UDM party which had been published on the IEBC's website and in the Standard Newspaper of July 27, 2022; declining to order gazettelement of Abdiwelly Haji Bukura despite his name appearing as No 3 in the party list and despite holding that the correct party list of Mandera County Assembly was the one published in the Standard Newspaper of July 27, 2022; failing to order gazettelement of the correct and valid party list in order of priority as published in the Standard Newspaper of July 27, 2022 despite making a finding that the gazetted list was null and void; giving contradictory orders by finding that the party list as gazetted by the IEBC was invalid and that the correct party list was the one published in the Standard Newspaper of July 27, 2022, save for the name Sokorey Maalim Isaakow which is tantamount to amending the UDM party list contrary to the express provisions of Section 34 (10) of the *Elections Act* and in excess of jurisdiction; and assuming that the petition before court was one of a public interest nature and thus failed to judiciously exercise his discretion on the issue of costs of the petition.
19. The orders sought by the appellants included an order directing the IEBC to publish the party list submitted by the UDM party in the order of priority and as published in the Standard Newspaper on July 27, 2022. In the alternative, an order be issued directing the UDM party to forward to the Deputy Registrar of the High Court the valid party list for transmission to the Government Printer for gazettelement and to the Clerk of the County Assembly of Mandera for the swearing in of Abdiwelly Haji Bukura.
20. In the appeal by Abdow Bishar Maalim, the learned magistrate was faulted for arrogating himself jurisdiction to extend time within which one can pay deposit for security for costs; by shifting the burden of proof to the appellant yet he was the principal respondent in the dispute before court; relying on extraneous documents to arrive at a final decision revoking the appellant's election; making a declaration whose impact would affect persons not named as respondents before the Election Court; relying on a list published in the newspapers as opposed to the list submitted by the UDM Party to the IEBC; and finding that the appellant was not validly elected despite the glaring procedural and legal lapses challenging his election.
21. The learned judge (Prof Sifuna, J.) vide a judgment delivered on August 7, 2023 dismissed the appeal by Abdow Bishar Maalim and allowed the appeals by Abdiwelly Haji Bukura and the UDM Party respectively. The Court made some salient findings which we reproduce as hereunder:

“ 13. A Party List belongs to the political party nominating. Hence the IEBC has no power to amend a Party List or publish names not in the Lists, as did IEBC in this case which is tantamount to it nominating for political parties instead of the political parties nominating by themselves. IEBC's role on Party Lists is merely advisory, supervisory and facilitative, rather than parallel, supplemental or complementary. By doing what it did in this case, the IEBC hijacked the Party Lists, thereby overstepping its powers and acting without jurisdiction and in flagrant excess of its remit.

14. This renders the resultant List an outright illegality ab initio, hence null and void. With the consequence that such a List cannot confer on anyone any



benefit; and any benefit derived from it by any nominee is not retainable. If the process is wrong and illegal, the result cannot be right, legitimate or valid.

16. Except where the IEBC has received an amended Party List from a political party, the party's original Party List remains the valid and legitimate one for all intents and purposes. Where the party has not subsequently submitted an amended or fresh Party List, and for which evidence must be availed, any subsequent Party List or purported Party List that the IEBC subsequently published whether again in the Newspaper or the Kenya Gazette departing from the initially submitted party List or the party's subsequent fresh or amended Party List is an illegality that an election court must reject.
 17. In the same spirit of information to the general public, I hold that any fresh or amended Party List(s) that a political party has subsequently submitted to the IEBC should similarly be published in a prominent newspaper of national circulation, before later being published in the Kenya Gazette. To my mind, the provision for publication in the newspaper was deliberately intended to ensure the publication reaches a bigger segment of the Kenyan public as possible.
 18. Where IEBC claims to have received a fresh or amended List from the political party, evidence that the subject party submitted such a list must not only be alleged, but must be specifically proved with acceptable documentary proof, which must be provided rather just being merely alleged, as attempted by IEBC in this case. This will attenuate the mischief of some uncanny characters at the IEBC stealthily tip-toeing to the Government Printer, and sneaking in, their mysterious Lists (wonder Lists!) as was the case in the nominations the subject of this appeal.”
22. On the question of which list was the valid UDM party list, the court held that:
- “The court agrees with the election court that the valid UDM Party List is the one that was received by the IEBC, uploaded to the IEBC website and the IEBC subsequently published it in the Standard Newspaper on July 27, 2022 and not any other. The UDM Party List that IEBC published in the Special Gazette Notice No 10712 of September 9, 2022 was an invalid one and an illegality, hence null and void ab initio. Consequently, no benefit could legally be derived therefrom and no benefit derived from it can be retained, it must be lost. This is the List on which Abdow Bishar Maalim appeared...Therefore, currently though sworn and serving, he is a stranger in the house; hence should exit as he is occupying one of the three special seats allocated to UDM in the marginalized category.”
23. As regards the nomination of Sokorey Maalim Isaakow, the court held that although she was sworn in and was serving as a MCA, she was not in the UDM's Party nomination priority list published in the Standard Newspaper of July 27, 2022. The court held that although she was not a party to these proceedings, she could not be allowed to keep her seat amidst the illegality. In the learned judge's words,
- “a court's hands are never tied and neither can its legs be shackled.”
- The court held that the learned magistrate upon finding that Sokorey Maalim Isaakow was improperly nominated ought to have nullified her nomination.
24. The dispositive orders issued by the learned judge were that:



1. The consolidated judgment of Hon. Wasike delivered on February 2, 2023 is upheld in part as detailed in the orders.
2. The learned magistrate's ruling delivered on November 3, 2022 in MCEP E007 of 2022 is upheld.
3. It is declared that the UDM's Party list for the marginalized category for Mandera County and its priority order, as published in the Standard newspaper of July 27, 2022 is the party's valid party list in the priority as follows: 1. Bishar Hussein Farah (youth); Suban Ahmed Abdinoor (PWD); Abdiwelly Haji Bukura (PWD); Khalida Dahir Adan (woman); Mohamed Hassan Mohamed (worker); Sahara Adan Mohamed (worker); Mohamednoor Ismail Mohamed (youth); Mulki Abdulahi Mohamud (ethnic minority).
4. The purported UDM Party list for the marginalized category Mandera County, published by the IEBC in the Special Kenya Gazette No 1012 dated September 9, 2022, is invalid hence is nullified and rendered null and void for purposes of the 2022 General Election.
5. The election by nomination of Abdow Bishar Maalim as a UDM Party's nominated Member of the County Assembly of Mandera County marginalized category representing the youth is nullified.
6. Suban Ahmed Abdinoor and Abdiwelly Haji Bukura are hereby declared as having been duly nominated by the UDM Party for the position of the party nominated Members of the County Assembly of Mandera marginalized category representing PWD in accordance with the said party's party list published by the IEBC in the Standard newspaper of July 27, 2022.
7. The IEBC shall within 7 days from the date of being served with these orders, publish in the Kenya Gazette, the UDM's party list for Mandera County marginalized category in the same priority order as published in the Standard newspaper of July 27, 2022.
8. Abdow Bishar Maalim and Sokorey Maalim Isaakow having not been in the said valid UDM Party list (the marginalized category) for Mandera County, that was published in the Standard newspaper of July 27, 2022, the IEBC shall within 7 days from the date of being served with these orders, in the same Kenya gazette notice as in order (7) above degazette Abdow Bashir Maalim and Sokorey Maalim Isaakow as the UDM Party's nominated Member of the County Assembly of Mandera, and in their places gazette in the same Kenya Gazette Suban Ahmed Abdinoor and the Abdiwelly Haji Bukura as the duly elected UDM Party's nominated Members of the County Assembly of Mandera marginalized category representing PWDs.
9. The Speaker of Mandera County Assembly shall within 7 days from the date of such gazettelement swear in Suban Ahmed Abdinoor and the Abdiwelly Haji Bukura as the UDM Party's nominated Members of the County Assembly of Mandera marginalized category representing PWD.
10. Suban Ahmed Abdinoor, and Abdiwelly Haji Bukura shall have the costs of the two successful appeals (Nos. E004 and E005 of 2023) which are hereby consolidated and capped at Kenya Shillings One Million, Two Hundred Thousand (Kshs. 1,200,000/=), to be shared equally among the three, to be paid by the IEBC.
11. Suban Ahmed Abdinoor and Abdiwelly Haji Bukura the petitioners in the two petitions in the Election court shall have the costs of those petitions, hereby capped at Kshs. 250,000/= each, to be paid by the IEBC.



12. These orders shall forthwith be served upon the Speaker of the County Assembly of Mandera for compliance and necessary action.
13. A Certificate of this determination shall issue to the Speaker of the County Assembly of Mandera as required under section 86(1) of the Election Act.
25. Thereafter, the UDM Party filed an application dated August 11, 2023 under certificate of urgency. The orders sought in the application were, *inter alia*, that:
 - a. There be stay of the order for the degazettement of Honorable Sokorey Maalim Isaakow as a Member of the Mandera County Assembly, pending the hearing and determination of the application.
 - b. The court reviews and/or varies paragraphs 30, 35, 37, 39, 40 and order 8 of the final orders at paragraph 7 of the judgment delivered on August 7, 2023 as relates to Sokorey Maalim Isaakow as a nominee of the appellant's party in the marginalized category and make an order for her to be gazetted as a nominee of the appellant's party in the Gender Top-Up category as published on July 27, 2022 in the Standard newspaper.
 - c. That the court do order that the IEBC gazette the correct party list for Gender Top-Up as published in the Standard newspaper of July 27, 2022.
 - d. The court reviews its judgment and order that Sahara Adan Mohamed who appears as nominee No 6 in the marginalized category be degazetted as a Member of the Mandera County Assembly.
26. The grounds in support of this application were, *inter alia*, that the court directed the IEBC to degazette the nomination of Sokorey Maalim Isaakow as an MCA on the ground that she was not nominated by the UDM party. According to the UDM Party, Sokorey Maalim Isaakow was nominated in position No 3 in the UDM Party Gender Top-Up category and her name was duly advertised by the IEBC on July 27, 2022. However, the IEBC in Gazette Notice No 10712 of September 9, 2022 wrongly gazetted her in the marginalized category. It was contended that the person who ought to be degazetted was one Sahara Adan Mohamed who was wrongly gazetted by the IEBC as UDM nominee in the category of Gender Top-Up whereas she was listed as No6 in the list published by the IEBC on July 27, 2022.
27. The court (Prof Sifuna, J.) in its ruling dated August 17, 2023 held, *inter alia*, that having delivered judgment on the consolidated appeals, and having issued a certificate of the determination as required under section 86 (1) of the [Elections Act](#), it was *functus officio* and it could not issue the orders sought in the application. On whether there were errors or omissions in the judgment and in the certificate issued thereafter, it was held that the alleged errors pointed out by the UDM Party were substantial factual determinations for which the UDM Party needed to move to a superior court by way of an appeal. The court further held that the UDM Party was trying to introduce new issues through its application such as the nomination of Sahara Adan Mohamed, which was not an issue before the Election Court. The court termed the application as an abuse of court process and an appeal in disguise.
28. The court therefore dismissed the application by the UDM Party and further directed the Deputy Registrar of the High Court at Garissa, to ensure that the consolidated judgment in the three appeals (Garissa High Court Election Petition Appeals Nos. E002, E004 and E005 of 2023) as well as the consequential certificate issued under section 86(1) of the [Elections Act](#) are served on the IEBC and on the Speaker of the County Assembly of Mandera and an affidavit of service filed forthwith.



29. Aggrieved and dissatisfied with the ruling of the High Court dated August 17, 2023, the UDM Party preferred this appeal. In its memorandum of appeal dated September 12, 2023, it faults the learned judge for, *inter alia* declining to review/vary the order on the revocation of the nomination of Sokorey Maalim Isaakow as contained in the judgment delivered on August 7, 2023 and in so holding failed to appreciate that Sokorey was nominated as No 3 under the Gender Top-Up category in the list published by the IEBC in the Standard newspaper of July 27, 2022, which list the same court upheld as the UDM party's valid party list; holding that the court lacks jurisdiction to review the judgment delivered on August 7, 2023; finding that the basis of application for review namely, error apparent on record, were new issues being litigated afresh, not having been part of the petitions before the court and in so holding failed to appreciate that the issues relating to the party list on the basis of which the Sokorey's name was gazetted were subject of the petition that was both before the election court in the first instance, and the High Court on appeal; and failing to appreciate that there was sufficient reason to review his judgment as it revoked the appointment of Sokorey, who had been validly nominated, and retained Sahara Adan, who ought not to be in the County Assembly of Mandera, and as a result, occasioned a substantial injustice to both the UDM Party and the said Sokorey Maalim.
30. Upon filing of this appeal, various applications seeking diverse orders were filed by different parties herein. On September 18, 2023 Sokorey Maalim Isaakow filed an application seeking to be joined in the instant proceedings as a co-appellant on the ground that the High Court judgment against her was entered without her participation in the proceedings. When this appeal came up for hearing, all counsel present indicated that they were not opposed to the said application. This Court therefore allowed the application as prayed.
31. The UDM Party had, apart from filing an appeal, filed an application seeking stay of execution and enforcement of the impugned judgment.
32. Abdow Bishar Maalim on his part filed a notice of motion dated September 15, 2023 seeking to strike out the Notice of Appeal dated August 21, 2023 which had been filed by the UDM Party. He also filed a notice of preliminary objection dated September 15, 2023 on four (4) grounds: that this Court has no jurisdiction to hear the appeal pursuant to the provisions of section 75(1A) & (4) and 85A of the [Elections Act](#) No 24 and rule 35 of the [Election \(Parliamentary and County Election\) Petition Rules, 2017](#); that the notice of appeal had been filed contrary to the provisions of rule 6 of the [Court of Appeal \(Election Petition\) Rules, 2017](#); that the notice of appeal as filed is fatally defective, incompetent and an abuse of the court process and ought to be struck out summarily with costs; and that the notice of appeal offends judicial decidendi and has been filed contrary to the Supreme Court's decision in [Mobamed Ali Sheikh v Abdiwahab Sheikh Osman Hatbe & 3 others](#) (2019) eKLR.
33. When this appeal came up for hearing, it was agreed that the preliminary objection relating to the jurisdiction of this Court be determined first. Mr. Issa appeared together with Mr. Mbatai for the UDM Party. The IEBC was represented by learned counsel Mr. Kipkogei, Miss Saina and Miss Thiong'o. Abdow Bishar Maalim was represented by Mr. Jamal, learned counsel, while learned counsel Mr. Duwane appeared for Abdiwelly Haji Bukura. Mr. Kubai, learned counsel, was present for Sokorey Maalim Isaakow, who was joined in the appeal as a co-appellant.



34. Highlighting his written submissions to the preliminary objection, Mr. Jamal contended that as per the Supreme Court decision in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR,
- “A Court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”
- He submitted that the jurisdiction of this Court to hear appeals from the High Court as per the provisions of Article 164 (3) (a) of the *Constitution* does not extend to election appeals from the election of members of county assemblies.
35. It was contended that under the provisions of section 75 (1A) of the *Elections Act*, a question as to the validity of the election of a member of county assembly shall be heard and determined by the Resident Magistrates’ Court designated by the Chief Justice, with a right of appeal to the High Court on matters of law only being provided for under section 75 (4) of the *Elections Act*. On the right of appeal to this Court, counsel submitted that the provisions of section 85A (1) expressly provide that an appeal from the decision of the High Court in an election petition shall only be that of membership of the National Assembly, Senate or the office of County Governor. There is no mention of the election of member of county assembly. In other words, this Court has no jurisdiction to hear and determine the appeal as it involves the election of member of county assembly.
36. Counsel submitted that election proceedings are sui generis, and that they involve a special jurisdiction that is only exercised in accordance with the statute creating it, in this case the *Elections Act*. Reliance was placed on the Supreme Court decision of *Moses Masika Wetangula v Musikari Nazi Kombo & 2 others* [2015] eKLR.
37. In sum, it was submitted that the provisions of section 85A (1) do not cloth this Court with jurisdiction to hear and determine appeals involving the election of members of county assemblies and therefore the appeal is bad in law and ought to be struck out for want of jurisdiction.
38. Mr. Duwane for Abdiwelly Haji Bukura supported the preliminary objection and associated himself with the submissions made by Mr. Jamal. He urged the Court to allow the preliminary objection and strike out the notice of appeal.
39. Mr. Issa opposed the preliminary objection and argued that this Court has jurisdiction to hear the appeal. He submitted that the provisions of Article 87 (1) ought to be read together with the provisions of Article 105 of the *Constitution*. He put forth the argument that Article 87 is not a jurisdiction one, it merely requires timely resolution of electoral disputes. According to counsel, the relevant provision of the *Constitution* to this appeal is Article 105.
40. Counsel further contended that the provisions of section 75 (4) of the *Elections Act* as read together with rule 34 of the *Elections (Parliamentary and County Elections) Petitions Rules, 2017* provide that appeals from the decision of the Magistrates’ Court shall lie to the High Court on matters of law only. According to counsel, the *Elections Act* is silent on the right of a further appeal from the decision of the High Court in an election petition involving the position of member of county assembly, and that a thorough reading of the provisions of section 75 (4) and 85A of the *Elections Act* as read together with rule 35 of the *Elections (Parliamentary and County Elections) Petitions Rules, 2017*, can only yield the interpretation that an appeal to this Court from the decision of the High Court in an election petition involving the position of member of county assembly is not prohibited.



41. Counsel further submitted that pursuant to the provisions of Article 164 (3)(a) of the *Constitution*, this Court is vested with jurisdiction to hear and determine appeals from the High Court, and that the appeal emanates from the ruling delivered by Prof Sifuna, J. dismissing the application by The UDM Party which sought review of the final orders directing the IEBC to degazette Sokorey Maalim Isaakow as a member of the Mandera County Assembly. It was counsel’s submission that this Court has both inherent and constitutional jurisdiction to correct any manifest and fundamental injustice from a decision of the High Court. In support of this argument, counsel cited the Supreme Court decisions in *Judicial Service Commission & another v Kalpana H. Rawal* [2015] eKLR and *Deynes Muriithi & 4 Others v Law Society of Kenya & Another* [2016] eKLR.
42. On the completeness of the existing electoral statutes, it was submitted that the *Elections Act* does not provide for all the matters pertaining to electoral disputes. The decision of this Court in *Richard Ncharpi Leiyagu v Independent Electoral and Boundaries Commission & 2 others* [2013] eKLR was cited in support of this argument, where the Court held, *inter alia*, that statutes cannot cover every perceivable situation and make appropriate provisions, hence the Court is called upon to exercise its inherent jurisdiction to control its own procedures and cure any injustice.
43. It was further submitted that this Court could exercise its inherent jurisdiction and intervene to rectify the injustice meted upon the UDM Party and Sokorey Maalim by the High Court.
- Counsel sought refuge in the Supreme Court decision of *Geoffrey M. Asanyo & 3 Others v Attorney General* [2018] eKLR where the Court held, *inter alia*, that:
- “We have no doubt that whereas the issue before us may not have been articulated at the Court of Appeal, the inherent jurisdiction of this Court to right jurisdictional wrongs committed by the Superior Courts in executing their constitutional mandates would necessitate that this Court should assume jurisdiction and interrogate those alleged wrongs.”
- See also *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* [2017] eKLR.
44. Counsel also cited the decision of this Court in *M. Mwenesi v Shirley Luckhurst & another* [2000] eKLR and that of the Supreme Court in *Hon. Lemanken Aramat v Harun Meitamei Lempaka & 2 Others* [2014] eKLR in support of his argument that this Court has the constitutional and statutory mandate as an appellate court to inquire into any substantial miscarriage of justice made by the High Court.
45. Counsel further relied on the Supreme Court decisions in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators Kenya Branch (Interested Party)* [2019] eKLR and *Synergy Industrial Credit Limited v Cape Holdings Limited* [2019] eKLR, where the Court held, *inter alia*, that this Court ought to have residual jurisdiction in exceptional circumstances to enquire into unfairness from certain decisions emanating from the High Court in arbitration matters, and that the obvious injustices by the High Court should not be left to subsist because of the ‘no court intervention’ principle.
46. In sum, counsel contended that this Court has jurisdiction to hear the appeal and determine it on its merits.
47. Sokorey Maalim Isaakow through Mr. Kubai fully associated herself with the submissions made by Mr. Issa. Mr. Kubai submitted that the provisions of section 75 (1A) as currently worded presuppose that the proceedings before the Resident Magistrates’ Court were conducted with the participation of all necessary persons. In this matter, Sokorey Maalim Isaakow did not participate in the proceedings



before the Resident Magistrates' Court, whereas the final decision made by that court and by the High Court greatly affected her nomination to the Mandera County Assembly.

48. Counsel submitted that the circumstances of this appeal are exceptional and should appeal to this Court's inherent jurisdiction. See *Richard Ncharpi Leiyagu v Independent Electoral and Boundaries Commission & 2 Others* (*supra*) and *Geoffrey M. Asanyo & 3 Others v Attorney General* (*supra*).
49. The IEBC on its part through Miss. Saina also fully associated itself with the submissions made by Mr. Issa. Counsel contended that the exceptional circumstances of this appeal should be considered in that the High Court nullified the election of an individual, whose election had not been challenged before the Election Court. In such an instance, this Court has power to remedy that injustice, and if it were to allow the preliminary objection as prayed, it would have locked out Sokorey Maalim Isaakow without a remedy, counsel submitted.
50. The preliminary objection raised by Abdow Bishar Maalim touches on the jurisdiction of this Court to hear and determine the appeal on its merits. When an issue is raised on jurisdiction of a court to hear and determine a matter, the court must first deal with it, as jurisdiction of a court is everything, as was held by this Court in the case of *The Owners of the Motor Vessel Lillian 'S' v Caltex Kenya Limited* (1989) KLR.
51. It is clear that a court of law cannot cloth itself with jurisdiction beyond what is conferred upon it by the *Constitution* or legislation or both. The question which this Court is called upon to determine is whether it has jurisdiction to sit on a second appeal in the matter of election of a member of county assembly. While identifying this issue, we are cognizant of the attempt by the UDM Party to separate election appeals emanating from nominations through the party lists from those of members of county assemblies elected directly by the electorate as contemplated under Article 177 (1) (a) of the *Constitution*. In our view, nothing turns on this attempt. Article 90 of the *Constitution* expressly uses the term "Elections" to refer to the process of allocation of party lists seats in parliament and county assemblies. Therefore, a dispute emanating from a nomination exercise on party list is an election dispute to be adjudicated in the relevant manner as provided for under the *Constitution* and statute.
52. the *Constitution* under Article 164 (3) confers jurisdiction on this Court. It provides as follows:
 - "(3) The Court of Appeal has jurisdiction to hear appeals from-
 - a. the High Court; and
 - b. any other court or tribunal as prescribed by an Act of Parliament."
53. This appeal is against the ruling delivered by the High Court. Therefore, a plain reading of Article 164 (3) (a) and section 3 of the *Appellate Jurisdiction Act* would readily yield the interpretation that this Court is clothed with jurisdiction to hear and determine such appeal. However, this is not an ordinary civil appeal. It is an election petition appeal.
54. What is the place of election appeals from the High Court? The answer to this question lies in section 85A of the *Elections Act*, a statute enacted pursuant to the provisions of Article 87 (1) to ensure the timely settling of electoral disputes. It provides in part as follows:
 - "85A. Appeals to the Court of Appeal
 - (1) An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the



office of county governor shall lie to the Court of Appeal on matters of law only...” [Emphasis added]

55. Section 85A does not contemplate a second appeal to this Court in an election concerning a member of county assembly. The appeals expressly allowed to this Court under the said provision are those concerning membership of the National Assembly, Senate or the office of county governor. The Elections Act at section 75 elaborately provides for county election petitions.

Section 75 (1A) specifically provides that:

“(1A) A question as to the validity of the election of a member of county assembly shall be heard and determined by the Resident Magistrate’s Court designated by the Chief Justice.”

56. Indeed, this appeal can be traced to Election Petition No E007 of 2022 and Election Petition No E006 of 2022 which were filed by Abdiwelly Haji Bukura and Suban Ahmed Abdinoor at the Resident Magistrates’ Court at Mandera, pursuant to the provisions of section 75 (1A) of the Elections Act. With regards to appeals made regarding the election of a member of county assembly, section 75 (4) of the Elections Act provides as follows:

“(4) An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be –

- a. filed within thirty days of the decision of the Magistrate’s Court; and
- b. heard and determined within six months from the date of filing of the appeal.”

57. Our reading of the provisions of section 75 and 85A of the Elections Act yields the interpretation that there is no provision of a second appeal to this Court concerning the election of a member of a county assembly. the Constitution as well as the Elections Act do not contemplate second appeals to this Court in respect of such elections. We associate ourselves with the views expressed by Abdow Bishar Maalim and Abdiwelly Haji Bukura in their respective submissions that the proceedings before an election court are sui generis.

58. An election is guided by, *inter alia*, the provisions of Article 87 (1) of the Constitution which provides for timely determination of electoral disputes. Therefore, the argument that a second appeal can lie before this Court because the provisions of section 85A of the Elections Act do not expressly prohibit second appeals concerning the election of a member of county assembly does not hold water. In Joel Nyabuto Omwenga & 2 Others v Independent Electoral and Boundaries Commission & another [2014] eKLR, this Court addressed itself to the issue of the perceived lacuna under section 85A of the Elections Act concerning second appeals from the election of members of county assemblies. The Court stated:

“What we are called upon to decide is whether, in the agreed absence of an express provision of law allowing a second appeal to this Court from the High Court in its appellate jurisdiction in an electoral dispute, this Court can nevertheless, for whatever lofty reason, entertain and determine such an appeal. It is not a question of whether we can hear and determine such an appeal but rather whether we can rightfully, properly and lawfully embark on such an undertaking especially where, as here, our jurisdiction has been questioned.”



59. In determining the above issue, this Court held:

The statute gives only one opportunity to appeal to the High Court and even then, on matters of law only. It then imposes timelines on appellants as to the period within which to file the appeal, and on the High Court as to the deadline for its determination. In the absence of like provisions for yet another appeal to this Court with its own timelines, it is as ambitious as it is misconceived for the appellant to presume that a second appeal can lie to this Court.

Indeed, other than exemplifying unjustified innovation and hubris were this Court to capture and usurp such undonated jurisdiction, it would make nonsense of the need for finality and expedition that our new electoral laws sought to entrench by the strict timelines in the statute. It must be borne in mind that electoral contests and disputes are highly divisive and disruptive ventures and the people in the *Constitution*, and Parliament in the statute, sought to limit the period of anxiety and certainty. To assume a non- statute-based jurisdiction to entertain appeals would be to subvert the salutary aims of the people and Parliament. It is a task we have neither desire nor reason to undertake. We are cognizant that the true theatre of electoral competition is the ballot box and there is urgent need for closure. A court should never invent for itself a jurisdiction and thereby prolong the anxiety and subvert the very finality the *Constitution* envisions and the statute institutes by making no further provision for appeals beyond the one on points of law.” [Emphasis added].

60. Similarly, in *Isaac Oerri Abiri v Samwel Nyang’au Nyanchama & 2 others* [2014] eKLR, this Court held:

“It will be observed that there is no mention of a second or third appeal from the decision of the High Court under Section 75 (4) of the Act. In our view, the omission of a second or further appeal from the decision of the High Court under the said section is neither inadvertent nor an error but deliberate. The interpretation we ascribe to the omission is that the legislature intended that there should be no further appeals from the decision of the High Court on appeal from the determination of an election petition on a question of the validity of the election of a member of a county assembly. In our view, if at all it was the intention of Parliament to involve the Court of Appeal in determination of appeals from the High Court on appeals from the decision of the Resident Magistrate’s Court, nothing would have been easier than to state that a party aggrieved by a determination of an appeal by the High Court from the Magistrate’s Court, may prefer a second appeal to the Court of appeal. In our view, the legislature clearly intended to confine jurisdiction to determine electoral disputes involving membership of a county assembly to the Resident Magistrate’s Court with one chance of appeal to the High Court on matters of law only.” [Emphasis added].

61. A similar view was expressed by Musinga, JA. in *Mohamed Ali Sheikh v Abdiwahab Sheikh & 4 Others; Emmanuel Changawa Kombe (Interested Party)* (2018) eKLR, where learned counsel Mr. Issa had argued an application for striking out of a notice of appeal on the ground that the Court has no jurisdiction to hear a second appeal in an election appeal relating to election of a member of a county assembly. The learned judge held:

“In my view, in the absence of any express provision of a right of a second appeal to this Court by section 85A of the *Elections Act*, to find that this Court has jurisdiction to hear a second appeal from a judgment of the High Court in an election petition for MCA would



be negation of our people’s aspiration for timely settlement of electoral disputes as reflected under Article 87(1) of the *Constitution*. If Kenyans so desire, they can lobby the legislature to amend section 85 of the *Elections Act* to provide for such an appeal. Short of that, I am not persuaded that this Court ought to depart from the position it has firmly held.” [Emphasis added]

62. The position was affirmed by the Supreme Court in *Hamid Yaroi Shek Nur v Faith Tumaini Kombe & 2 others* [2018] eKLR, where the court held:

“[33] The foregoing analysis leads us to the conclusion, in agreement with the Court of Appeal, that in the absence of an express statutory provision, no second appeal lies to the Court of Appeal, from the High Court, emanating from an election petition concerning the validity of the election of a member of county assembly. As this determination conclusively disposes of the appeal before us, we shall not consider the second issue.”

See also *Mohamed Ali Sheikh vs Abdiwahab Sheikh & 4 Others vs Emmanuel Changawa Kombe* [2019] eKLR.

63. From the above decisions, it is our considered view that the question of second appeals from the decisions concerning the election of members of county assemblies is well settled in law. The Supreme Court decisions that in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators Kenya Branch (Interested Party)* (*supra*) and *Synergy Industrial Credit Limited v Cape Holdings Limited* (*supra*) relating to second appeals to this Court in arbitration disputes, although persuasive, are distinguishable from election proceedings that are sui generis in nature.

64. Before we make our final orders, we deem it necessary to address the issue of the non-participation of Sokorey Maalim Isaakow in the proceedings before the Election Court and the subsequent orders issued against her nomination by the High Court. By operation of the provisions of Article 50 and Article 25 (c) of the *Constitution*, the right to be heard was a minimum prerequisite before any adverse action could be taken against Sokorey Maalim Isaakow. The *Halsbury’s Laws of England Judicial Review* (Volume 61 (2010) 5th Edition) para. 639 states as follows with respect to the right to notice and opportunity to be heard: -

“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court. Moreover, even in the absence of any charge, the severity of the impact of an administrative decision on the interests of an individual may suffice in itself to attract a duty to comply with this rule....”

65. It is a fact that Sokorey Maalim Isaakow was not a party to the proceedings before the Elections Court, and naturally, the court could not, and indeed it did not issue any orders against her. It is the High Court in its judgment in the consolidated appeals that made orders that affected her.

66. In arriving at the impugned decision, the High Court held that although Sokorey Maalim Isaakow was sworn in and was serving as Member of County Assembly for Mandera, she was not in the UDM’s Party nomination priority list published in the Standard Newspaper of July 27, 2022. The court held that although she was not a party to the proceedings before the election court, she could not be allowed to keep her seat amidst the illegality. In the learned judge’s words, “a court’s hands are never tied and neither can its legs be shackled.”



67. While we appreciate that Sokorey Maalim Isaakow had a constitutional right to be heard before any adverse orders were issued against her, we agree with the holding of the learned judge that having found that her nomination to the Mandera County Assembly was based on the wrong party list, her nomination could not be allowed to stand. In other words, it was an illegality which the High Court and indeed this Court cannot turn a blind eye to and allow it to perpetuate. While this Court sympathizes with the situation Sokorey Maalim Isaakow finds herself in, we nonetheless are alive to the fact that the IEBC had published the party lists under the various categories in the Standard Newspaper on July 27, 2022 and in Gazette Notice No 10712 of September 9, 2022. The reason for publishing the names of nominated candidates in a nationwide newspaper and in the Kenya Gazette is to create awareness and to give opportunity to any party or person dissatisfied with the names as published to seek redress through the appropriate avenue. Sokorey Maalim Isaakow was most certainly aware that her nomination was in the Gender Top-up category and not under the marginalized category. Her swearing in as a nominated member of county assembly for Mandera County was pursuant to the Gazette Notice No 10712 of September 9, 2022. While we appreciate that the IEBC erred in publishing her nomination in the wrong category, we are not convinced that she (Sokorey Maalim Isaakow) could not have taken the necessary legal steps on her own to correct the apparent error. In the circumstances, therefore, this Court acknowledges her right to a fair trial, but hastens to note that it cannot overlook the error by the IEBC and allow her to retain her seat in the Mandera County Assembly as this would be perpetuating an illegality.
68. In conclusion, we find and hold that this Court has no jurisdiction to hear or entertain a second appeal from an election petition involving the election of a member of a county assembly. In the result, we uphold the preliminary objection by Abdow Bishar Maalim, which was supported by Abdiwelly Haji Bukura, both of whom shall have costs of the preliminary objection as against the UDM Party and the IEBC. We shall cap the costs at Kshs.200,000. We hereby strike out the notice of appeal and the record of appeal filed by the UDM Party.

DATED AND DELIVERED AT NAIROBI ON THIS 10TH DAY OF NOVEMBER 2023.

D. K. MUSINGA (P)

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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

