



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, WARSAME & MURGOR, JJA)

CIVIL APPEAL NO. 224 OF 2013

BETWEEN

LYDIA NYAGUTHII GITHENDU.....APPELLANT

AND

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC).....1ST RESPONDENT

THE NATIONAL ALLIANCE (TNA) PARTY..... 2ND RESPONDENT

THE SPEAKER, NYANDARUA COUNTY ASSEMBLY 3RD RESPONDENT

MOSES MWICIGI 4TH RESPONDENT

JOYCE NYAMBURA NGANGA..... 5TH RESPONDENT

DAVID MANGI NDIRANGU..... 6TH RESPONDENT

ANN WAITHIRA KIONERO..... 7TH RESPONDENT

MARGARET WAMUYU..... 8TH RESPONDENT

MONICA WAMUYU..... 9TH RESPONDENT

REBECCA NYANGATI..... 10TH RESPONDENT

NANCY WAMBUI..... 11TH RESPONDENT

BETH WAHITO..... 12TH RESPONDENT

DORACS NYAMBURA..... 13TH RESPONDENT

PATRICIA WANJUGU..... 14TH RESPONDENT

TIZIANA WANJIRU..... 15TH RESPONDENT
JANE MUTHONI..... 16TH RESPONDENT
RAHAB WANJEHIAH..... 17TH RESPONDENT
MIRIAM WAHURA..... 18TH RESPONDENT

*(Appeal from the Judgment/Decision of the High Court of Kenya at Nairobi (Mumbi Ngugi,
Majanja and Korir, JJ) dated 12th July, 2013*

In

H.C.JR. Appl. No. 218 of 2013)

BETWEEN

REPUBLIC..... APPLICANT

AND

**THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION (IEBC) & 17 OTHERS..... RESPONDENTS
(EX-PARTE APPLICANT-LYDIA NYANGUTHII GITHENDU)**

AS CONSOLIDATED FOR PURPOSES OF JUDGEMENT WITH

CIVIL APPEAL NO. 238 OF 2013

BETWEEN

**ESTHER NJOGU.....1ST APPELLANT
DAVID NDUNGU NJUGUNA.....2ND APPELLANT**

AND

**THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION.....RESPONDENT**

**MOSES MWICIGI..... 1ST INTERESTED PARTY
JOYCE NYAMBURA NGANGA..... 2ND INTERESTED PARTY
DAVID MWANGI NDIRANGU..... 3RD INTERESTED PARTY
ANN WAITHIRA KIONERO..... 4TH INTERESTED PARTY
MARGARET WAMUYU..... 5TH INTERESTED PARTY**

MONICA WAMUYU.....	6 TH INTERESTED PARTY
REBECCA NYANGATI WERU.....	7 TH INTERESTED PARTY
NANCY WAMBUI.....	8 TH INTERESTED PARTY
BETH WAHITO.....	9 TH INTERESTED PARTY
DORCAS NYAMBURA.....	10 TH INTERESTED PARTY
PATRICIA WANJUGU	11 TH INTERESTED PARTY
TIZIANA WANJIRU MWANGI.....	12 TH INTERESTED PARTY
JANET MUTHONI.....	13 TH INTERESTED PARTY
RAHAB WANJEHIAH.....	14 TH INTERESTED PARTY
MIRIAM WAHURA.....	15 TH INTERESTED PARTY

(Appeal from the Judgment and order (findings and holdings) of the High Court of Kenya at Nairobi (Majanja, Ngugi & Korir, JJ) dated 12th July, 2013

in

Petition No. 238 of 2013)

JUDGMENT OF THE COURT

1. Introduction

Appeal No. 224 of 2013 and Appeal No. 238 of 2013 arise from the same set off acts and legal position namely the Constitutionality, legality and regularity of the two TNA (The party of National Alliance) Nyandarua County Assembly nominee lists), published by the Independent Electoral and Boundaries Commission (IEBC) hereinafter referred to as “*the Commission*” on the 15th and 16th May, 2013 respectively. The two appeals were heard together. We therefore found it prudent to write a joint judgment respective both.

PART ONE (1)

2. Background information with regard to both Appeals No. 224 of 2013 and 238 of 2013

The genesis of the litigation culminating in this appeal has its roots in two party lists indisputably submitted by The National Alliance Party (TNA) herein after referred to as TNA to the Commission. The lists were submitted pursuant to the provisions of **Article 97(1) (c) 98(1) (b) (C) and (d) and 177 (1) (b) and (c) of the Kenya Constitution 2010**. The two lists were published in the Daily Nation Newspaper of 15th May, 2013 and 16th May, 2013 respectively, pursuant to the commission’s powers donated by **Article 90** of the Constitution, and **Section 34-37 of the Elections Act 2011** as amended by the Elections (Amendment Act No.2) 2012. The Commission’s receipt stamp indicates that both lists were received by the Commission on the **26th February, 2013**. It is however not clear which of the two lists was received first. The Commission admits to have used both lists to arrive at the final list published on **21st May**,

2013 as forming the rightful TNA party Nominee list for Nyandarua County Assembly.

3. **Petition No. 147 of 2013.**

Petition number 147 of 2013 was presented to the High Court by the National Gender and Equality Commission against the Commission and the Attorney General seeking among others orders to compel the Commission to put in place a mechanism to resolve any disputes concerning party lists submitted to the Commission in accordance with **Article 88(4) of the Constitution** as read with **Section 74** of the Elections Act. Pursuant to the orders made in petition 147 of 2013 a Dispute Resolution (the Dispute Resolution Committee) was accordingly set up by the Commission to resolve any disputes that may arise from the nomination lists submitted by political parties to the commission.

4. **Background Information to Appeal No. 224 of 2013.**

The appellant herein **Lydia Nyaguthii Githendu** herein after referred to as the “**Appellant**” was among other persons who variously moved to the Independent Electoral and Boundaries Commissions’ Dispute Resolution Tribunal on Electoral disputes and presented various complaints regarding the TNA party Nominees list to the Nyandarua County Assembly. Though it is only **Lydia Nyaguthii Githendu** who has appealed in the appeal before us, there were other complaints in respect of the nominee positions of the 4th to the 18th respondents also cited in this appeal. We therefore find it prudent to summarize them on the record. Complaint No. IEBC/NDRC/PC/09/2013 had been presented by **John Maina Kamau ID. No. 13209637** that TNA made a mistake by placing his name in the Gender Top-up list instead of the Marginalized list; IEBC/NDRC/PL/218 by **Eunice Wakarima ID No.21585494 (TNA)** that her name should replace that of **Joyce Nyambura** the 5th respondent who had been listed both on the marginalized and the Gender top-up list, IEBC/NDRC/PC/223/2013 by **J.M. Waiganjo & Co. Company advocates ID. No. 24131336 (TNA)** and IEBC/NDRC/PL/322/2013, by **Esther Wanjiku Njogu appellant in Appeal No. 238 of 2013 and 8 others** that her name had been omitted from the party nomination list, IEBC/NDRC/PL/219/2013 by **Lydia Nyaguthii Githendu ID. No. 3213215 (TNA)** the sole appellant herein that **Joyce Nyambura**, the 5th respondent’s name which had been listed in both the marginalized and the Gender Top-up lists be removed from the Gender Top-up list and be replaced with hers as per the TNA party recommendation; by **J.M. Waiganjo & Company Advocates ID. No. 24131336 (TNA)** and IEBC (NDRC)/PC/322/2013, ID No. 4676679 **Wanjiku Njogu 1st Appellant in CA. No. 238 of 2013 & 8 others** that her name which ought to have been listed on priority in the Gender Top-up list had been omitted in the published party list; IEBC/NDRC/PL/223/2013 by **J.M. Waiganjo & Company Advocates ID. No. 24131336 (TNA)** and IEBC/NDRC/PL/322/2013 **Esther Wanjiku Njogu** the 1st appellant in CA. No. 238/2013 ID. No.4676689 TNA & **David Ndungu Ndegwa**, the 2nd Appellant in CA. No.238/2013, **Miriam Wahura Nganga**, the 18th respondent, **Rachael Wambui Mwangi; Lucy Wamunyu Kiboi, Hellen Wambui Annan; Lucy Gathoni Kimani; Teresia Njoki Muturi and Lea Wambui Kuria** that the list of nominees as published did not reflect the geographical and cultural diversity of the county; and secondly the distribution of the sixteen slots was not done equitably amongst the thirteen (13) wards in Nyandarua North and twelve (12) wards in Nyandarua South. IEBC/NDR/PL/223/2013 by **Virginia Wairimu** identity Card No.11188969 (DP) that **Teresia Njoki** whose name had been listed as number one on the Gender Top-up list was not a member of TNA; IEBC/NDRC/PL/258/2013 by **Simon Wanjeru Murage** ID No.0762311 (TNA) that he was the first male applicant in TNA for nomination under the marginalized list and his name was first on the list published by the Commission on its website and yet his name was replaced by a man who suffers no disability at all; IEBC/NDRC/PL/274/2014 by **Tabitha Wangari Kanyori** identify card No. 14625520 (TNA) that the names on the Gender Top-up list submitted to the Commission had been exchanged, others removed, the gender issue was not considered for some two names that appeared for the first time ,one being an aspirant while another the chairman Nyandarua County Gathere ward; IEBC/NDRC/PL/223/2013 by **J.M. Waiganjo & Company Advocates ID.No.24131336 (TNA)**, IEBC/NDRC/PL/322/2013 by **Esther Wanjiku Njogu** ID. No. 4676689 (TNA) & 8 others that

the party TNA which is the custodian of its party lists had not complained that its party list was changed and or altered; IEBC/NDRC/PL/281/2013 by **Ann Waithira K**, the 7th respondent ID. **No.11706932** (TNA) that the complainants name had been misspelt and one digit wrongly added to her identity card number; IEBC/NDRC/PL/298/2013 by **Monicah Kariuki** the 9th respondent ID **Card No. 220416199** (TNA) that her name which had been listed 3rd in the Gender-Top up list had been misspelt to read as **Monicah Wamuyu Karoki** instead of **Kariuki**; IEBC/NDRC/PL/345/2013 by **Samuel Kimani Gachuhi** ID Card Number **22465120** (TNA) that they changed the nomination of **David Mwangi Ndirangu** under the marginalized list; IEBC/NDRC/PC/372/2013 by **George M'njiri** identity card **No.21863419** (TNA) that the party list was doctored and that the marginalized had not been represented; IEBC/NDRC/PL/403/2013 by **Helen Agnes Wambui** Identity Card No. 2937933 (TNA) that the marginalized and the Gender Top-up lists as published lacked regional representation as Nyandarua North had only 3 slots while Nyandarua South had been allocated 13 slots; IEBC/NDRC/PL/426/2013 by Jane **W. Kamonjo** passport No. A187696 (TNA) that she had been a nominee but was shocked to find her name on the ballot list on 18th January, 2013, she had raised complaint as early as 25th January, 2013 but no remedial action was taken; IEBC/NDRC/PL/450/2013 by the **Democratic Party** that all allocations under the marginalized list had gone to TNA and yet the DP had been entitled to some seats; IEBC/NDRC/PC/501/2013 by **David Ng'anga Ndungu** identity Card No.46741409(TNA) that **Joyce Nyambura** the 5th respondent's name appears twice on the list, **David Ndirangu's** name should be struck out as the said person (**David Ndirangu**) was neither a person with disability or a youth; **Antony Muita Maruhi** was not a voter in Nyandarua but rather in Syokimao/Mlolongo, regional balance had not been observed with the result that Kinangop and Kipipiri received 13 out of the 16 available slots while Ndaragwa, Oljororok and Olkalou each received one seat, care had not been taken to ensure that only persons with basic education were listed, nomination fees paid by **Tabitha Wangari Kinyoi** and **Teresia Wangari Nganga** to be refunded; IEBC/NDRC/PC/556/2013 by **Michael Kimani** identity card no.2956432 (TNA) that **David Mwangi Ndirangu's** name had been omitted from the party list. Save for the complaint of **Ann Waithira K.** for the correction of names and that of

Monicah Kariuki also for the correction of names and ID card number which were acceded to, the rest of the complaints were dismissed by the Dispute Resolution Committee. In addition to the above, the Commission Dispute Resolution Committee carried out what it termed reconstruction of the house. On the marginalized list one **Moses Mwicigi** ID. No. 25610374 the TNA nominee who is the 4th respondent replaced one

Antony Muita Murugi who had been nominee number 1 on the published list, which replacement was made following confirmation by the TNA party that **Antony Muita Murugi** was not in their list of proposed nominees; **Joyce Nyambura** the 5th respondent who had appeared as number 2 on the marginalized list and number 6 on the gender Top up list had been retained on the marginalized list and removed from the Gender top up list, one **Miriam Wahura** ID. Number 10880859 (PWD) the 18th respondent replaced Joyce Nyambura who had been on both lists.

5. Complaint in HCC JR 218/2013.

Upon harmonizing the two lists, the Commission gave notice of the publication of the two lists on the 15th and 16th of May, 2013 respectively. The appellant in CA number 224 /2013 **Lydia Nyaguthi Githendu** was aggrieved by the decision reached by the Commission with regard to the complaints variously raised against the two party lists. She moved to the High Court at Nairobi and presented an application by way of a notice of motion for Judicial Review vide Judicial Review Application Number 218 of 2013 dated and filed on the same 3rd day of July, 2013. The motion was brought under **Sections 8 & 9** of the Law Reform Act, Cap 23 Laws of Kenya and **order 53 Rules 3 and 4(1)** of the Civil Procedure Rules 2010. The motion substantially sought an order of certiorari to issue to bring into court and quash the decision or judgment of the 1st

respondent, **Dispute Resolution Committee** made on 7th June, 2013 and thereafter substitute it with orders that:-

“(i) The 2nd respondent be and is hereby ordered to submit to the 1st respondent two distinct valid and proper party lists of nominees, under section 36(1) (e) and (f) of the Elections Act pursuant to Article 90(2) (b) and 177(1) (b) and (c) of the constitution of Kenya 2010.

ii. **The 1st respondent be and is hereby ordered to qualify/pick qualified persons from the submitted party lists to be validly nominated to Nyandarua County Assembly.”**

6. Decision in HCCJR 218/2013

The merit disposal of the judicial review application resulted in a judgment by

Mumbi Ngugi, D.S. Majanja and W.K. Korir, JJ of 12th July, 2013. Paragraph 3 of the said judgment read thus:-

“3. We have considered the deposition and the decision of the committee. In our view the matter raised concerns the party list submitted by TNA and as such the matter is a party matter. We find no basis to interfere with the decision of the committee.”

7. Grounds of Appeal for Civil Appeal No. 224/2013.

The appellant **Lydia Nyaguthii Githendu** was aggrieved by that decision. She has appealed to this court citing nine (9) grounds of appeal namely:

1. **The learned Judges erred in failing to adjudicate at all on the contention of the Appellant that the 2nd Respondent did not submit to the 1st Respondent two distinct proper party lists as required by Sections 36(1) (e) and (f) of the Elections Act No.24 of 2011, with the first list being on gender top-up under Section 36(1) (e) containing fifty (50) candidates, the names thereof alternating between a male and a female and the second party list in respect of marginalized persons, youth and persons with disabilities under section 36(1) (f) of the Elections Act aforesaid containing eight (8) candidates, four of whom shall be persons with disability and four of whom shall be youth and alternating between a male and female thereby failing to reach the inescapable conclusion that the entire nominations process carried out both in part by the National Alliance (TNA) party and the Independent Electoral and Boundaries Commission (IEBC) was grossly flawed, clearly in breach of the provisions of the Constitution of Kenya, 2010 and the Elections Act aforesaid and is therefore null and void.**

2. **The learned Judges erred in failing to appreciate that the Independent Electoral and Boundaries Commission (IEBC) Nominations Disputes Resolution Committee (NDRC) in both its judgments of 04.05.2013 and 07.06.2013 failed totally to adjudicate over the objections raised by the Appellant(s) and instead proceeded to render sketchy, terse decisions bereft of reasons to explain the casual dismissal of the weighty constitutional and legal issues raised by the Appellant.**

3. **The learned Judges erred both on facts and in law by failing to appreciate the fact that they were properly seized of the matter brought before them by the Appellant by dint of the provisions of Article 165(3) (d) (ii) (4), (6) and (7) of the Constitution of Kenya, 2010 and therefore the Honourable Judges had the legal duty to render a comprehensive, erudite judgment on the same and therefore erred in their holding that the Appellant’s matter is a party matter and therefore could not interfere with the Independent Electoral and Boundaries Commission (IEBC) Nominations Disputes Resolution Committee’s erroneous decision (s).**

4. *The learned Judges further failed to consider and find as a fact that there was an error apparent on the face of the record in both the original and the resubmitted TNA party list and published by the IEBC in the Daily Nation of 15th and 16th days of May, 2013 are mixed up and repeated thereby lacking a clear flow and chronology that should be used as a proper criteria for identifying and qualifying the nominees that would be ultimately gazetted as the duly nominated County Assembly representatives.*
5. *The learned Judges further failed to consider and find as a fact that some of the nominees lack the requisite qualifications in respect of special requirement (youth and persons with disabilities) as follows:*
 - i. *The 4th Respondent, Moses Mwicigi, did not pay the requisite nomination fees prescribed by the 2nd Respondent. Further, according to the TNA party list published by the 1st Respondent, he comes after Benard Mwai.*
 - ii. *The 6th Respondent, David Mwangi Ndirangu, who has been nominated in the youth and persons with disability category, was personally cross -examined at the IEBC Disputes Resolution Committee hearings on his qualification to be nominated either as a youth, person with disability or marginalized, and the tribunal noted with concern that he does not qualify as he is not a youth, a person with disability or marginalized in any material respect and the tribunal expressed loudly its dismay at the inclusion of his name in the party list. However, the same tribunal has on two occasions, 4th April, 2013 and 7th June, 2013 in its judgments strangely retained him on the list of the nominees.*
 - iii. *The 7th Respondent, Ann Waithera Kionero, appeared as number 16 on the original TNA party list published in the Daily Nation of 15.05.2013 and at number 1 on the resubmitted TNA party list published in the Daily Nation on 16.05.2013 and it is therefore questionable how her name was picked in preference to other female persons who appeared before her in the original TNA party list.*
 - iv. *The 11th Respondent, Nancy Wambui, is a teacher working with the Teachers Service Commission and is therefore ineligible for nomination under Section 25(2)*
 - (a) *of the Elections Act.*
6. *The learned Judges failed to consider and find that the constitutional and legal role of the Independent Electoral and Boundaries Commission (IEBC) is to firstly, receive the Party lists from the political parties and verify them to ensure their conformity with the provisions of the Constitution and Section 34(b) of the Political Parties Act before undertaking the qualifying/picking up of the persons to be nominated in accordance to Section 36(7) and (8) of the Elections Act aforesaid.*
7. *The learned Judges failed to consider and find that there is gross skewed allocation of the nomination seats bereft of equity and regional balance requirements amongst the constituencies of Nyandarua County with some constituencies receiving only one slot whereas in the case of Kinangop, the allocation is concentrated in one division namely South Kinangop aside from the constituency getting 50% (8 slots) from the sixteen (16) slots available contrary to the provisions of Article 10(1) (c) (2) (a), (b), (c) and (d) of the Constitution.*
8. *The learned Judges erred in failing to consider the Appellants Notice of Motion dated 3rd July, 2013, the written submissions and legal authorities filed pursuant to the order of the Judges thereby arriving at an erroneous conclusion.*
9. *The Learned Judges erred both on facts and in law by failing to appreciate the fact that the honourable Chief Justice constituted a three (3) bench panel to hear and determine all judicial*

review applications and petitions arising from the decisions of the Independent Electoral and Boundaries Commission (IEBC) Nominations Disputes Resolution Committees on the pertinent basis that the said matters raised weighty constitutional issues that required the three (3) judge bench to delve into, interrogate the same and render well reasoned, erudite judgments that espouse and give effect to the provisions of Article 177(1) (b) and (c) of the Constitution of Kenya 2010 and Sections 34,35,36,37 and 38 of the Elections Act No. 24 of 2011

In consequence thereof, the appellant sought from this Court the following reliefs:

8. **Relief Sought in Civil Appeal No. 224 of 2013.**

- a. *This appeal be allowed with costs to the appellant.*
- b. *That portion of Gazette Notice Number 9794, volume CXV- No 105 published on the 17th day of July, 2013 listing the 4th to 18th Respondents (both inclusive) as the valid nominees to Nyandarua County Assembly be and is hereby revoked.*
- c. *An order of certiorari do and is hereby issued bringing into the superior Court and quashing the decision or judgment of the 1st*

respondent Nominations Dispute resolution Committee (NDRC) made on 7th June, 2013 and in its place the following orders do issue-

- i. *The 2nd respondent be and is hereby ordered to submit to the 1st respondent two distinct valid and proper party lists of nominees under section 36(1) (e) and (f) of the Elections Act pursuant to Article 90(2) (b) and 177 (1)(b) and (c) of the Constitution of Kenya 2010.*
- ii. *The 1st respondent be and is hereby ordered to qualify/pick qualified persons from the resubmitted party lists to be validly nominated to Nyandarua County Assembly.*

9. **Submissions Made in Civil Appeal No. 224/2013**

Parties elected to proceed by way of written submission and oral highlights in

court. Those of the Appellant were filed in Court on 18/10/2013, for the first respondent on 1/11/2013, for the second respondent on 5/11/2013 and lastly for the 4th to the 18th respondents on the 28th November, 2013. Learned counsel **Stanley Kihiko Mutungu, Isaac Odhiambo, Victor Obondi** and **C.N. Kihara** appeared for the Appellant, 1st and 2nd respondents and the 4th to the 18th respondents respectively.

10. **Appellants Submissions.**

In his oral highlights to this Court, **Mr. Stanley Kihiko Mutungu** reiterating his written submissions urged us to allow appeal No. 224/2013 on the grounds *inter alia* that TNA had failed to comply with the provisions of **Article 90(2) (b) 177 (1) (b) and (c)** of the Constitution of Kenya 2010 as read together with **Section 36(1) (e) and (f)** of the Elections Act No.24 of 2011 in the nomination exercise for eligible nominees to the Nyandarua County Assembly; the appellant was aggrieved by that exercise and took her grievances to the Commission's Electoral Dispute Resolution Committee that had been set up for this purpose pursuant to the Courts order in High Court petition number 147 of 2013 **National Gender and Equality commission versus the Attorney General** (supra); the Appellant appeared before the said committee and presented her case which was supported by the submission of one **Justus Mbiuki** the Director Legal affairs of the 2nd respondent but it was ignored.

It is the appellant's argument that the Dispute Resolution Committee fell into an error when it failed to uphold the appellant's complaint that the nomination should have adhered to the requirement of regional balancing enshrined in Article 90(1) (c) of the Constitution. Instead it ruled that County Assemblies were

exempt from this requirement and yet the case law in interpreting this provision had ruled otherwise. The Commission also fell into an error when it failed to observe that the party was required to furnish two party lists with only eight (8) names, one for persons with disability, and youth with two

(2) categories four (4) for each category (persons with disability (PWD) and the youths and another general list containing fifty (50) intended nominees corresponding to the twenty five (25) wards comprised in the Nyandarua county arranged in an alternate manner of male and female.

When the Dispute Resolution Committee ruled against the appellant she was entitled to move to the High Court to seek redress. It is further the Appellant's contention that the High Court also fell into an error when it declined jurisdiction despite the clear provisions of the constitution and as expounded by case law on the subject.

By reason of the above, the appellant seeks from this Court an order that, **one**, this court has jurisdiction and is therefore properly seized of this matter; **two**, that the High Court was properly seized of the appellant's complaints but it erroneously declined jurisdiction and; **three**, that this Court should proceed to grant the appellant the reliefs the previous forums erroneously failed to bestow on her. In doing so, we have been urged to be guided by the relevant constitutional provisions, the Electoral law provisions as well as case law. Properly directing its mind to the genuine complaints that the Appellant has all along raised in the previous two forums, this Court should hold *inter alia* that:-

- i. The Commission should not have shut its door in the face of the appellant.
- ii. The High Court was properly seized of the matter.
- iii. Nyandarua (TNA) party lists were in breach of Article 177(1) (b) & (c) of the Constitution 2010 and section 36(1) (e) (f) (2) (7) & (8) of the elections Act in that TNA should have submitted two lists one containing only eight (8) names comprising names for persons with disability and youth being four (4) names for each category bearing in mind the gender equality rule.
- iv. The main list which contained forty seven (47) names should have contained fifty (50) names representing the twenty five (25) wards within Nyandarua County. Also to rule that some names were mixed up and others repeated and it was therefore not both constitutionally and legally compliant as it lacked chorology.
- v. That the said list should therefore be disallowed, degazetted and a fresh compliant list be ordered to be resubmitted by the 2nd respondent.

11.1st Respondents Submissions.

Mr. Obondi Victor learned counsel for the 1st respondent opposed the appellants

appeal. In urging us to dismiss the appeal, he relied entirely on the content of its written submission. After setting out the historical background information leading to the litigation culminating in this appeal already set out above, **Mr. Obondi** invited us to take note of the fact that the onus of nominating candidates for either election or as nominees fell squarely on the shoulders of the political party concerned, which in this regard was TNA; this was the entity constitutionally and legally mandated with the submission of a party list under **section 84** of the Election Act and **Article 177** of the Constitution; the Commission does not in any way come up with a party list and does not nominate any candidate as set out in **sections 34 and 35** of the Elections Act; therefore the role of the Commission in terms of the party lists was merely supervisory to ensure that the political parties submit party lists that conform with the requirements of both the constitutional and other laid down provisions of the law. (the Elections Act together with Regulations made there under)

In response to the Appellants submission, **Mr. Obondi** argued that the appellants' complaint has been

overtaken by events as the 4th through to the 18th respondents have already been gazetted vide gazette notice No. 9794 Vol.CXV.No.105 as members of Nyandarua County Assembly; by virtue of this gazette, they are deemed to have been elected; their election can only be faulted pursuant to provisions set out in Article 82(2) of the Constitution and Section 76(1) (a) of the Elections Act that is by way of an Election petition filed within twenty eight (28) days from the date of the Election (gazette in this case.) It is only then that an appeal can lie from the subordinate Court to the High Court and then from the High Court to this Court.

It is also *Mr. Obondi's* contention that the High Court rightly declined jurisdiction as the appellant herein sought to question the merits of the decision of the commissions' Dispute Resolution Committee and not its process; and lastly that the gazette of the 4th to the 18th respondents was never an issue before the other two forums and it cannot therefore be interrogated on appeal herein.

12. 2nd Respondents Summary of its Written Submissions.

No oral highlights were presented by learned counsel for the second respondent respecting their written submission filed herein. In summary, the 2nd respondent contends it is only the political party Disputes resolution tribunal established under **section 39** of the Act which has the mandate to resolve any disputes between a member and his/her political party; to this end jurisdiction was wanting both at the High Court and in this Court to entertain the appellants' complaint.

13. 4th through to 18th Respondents submissions. *Mr. C.N. Kihara* learned counsel for the 4th to the 18th respondents while reiterating the content of his written submission urged us to dismiss the appellants' appeal for the reasons that the Dispute Resolution committee rightly declined jurisdiction to intervene because the proper authority mandated to intervene in a dispute between a member and his/her party is the party itself; the party TNA duly intervened and resolved the issues in controversy between it and the appellants; the moment the 4th to the 18th respondents were gazette, they became elected and for this reason the appellants could only move to fault that election if she had presented her complaint as an Election Petition within 28 days of that Election to an election court which she did not do and therefore stands non suited;

Mr. Kihara argued further that no mandate vests in both the High Court and this Court to grant the reliefs sought by the appellant; even if this Court were to find that there were any irregularities committed which they contend there were none, no reprieve can be availed to the appellant who firstly failed to follow the proper laid down procedures to redress her grievances on the one hand, and on the other hand, by reason of her complaint having been overtaken by events as the 4th to the 18th respondents had already been gazetted; Article 90 of the Constitution exempts County Assemblies from compliance with the Regional, Ethnic and cultural balancing requirement; case law which has tended to interpret the provisions of Article 90 of the Constitution 2010 as covering County Assemblies are distinguishable as these originated specifically from proceedings stemming from petitions which is not the case herein and lastly, that since the gazette of the 4th to the 18th respondents was never an issue before the first two forums it can never be an issue before this forum.

14. Appellants Response to the Respondents submissions.

In response to the respondents submissions, *Mr. Kihiko* urged us to fault the respondents submissions on the ground that so long as the 1st and 2nd respondents were implementing the provisions of the Constitution on the one hand, and the provisions of the relevant election law and the regulations made thereunder on the other hand, they had no alternative but to comply with those provisions; it is not true as contended by the respondents that matters complained of by the appellants fell within those touching on elections as these fell squarely into matters of nomination to County Assemblies; the appellants followed the correct procedure to seek redress in the other two first forums; she had made out a case for the grant of the reprieve sought from those forums; those forums erroneously withheld relief from the appellant; this Court is properly vested with jurisdiction to correct that error; and lastly that case law relied upon by the respondents is irrelevant, while that relied upon by the appellant is relevant and should be followed by

this Court as these provide a correct interpretation of both the Constitutional as well as the Electoral Law and the Regulations made thereunder.

15. Case law Cited in Civil Appeal No. 224/2013- Appellant's case law.

On case law, the appellant relies on the decision in the case of *the Commission for the Implementation of the Constitution versus the Attorney General and another [2013] eKLR* for the proposition that a court of law is entitled to intervene when called upon to interpret the Constitution and supervise the exercise of the constitutional mandate; the case of *Federation of Women Lawyers Kenya Fida (k) & 5 others versus Attorney General & another [2011] eKLR* for the proposition that where the constitution allocates power to an authority and that authority exercises that power within the parameters of that Constitution, then a Court of law has no jurisdiction. If that jurisdiction is exercised outside the Constitutional mandate, then a Court of law has power to intervene; the case of the Commission for the *Implementation of the Constitution versus the Attorney General and another [2013] eKLR* for the proposition that on a proper reading of **Article 90(2) (c)** of the Constitution the requirement for regional and Ethnic diversity balancing should apply so as to reflect the face and diversity of the people of Kenya but definitely also of the County Assembly in question; the decision in the case of *Rose Wairimu Kamau & 3 others versus Independent Electoral & Boundaries Commission Civil Appeal No. 169 of 2013 [2013] EKLR* for the proposition that where the complaint giving rise to the appeal was lodged with the IEBC and a Constitutional petition filed in the High Court before the nominees were gazetted the provisions of **Article 97(1) and 177(2)** respectively do not operate to shield the nominees so gazetted from the possible effect of degazettement where such nomination stands faulted.

16. 1st Respondents case Law.

The first respondent relied on the decision in the case of the *Owners of the Motor Vessel Lillians versus Caltex Oil (Kenya) Ltd [1989] KLR 1* for the proposition that where a court has no jurisdiction it has to down its tools; the decision in HCCC *Petition No. 5 of 2013. Stanley Mungathia Daudi & 4 others versus Hon. Cyprian Kubai Kiringo Member of Parliament Igembe Central Constituency & 3 others [2013] eKLR* for the proposition that where adequate mechanism to deal with a specific issue or dispute by

other designated Constitutional organs, the jurisdiction of the court should not be invoked

until such mechanism has been exhausted; the decision in the case of *Republic versus*

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Cecillia Mureithi & another [2008] eKLR for the propositions that (i) the remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made but the decision making process; (ii) the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected to; (iii) the Court will not however on judicial review application act as a Court of appeal over the body concerned nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body unless, it has been exercised in a way which is not within that body jurisdiction or the decision in *Wednesbury* unreasonable (iv) the function of the court is to see that lawful authority is not abused by unfair treatment.

17. The 4th through to 18th Respondents Case Law.

The 4th to the 18th respondents on the other hand relied on the decision in the case

of *Speaker of the National Assembly versus Karume Civil Application Nai 92 of 1992* for the proposition that where there was a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

PART TWO (2).

18.The Background Information to Civil Appeal No.238 of 2013.

The establishment of the commissions' dispute resolution committee paved the way for the appellants herein **Esther Njogu** and **David Ndungu Njuguna**/ 1st and 2nd appellants respectively to present their complaints with regard to the twin published lists that had originated from Nyandarua County. The 1st Appellant's **Esther Njogus'** was registered as IEBC/DRC/PL 86/2013, while that of the second Appellant **David Ndungu Njuguna** was registered as IEBC/DRC/PL/187/2013. The complaint of **Esther Wanjiku Njogu** raised the issue as to whether the list submitted by TNA met the requirement of

Section 36(1) (e) and **36(2)** of the Elections Act 2011 and Article 81(d) of the Constitution. Whereas the complaint of the second Appellant **David Ndungu Ndegwa** invited the commission to rule on the issue as to whether the nominee one **Daniel Mwangi Ndirangu** was disabled. Both complaints were dismissed by the commissions' Dispute resolution committee.

19. Complaints raised in HCC Petition No. 238 of 2013.

The appellants were once more aggrieved and moved to the High Court and presented petition number 238 of 2013 dated and lodged on the same 8th May, 2013. The petitioners included the two Appellants herein and a 3rd person named **Hellen Wambui Annan**. In a summary, the appellants alleged that in the exercise of their official functions both the commission and the party were obligated to observe and act in accordance with the provisions of the Kenya Constitution 2010, the national Elections Act and the County Election Act as well as the party nomination guidelines; Nyandarua south comprising Kinangop and Kipipiri with twelve (12) electoral wards only got four(4) slots for nominated positions as opposed to twelve (12) slots allocated to Nyandarua North that comprised **Olkalau, Oljororok and Ndaragwa**. Turning to specific allocation of slots the appellants complained that Kinangop got the lions share of seven (7) slots which went to **Moses Mwangi (Maguku ward-disputed)**;

Joyce Nyambura (Mugumo); Ann Waitherero (North Kinangop) Monica Wamuyu

(Nyakio ward); **Rebecca Nyanga (Njabini ward)** and **Beth Wahito (Njabini ward)**. The

Kipipiri list comprised **Nancy Wambui, Dorcas Nyambura, Jared Muthoni** and **Nancy Wambui** whose nomination was disputed. **Ndaragwa** received only one slot which went to

Margaret Wamuyu. Olkalao got two slots which went to **Patricia Wanjugu** and **Rahab Wanjehia Ol'Jororok** received two slots which went to **David Mwangi Ndirangu** whose nomination was disputed and **Miriam Wahigi**.

The appellant's complaints did not end there. They took issue with seven (7) of the nominees namely **Nancy Wambui, David Mwangi Ndirangu, Thirikwa Kamau Thirikwa,**

John Mburu Mathari, Moses Mwicigi, Peter Wambugu Kayori and **Michael Kamau**

Mbugua. They disputed the nomination of **David Mwangi Ndirangu** because he was neither a person with a disability, a woman or a youth, and **Nancy Wambui** because she was still in her employment with the Teachers Service Commission (T.S.C.) as a teacher and for this reason she was not eligible for nomination as well as **Moses Mwicigi** because he did not pay the requisite nomination fee. The appellants went on to add further that they raised these same complaints to the commissions' complaints committee vide cause Number 223 of 2013; the complaints committee only acceded to the deletion of two names from the list of **Joyce Nyambura Ng'anga** and **Moses Mwicigi** for the reasons given.

Other Complaints were that because the respondents failed to honour the list of nominees that had been approved by the political leadership of Nyandarua, the county party office and other stakeholders; the list

published by the commission was therefore not the list

approved as above; the said nominations did not comply with the constitutional threshold on the need for regional balancing in Nyandarua county. The commission also ignored the sentiments of the elected members of the National Assembly in the county contained in the communication to that effect dated 16th March, 2013.

20. Reliefs Sought in HCCC Petition No. 238/2013.

In consequence thereof the appellant's sought from the High Court the following reliefs:-

- a. ***That a declaration be issued that the 1st respondent's list of nominees to the Nyandarua county Assembly as published in its website violates Article 90, 98,174 and 177 of the Constitution.***
- b. ***That a declaration do issue that the list of nominees to the Nyandarua County Assembly as published by the respondent in its website is unconstitutional to the extent that it supports to exclude discriminate against Ndaragwa, Ol'Kalau and Ol'Jororok, constituencies.***
- c. ***That a declaration be issued to declare that the list of nominees to the Nyandarua County Assembly confirmed by the National Alliance Party (TNA) vide its letter of the 16th March 2013 and supported by all elected leaders is the proper list of nominees to the Nyandarua County Assembly.***
- d. ***That a mandatory injunction do issue compelling the Respondents to adhere to the list of nominees of members of the Nyandarua County Assembly as confirmed by the National Alliance Party (TNA).***
- e. ***That cost of this petition be borne by the Respondent.***

21. The Commissions Opposition to HCC Petition No. 238 /2013.

The Commission opposed the petition vide a replying affidavit deposed by one

Praxedes Tororey on a date not indicated but lodged in Court on the 4th day of June, 2013. In summary, the Commission contended that resolution of the complaints raised by the appellants in the petition rested with the political parties Tribunal as established pursuant to the directions given in the decision in ***Petition number 147 of 2013 National Gender Commission versus IEBC***; all the constituencies in Nyandarua county were represented in the nomination list; both the marginalized and gender top-up lists met both the constitutional and legal thresholds; the party only submitted lists of names of persons who were its paid up members; has no knowledge of the allegation that ***Nancy Wambui, David Mwangi Ndirangu, Thirikwa Kamau Thirikwa, John Mburu, Peter Wambugu Kayori and Michael Kamau Mbugua*** had not paid up their membership fees; that ***David Mwangi Ndirangu*** was rightly considered for nomination as a marginalized person as the marginalized catered for persons with disability, youth and persons from marginalized groups.

The respondent went on further to depose that the marginalized category into which

David Ndirangu fell has an expanded meaning that cover interests identified by the political parties to cover groups not covered by the Constitution; one ***Nancy Wambui*** whose nomination had been objected to by the appellants had not been served; maintained that ***Nancy Wambui*** was not served by the appellants to attend the proceedings before the commission dispute Resolution committee; the commission was justified in taking ***Nancy Wambui*** into consideration because her name was in the second list submitted by the party; it was conceded that the party attempted to change the nomination list vide its communication dated the 16th day of March, 2013 but the request was declined by the Commission because the time line set for submission of party nomination lists had lapsed on the one

hand and on the other hand the party had already submitted its lists of nominees.

Lastly that although the appellants contended that Nyandarua South had received the lions share of the nominees slots they had not explained how that offended the community and cultural diversity of the county or how it was otherwise in breach of **Article 197 (2) (a)** of the Constitution on the one hand, and on the other hand **Article 90(1) (c)** of the Constitution exempts Assembly's party lists from the requirements for regional and ethnic diversity; the Commission was justified in declining to accept the party's reconstituted list after the March 4th General Elections as to act otherwise would have been a breach of **section 35** of the Elections Act; the Commission derived the party's published list from the first published list and where there were any gaps or inadequacies these were redressed with the names from the second list; the first had already been published in the Daily Nation of 15th May, 2013 while the second was published on 16th May, 2013 as amended by the list published in the Daily Nation of 21st May, 2013.

To crown it all, the Commission ended its deposition by asserting that the Commissions' Dispute Resolution Committee was right in rejecting the appellants complaints which action the High Court was invited to affirm as the law did not permit the High Court to substitute its own decision with that of the committee as there is no process of appeal permitted for any aggrieved party to appeal from the commissions' dispute committee decision to the High Court.

22. The High Courts' Decision in Petition No. 238/2013.

On 13th June, 2013 the Appellants' learned counsel then on record for them in the High Court applied orally to the High Court for leave to serve the affected nominees by way of advertisement which application acceded to. We were however informed that though served by way of advertisement in one of the daily news papers the affected parties apparently did not show up or participate in the proceedings in the High Court. Thereafter the participating parties filed written submissions and subsequently orally highlighted these in court. The High court petition resulted in a brief three judge bench judgment (*Mumbi Ngugi, D.S. Majanja and W.K. Koriri, JJ*). It *inter alia* went like this:-

“3 We agree with the respondents that how the slots were to be distributed was a party matter. Further whether the party lists reflects proportional distribution of available nomination slots among constituencies forming Nyandarua County is not decisive evidence of lack of diversity within the county absent evidence to the contrary.

4. No error has been disclosed to impugn the committees' decision. Consequently the petition is dismissed with no order as to costs”

13. Grounds of Appeal in Civil Appeal No. 238/2013.

The appellants were aggrieved by that decision and have appealed to this Court citing eight (8) grounds of appeal. In a summary, these are that the learned trial Judges of the High Court erred in law and in fact:-

- 1. In holding that there was no breach of the petitioners' fundamental rights and freedoms.***
- 2. By failing to hold that failure to consider the diversity of Nyandarua County in the determination of the lists of the National Alliance Party (TNA) nominees for the Nyandarua County offends Article 10 and 90 of the Constitution as well as the spirit of the constitution.***
- 3. In holding that the inclusion of Nancy Wambui as a TNA nominee to the Nyandarua county Assembly while she was still a teacher under the employment of the Teachers Service Commission offended the Election Act, the Constitution and the rule of law.***
- 4. By failing to hold that the party's decision in the distribution of the Nyandarua County TNA***

nomination slots was not absolute but subject to statutory and constitutional compliance.

5. *In failing to hold and appreciate the fact that the list of TNA nominees to Nyandarwa county Assembly is unconstitutional to the extent that it purports to discriminate against Ndaragwa, OlKalau and Oljororok Constituencies.*
6. *In failing to hold that the respondent erred in upholding the list of Nyandarua County Assembly TNA nominees list when it was evident that out of the fifteen TNA Nominees, seven (7) came from Kinangop Constituency and five of the said Kinangop nominees come from two wards.*
7. *In failing to hold that the National Alliance Party had already resolved the dispute by declaring in writing their decision and preference and thus no dispute existed between TNA and the Petitioner in the said High Court petition. Further that when the partys' Advocates appeared before the respondent's tribunal, he supported the appellant's case.*
8. *In failing to hold that the nomination of David Mwangi Ndirangu to the special seats category offends the constitution and the rule of law since he was not a person living with disability, was not a women and neither was he a youth.*

24. Reliefs sought in Civil Appeal No. 238 /2013.

In consequence thereof, the appellants proposed to this Court to quash and set aside the judgment and the decree of the learned Judges given on the 12th July, 2013; to declare null and void the Kenya gazette No.9794 Vol. CXV No. 105 and all consequential actions done subsequent to the said Kenya gazette in relation to Nyandarua County; to proceed to allow the prayers of the Appellants in the Superior Court; and that costs be provided for. The appeal is directed against the commission, the party and the interested parties who are the beneficiaries of the gazette notice of 17th July, 2013, persons likely to be affected by the judgment resulting from the determination of this appeal. Thereafter parties elected to proceed by way of written submission. Those of the appellants were filed on 8th October, 2013; the respondents filed on the 9th October, 2013 and for the interested parties filed on the 5th December, 2013.

25. Appellants Submissions in Civil Appeal No. 238/2013.

In his oral submission to Court **Mr. Gachau** learned counsel for the Appellants adopted the Appellant's written submissions, and clustered the eight (8) grounds of appeal into three namely:-

- a. *Whether the list of TNA nominees to the Nyandarua county Assembly as published by the respondent offends the provisions of Articles 10 and 90 of the Constitution.*
- b. *Whether the list of TNA nominees to the Nyandarwa County Assembly as published by the respondent should be nullified for being unconstitutional.*
- c. *Whether the respondent should be compelled to publish a fresh list in conformity to the list confirmed by TNA on 16th March, 2013.*

Arguing the three clusters globally **Mr. Gachau** urged us to allow the appeal on the grounds that the High Court should not have declined jurisdiction because issues placed before it by the appellants touched on issues as to whether the Commission had acted within the province of both the constitutional and the applicable election law in acting on two lists submitted simultaneously to it by TNA, The Party and received on the same date with no indication as to which of the two party lists was received first and also whether the commission was in order when it declined to accept a corrected list submitted to it vide TNA's letter of 16th March, 2013. To **Mr. Gachau** the error committed by the learned High Court Judges is curable by this Court under powers donated to it by **Section 3** of the Appellate Jurisdiction Act Cap 9 Laws of Kenya. This Court should therefore revisit and construe the provisions of Article 90, 98, 174 and

177 of the Constitution and **Section 34(6)** of the Elections Act, apply that construction to the facts on the record and find that the learned trial Judges should have faulted the Commission's failure to accede to the appellants complaints presented to it as set out above.

Further that the Commission having admitted that it in fact received and published two lists when it should have received and published only one is in itself, an admission of wrong doing which should have been resolved by the High Court in the appellants favour; it is the High Court which had the constitutional mandate which should have construed the constitutional provisions allegedly breached and fault the process that had been employed by the commission to arrive at the confirmed list which the appellants had in fact moved to Court to fault.

26. Respondents Submission in Civil Appeal No. 238/2013.

In response to the appellants submission, **Miss Ameyo** for the respondent while adopting their written submission urged us to dismiss the appeal on the grounds that there is no jurisdiction for this Court to intervene in favour of the appellants plea because the interested parties have already been gazetted as the rightful nominees for Nyandarua County vide gazette No.9794 of 17th day of July, 2013; the High Court rightly declined jurisdiction as **section 75 (1) (9)** vests that jurisdiction in the magistrates courts; by the time TNA submitted the list of 16th March, 2013, time for submission of such lists had lapsed and the respondent was entitled to reject the second list.

Miss Ameyo continued to urge that the law exempts County Assemblies from complying with Regional, Ethnic and cultural diversities requirements; the Commission conceded that had received two party lists and acted on them; the 3rd and 8th interested parties were drawn from the second list; the appellants have not demonstrated how the distribution of slots among the Nyandarua County Constituencies inclusive of the 3rd and 8th interested parties in the said lists was improper as the 8th interested party had resigned from her public service on 8th February, 2013, while the 3rd was properly on the lists as the law does not define the categories of marginalized or what is meant by youth; and lastly there is no guarantee that if the exercise were to be repeated the appellants would automatically get a slot.

27. Submissions of the 1st to 14th Interested Parties. Mr. C.N. Kihara for the 1st -14th interested parties has also urged us to dismiss the Appellants' appeal on the grounds that the High Court judges rightly declined jurisdiction because they recognized that their jurisdiction on these matters was limited by the Election law; there is no jurisdiction in this Court to degazette the gazettelement of July, 2013 as this was not one of the reliefs sought before the High Court; there has been no demonstration that the allocation of nominee slots in Nyandarua county Assembly was irregular; each constituency was allowed slots; it matters not that some constituencies were allocated more slots than others; the appellants have placed no facts before this Court to warrant overturning the current status quo as the appellants have not pointed out which of the gazetted nominees took their positions; if only two positions are being fought for, then there is no justification in this Court to nullify the whole list as gazetted.

Turning to the position of the 3rd and 8th interested parties, it was **Mr. C.N. Kihara's** arguments that the 8th interested party had resigned from her job as at 8th February, 2013 and it mattered not that the employer had not effected her resignation as at the time of publication. What matters is that the employer had so accepted the 8th respondent's resignation as at the time of gazettelement in July, 2013. As for the 3rd interested party, this Court was invited to find that his nomination cannot be faulted because the definition of marginalized and youth are open ended; there is no guarantee that once the list is nullified the appellants will be nominated; and lastly it will be unfair for the court to nullify the entire list when only two slots are in contention.

28. Case law cited in Civil Appeal No. 238/2013.

On case law, reliance was placed on the decision in Civil Appeal No. 169 of 2013

(UR) ***Rose Wairimu Kamau and three others versus the Independent Electoral and***

Boundaries Commission for the proposition that, although Article 90(2) (c) of the Constitution excludes the criteria of regional and Ethnic diversity of the peoples’ of Kenya from consideration in the nomination at the county level, nonetheless it does not obviate any balance in the community of the county concerned, that is to say that nomination for women, the youth and the people with disability should be done fairly and equitably with a view to ensuring that (a) community and cultural diversity of the county is reflected in the County Assembly; the decision in the case of **Speaker of the National Assembly versus Karume [2008] 1KLR (EP) 425** for the proposition that where there is a procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed; the decision in the case of

Kones versus Republic & another Exparte Kimani Wa Nyoike & 4 others [2008] 3KLR

291 for the proposition that the commission does not appoint nominees, all it does is to ensure that the principle of gender equality is observed by the parties and once it is satisfied on that aspect of the matter, its only function is to forward the names for publication; the decision in the case of **Commissioner for the Implementation of the Constitution versus the Attorney General & another [2013] eKLR** for the proposition that the requirement for the lists to reflect the regional and ethnic diversity of the people of Kenya is meant to ensure that no ethnic group or region of the country dominates the lists provided by the parties; the exception to this , being the County Assembly which from the nature of things may be from the ethnic majority or from one region in which the county is located; the decision in the case of **National Gender and Equality Commission versus the**

Independent Electoral and Boundaries Commission [2013] eKLR for the proposition that (i) party lists submitted to the Commission under **section 34(6)** of the Elections Act 2011 shall be in accordance with the Constitution and the nomination rules of the political parties; (ii) this does not extend to the directing of the manner in which the lists are prepared as these are matters within the jurisdiction of the parties but in considering the lists the IEBC must nevertheless be satisfied that the lists meet the constitutional and statutory criteria; (iii) in the event that there is a dispute in the manner in which the parties conduct their internal elections, then recourse may be had by the aggrieved party member inter alia, to the political party disputes tribunal established under **section 39** , part VI of the political parties Act 2011, or to the High Court in appropriate circumstance; the decision in the case of **Mumo Matemu versus Trusted Society of Human Rights Alliance & 5 others [2015] eKLR** for the proposition that where the process followed is unconstitutional, wrong, unprocedural or illegal it cannot lie for any party to say that the process is complete and for this reason, a court of law would have no jurisdiction to address any grievances that may be raised by any party against that process.

29. This Court’s Mandate.

This is a first appeal. Being a first appeal, our mandate is as set out in Article 164(3) of the Constitution 2010; **section 78** of the Civil Procedure Act, Cap 21 laws of Kenya, **section 3** of the Appellate Jurisdiction Act Cap 9 laws of Kenya and rule 29(1) of this Courts Rules. It is to re-appraise the facts before us and draw inferences of fact. See the case of **Selle and another versus Associated Motor Boat Company Ltd & 2 others [1968] EA 123** where it was observed thus:-

“An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witness and should made due allowance in this respect. In particular, this Court is not bound necessarily to allow the trial Judges findings of fact if it appears either that he was clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of the witness is inconsistent with the evidence in the case generally”

30. Summary Assessment of Facts on the Record.

Being guided as above, we have re-evaluated and re-analyzed the content of the record as it has been placed before us. We find that it is undisputed that two lists were forwarded by TNA and published by the commission with regard to matters in controversy herein. But before that publication, TNA had vide its letter dated the 16th day of March, 2014 informed the commission that it had rearranged its party nomination list regarding Nyandarua County among others. The correspondences were signed by **Onyango Oloo** as

the secretary General and **John Sakaja** as the National Chairman. The names enumerated therein are **David Mwangi Ndirangu, Ann Waithera Kionero, Benard Mwai, Beth Wahito Njoroge, Andrew Njiri Kimani, Esther Wanjiru Njogu, Thirikwa Kamau, Monica Wamuyu Karori, Moses Muchugi, Jane Muthoni Mwathe, Jerevasio M. Gatero, Lucy Gathoni Kimani, Michael Kimani Mbugua, Patricia Wanjugu, James Irungu, Miriam Wahura Nganga, Elijah Ngunyi Wagogi, Grace Wanjiru, John Mburu Matheri, Eunice Wakarima, Joyce Nyambura Nganga, Geoffrey Githinji, Hellen Agnes Wambui, Lucy Muthoni Mwangi, Dorcas Nyambura, John Maina, Rebecah Nyangati, Esther Wambui, Beth Wahito, George Mwangi, Dorcas Nyambura, Simon Nduati, Tizian Wanjiru, Geoffrey Githinji, Jane Muthoni, Rachel Wambui, Ann Waithera, Esther Wanjiru, David Ndungu, Lydia Nyaguthii, Lucy Gathoni, Hellen Agnes Wambui, Salome Gathoni, Rachel Wambui Mwangi, Dorcas Nyambura Kihara, George Mwangi Nyiri, Miriam Wahura Nganga, Peter Wambugu Kinyori, Beth Wahito Njoroge, and Nganga Joyce Nyambura.**

From the content of the Commissions' deposition and also submission on record, the commission did not act on the party's letter of 16th March, 2013 because according to it, it had already received the two lists that it published on the Wednesday of 15th May, 2013 and 16th May, 2013. It is the assertion of the Commission that the final TNA list of nominees that was subsequently gazetted by the Commission was drawn from the two lists which according to it were procedurally submitted on the same date although the commission is not in a position to say which of the two lists was received ahead of the other, save that it is sure that both lists were received simultaneously.

The first proposed list was published by the Commission in the Daily Nation of Wednesday 15th May, 2013. Under marginalized (special category) **Anthony Muita Maruhi (Male)** was indicated as representing the youth, while **Joyce Nyambura Ng'anga** female was indicated as a person living with disability and self-employed. The others were indicated as **David Mwangi Ndirangu** (M- no indication); **Margaret Wamuyu** (F- no indication), **Benard Mwai** (M- no indication); **Monica Wamuyu** (F- no indication); **Moses Mwachigi** (M- youth); **Esther Wambui** (F- no indication); **John Maina** (M- no indication); **John Maina** (M-no indication); **Rebecah Nyangati** (F- youth); **Nancy Wambu** (F-worker); **Simon Wanjeru** (M-PWD); **Joyce Nyambura** (F-Youth); **Mathews Gitinga** (M-worker); (**Beth Wahito**) (F- no indication), **George Mwangi** (M-youth); **Patricia Wanjiku**

(F- worker); **Dorcas Nyambura** (F- no indication); **Simon Nduati** (M- -worker); **Tiziana**

Wanjuku (F- no indication); **Geoffrey Githinji** (M-youth); **Jane Muthoni** (F- worker);

Rahab Wanjihia (F- no indication); **Mira Wahita** (F-no indication); **Racheal Wambui** (F-worker); **Ann Waithera** (F-no indication); **David Ndungu** (M- PWD); **Lydia Nyaguthi** (F-no indication); **Lucy Gathoni** (F- worker); **Hellen Agnes Wambui** (F- no indication);

Salome Gathoni (F- worker). **Rachael Wambui Mwangi** (F- No indication); **Dorcas Nyambura Kihara** (F- no indication); **George Mwangi Nyiri** (F- no indication) **Miriam Wahura Nganga** (F- - no indication), **Peter Wambugu Kanyori** (M- no indication); **Beth Wahito Njoroge** (F- no indication); **Ng'ang'a Joyce Nyambura** (F- no indication)

The second proposed list was published on Thursday May, 16, 2013. The list contains the names of **Eunice Wakama** (F- no indication); **Joyce Nyambura Nganga**(F-youth); **Geoffrey Githinji** (M- no indication); **Hellen Agnes Wangui** (F- no indication) **Lucy Muthoni Mwangi** (F- no indication); **Dorcas Nyambura** (F- no indication); **John Maina** (M- No indication); **Rebecca Nyangati** (F- youth); **Nancy Wambui** (F- worker); **Simon Wanjeru** (M-PWD); **Mathews Gitonga** (M- Worker); **Esther Wambui** (F-

no indication) **Beth Wahito** (F- no indication); **George Mwangi** (M- youth) **Dorcas Nyambura** (F-no indication); **Simon Nduati** (M- worker); **Tiziana Wanjiku** (F- no indication) **Geoffrey Githinji** (M- no indication) **Jane Muthoni** (F- no indication) **Rahab Wanjehia** (F- No indication) **Miriam Wahito** (F-worker); **Rachael Wambui** (F- worker); **Ann Waithera** (F- worker); **Esther Wanjiku** (F- no indication); **David Ndungu** (M-PWD); **Lydia Nyaguthi** (F- no indication); **Lucy Gathoni** (F-worker); **Hellen Agnes Wambui** (F- no indication); **Salome Gathoni** (F- worker) **Racheal Wambui Mwangi**(F- no indication) **Dorcas Nyambura Kihara** (F – no indication) **George Mwangi Nyiri** (F- no indication) **Miriam Wagira Nganga**(F- no indication) **Peter Wambugu Kanyori** (M- no indication); **Ng'ang'a Joyce Nyambura** (F-) **The list Published on 21st May, 2013** had two segments. The first segment related to the list for persons from marginalized groups namely: **Moses Mwichigi** (M—Youth- TNA); **Joyce Nyambura Nganga** (F-PWD); **David Mwangi Ndirangu** (M- no indication); **Ann Waithira Kionero** (F- no indication). The second segment dealt with the Gender top-up list for **Teresiah Njoki** (F- DP) **Margaret Wamuyu** (F- no indication); **Monica Wamuyu** (F-no indication); **Rebecca Nyanga** (F- no indication); **Nancy Wambui** (F-no indication); **Beth Wahito** (F-no indication); **Dorcas Nyambura** (F- no indication);

Patricia Wanjugu (F- no indication); **Tiziana Wanjiru** (F- no indication) **Janet Muthoni** (F- no indication); **Rahab Wanjehiah** (F- no indication) **Miriam Wahura** (F- no indication). The contested nominations were supposed to have been done in accordance with the party TNA nomination rules exhibited on the record. These spell out the qualification for a nominee and the process of nomination. The appellants' contend violation of that process with regard to the contested names. In defence of their acceptance of the party's exercise, the commission relies on the replying affidavit of **Praxedes Tororey**. In summary, it was contended that the Commission had no hand in the party nomination exercise; the constitutional and legislative provisions of the relevant law that the appellants have relied on in their attempt to fault the Commission's actions were fully complied with; we too should rely on these to affirm the Commission's exercise of its mandate. To the Commission, the exercise was fair as all the constituencies in Nyandarua County were represented; both the marginalized and the Gender top up lists met the requirements of the law; all the nominees were drawn from the two party lists submitted to the Commission by TNA as was required by law; the Commission's assumption was that the party could only have forwarded the names of nominees who were their party members and who had paid the requisite nomination fees.

Turning to specifics, the Commission continued to depose that it was a stranger to the allegations that **Nancy Wambui**, **David Mwangi Ndirangu**, **Thirikwa Kamau Thirikwa**, **John Mburu Watheri**, **Moses Mwicigi**, **Peter Wambugu Kayari** and **Michael Kamau Mbugua** had not paid nomination fees as this was a matter between the party and its members; **David Mwangi Ndirangu** fell into the marginalized group of people with disability; marginalized groups for purposes of nomination must be given a broad and open ended meaning to cover interests identified by the political parties and should not be restricted to the categories of interest or grounds, Identified by the constitution only. The Commission conceded that TNA sought to alter the party lists for Nyandarua County vide their letter of 16th March 2013 which move was turned down by the Commission because the dead line for submission of such lists had lapsed on the one hand, and on the other hand, it was a complete reconstruction of the party list after the March 4th 2013 General Elections. The Commission continued to contend that it did not supervise the allocation of slots within the county on the one hand and on the other hand they do not see how the specific slots assigned to specific constituencies offended the community and cultural diversity of the county or was otherwise in contravention of the relevant constitutional provisions. The Commission argued that in the premises it was justified in declining to accept the reconstituted list as in doing so, it would have been in contravention of the provision of **section 35** of the Elections Acts.

In conclusion, the Commission had this to depose in paragraph 9 of its replying affidavit:-

“That the 1st respondent drew the names on the published party list from the first submitted party list and where there were inadequacies and or gaps identified in this list, the 1st respondent redressed those from the resubmitted political party list which lists have since been published in the Daily Nation of 15th May, 2013 and 16th May, 2013. The relevant extracts are produced here with and marked PT1 and PT2 respectively”

35. ASSESSMENT OF THE EVIDENCE

We have considered the rival arguments of all the parties and the concerned constitutional, statutory and regulatory provisions and all relevant authorities. The approach is to determine the construction of the constitutional, statutory and regulatory provisions. We must also assess the relevant factual and issues as presented by both sets of appellants and respondents. We will begin by considering the facts of the case.

(i) With regard to the first party list published on the 15th day of May, 2013, we agree with the respondents submission that no medical or identification documents were exhibited to show that **David Mwangi Ndirangu** was not a person with disability or was a youth within the meaning of the Constitution or to show

Ndirangu's exact age, nor confirmation sourced from the Teachers Service Commission to show that **Nancy Wambui** was still in the TSCs employment as at the time of the nomination.

ii. The party TNA filed no replying affidavit or exhibited any document to show who was a paid up member and who was not. It was therefore not easy for any one to say for sure that **Moses Mwicigi** was not a fully paid up member of TNA. No specific complaint was laid against the nomination proposal for **Thirikwa Kamau Thirikwa, John Mburu Matheri, Peter Wambugu Kayori** and **Michael Kamau Mbugua**.

iii. On the second party list published on the 16th May, 2013, the major complaints against it were mainly that it had not been approved by TNA; it did not meet the thresh hold on the need for regional balance within Nyandarua County and lastly, that the Commission should not have ignored the sentiments of the elected members of the Assembly as expressed in the letter of 16th March, 2013.

iv. The Commission's response to the appellants complaints was that the best forum to resolve the appellants grievances was the tribunal which would have given the contesting parties an equal level playing field; all Constituencies in Nyandarua County were given slots for nominees, the disparity in the number of slots allocated to each constituency notwithstanding; both the marginalized, youth

and gender issues were taken into consideration in the nomination exercise; it was the duty of the nominating authority to ensure compliance with both the relevant constitutional and legal thresh holds; the Commission was entitled to assume that only names of fully paid up party members found their way on to the nominees list; the Commission was a stranger to the allegations that **Nancy Wambui, David Mwangi Ndirangu, Thirikwa Kamau Thirikwa, John Mburu, Peter Wambugu Kayari** and **Kamau Kayari** were not fully paid up members of the party; in the absence of a medical certificate, it was entitled to assume that **David Mwangi Ndirangu** was rightly considered for nomination to represent the marginalized; open ended definitions of marginalized both in the Constitution and the relevant law, gave wide latitude or room for the party to determine for itself which category of persons from Nyandarua fell into whichever category for nomination.

v. It is undisputed that the party TNA came up with a new list of nominees vide their letter of 16th March, 2013 which was rejected by the Commission for the reason that the time line for filing such lists had long lapsed. A part from simply arguing that the Commission should have heeded the elected party's wish on what the new list of nominees should comprise; there is nothing to oust the Commission's stand that acting otherwise would have been contrary to the law.

vi. Another major complaint leveled against this list was that Nyandarua South had received the lion's share of the nominations. The party TNA filed no replying affidavit to offer an explanation as to the criteria used to allocate the slots in the manner done.

vii. A plain reading of **Article 90(1) (c)** appears to exempts County Assemblies from the requirements

of **Article 96(b)** complying with regional, Ethnic and cultural diversity in their nomination lists. But **Article 177**, the Electoral Act and the case law assessed herein appears to suggest otherwise.

viii. The Judgments in both HCCC JR 218/2013 and HCCC Petition No. 238/2013 were bear skeletons if anything they were summary statements. Order 21 Rule 4 of the Civil Procedure Rules provides guidance on what an acceptable Judgment should look like. Order 21 Rule 4 reads:-

“A Judgment in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision.” The two brief judgments offended the above provisions.”

(ix) It is observed that in both brief judgments the learned Judges declined Jurisdiction on the grounds that the complaints fell within the province of **section 39** of the Political Parties Act and were therefore proper candidates for disposal by the Political Parties Dispute Resolution Tribunal. In HCCC JR 218/2013 the petitioner sought an order of certiorari to issue from the High Court to quash the decision of the Commission made on 7th June, 2013 and substitute it with an order directing the 2nd respondent (TNA- the Party) to submit to the Commission two distinct valid and proper party lists of nominees under **section 36(1) (e) and (f)** of the Election Act pursuant to **Article 96(2) (b) and 177 (1) (b) and (c)** of the Constitution of Kenya 2010, followed by the Commission qualifying the components of the list and then pick out qualified persons to form the validly nominated persons to the Nyandarua County Assembly. Whereas in HCCC Petition number 238 of 2013 the petitioners therein sought declarations that the

Commission’s list of nominees to the Nyandarua County Assembly as published on its website violated **Article 90, 98, 174 and 177** of the Constitution; that the list of nominees to the Nyandarua County Assembly as published by the respondent in its website was unconstitutional to the extent that it purports to exclude; discriminate against Ndaragua, Ol’Kalau and Ol’Jororok Constituencies; to declare that the lists of nominees to the Nyandarua County Assembly confirmed by the National Party (TNA) vide its letter of the 16th March 2013 and supported by all elected leaders is the proper list of nominees to the Nyandarua County Assembly and lastly a mandatory injunction to issue compelling the Respondents to adhere to the list of nominees of members of the Nyandarua County Assembly confirmed by the National Alliance Party (TNA).

(x) The question posed herein is whether the reliefs sought in the above petition fell within the province of **section 39** of the Political Parties Act. It reads:-

39. (1) There is established a tribunal to be known as the Political

Parties Dispute Tribunal.

(2) The Tribunal shall consist of persons qualified to be appointed as a judge of the High Court; and

(b) Four other members one of whom shall be an advocate of the High Court of five years standing.

3. The chairperson and members of the Tribunal shall serve on part-time basis.

4. The chairperson and the members shall hold office for a non-renewable term of six years.

5. A person shall not be qualified to be appointed as a member of the Tribunal if that person is a member of the public service or takes an active part in the activities of a political party.

6. A person shall not qualify for appointment under this section unless the person has met the requirement of Chapter Six of the Constitution.

(7) The quorum of the tribunal shall be three members one of whom shall be an advocate.

The mandate of the political party's dispute resolution tribunal is limited. It is stated as thus:

- 41. (1) The Tribunal shall determine any dispute before it expeditiously, but in any case shall determine a dispute within a period of three months from the date the dispute is lodged.**
- 2. An appeal shall lie from the decision of the Tribunal to the High Court on points of law and facts and on points of law to both the Court of Appeal and the Supreme Court.**
- 3. A decision of the Tribunal shall be enforced in the same manner as a decision of a Magistrates Court.**
- 4. The Tribunal shall apply the rules of evidence and procedure under the Evidence Act (Cap.80) and the Civil Procedure Act (Cap.21), with the necessary modifications, while ensuring that its proceedings do not give undue regard to procedural technicalities.**

In our considered opinion, the reliefs sought above together with the accompanying complaints evidently show that they centre on the Constitutionality, Legality, Regularity of the final party list forming TNA's list of Nominees to Nyandarua County Assembly.

We find nothing in the above cited relevant provisions to suggest that the said tribunal had been clothed with the mandate to determine constitutional issues. We find nothing in the complaints as raised by both sets of appellants to suggest that they were merely party/member issues. They dealt with noncompliance with clearly laid down constitutional, legislative and regulatory provisions of the law.

- x. The entity clothed with that mandate is the Commission. Its role was to ensure that nominee party lists submitted to it were both constitutional, legislative and regulatory compliant. Both sets of appellants alleged that it failed to exercise its mandate properly, and that is why they moved to the High Court by way of judicial review in HCCC No. JR.218/2013 and by way of a constitutional petition.
- xii. Being a judicial review application and a petition both citing infringement of Constitutional provisions of the High Court as the Constitutional Court, and a court constitutionally charged with supervision of administrative bodies and officials was the proper entity to address the appellants' complaints. It ought to have subjected the facts presented by parties to the usual considerations in line with the mandate donated to it under **Article 165 (3) (d) (ii)**, namely, the jurisdiction to hear any question respecting the interpretation of the Constitution including the question whether anything said to be done under the authority of the Constitution or of any law is in compliance with the Constitution. The matters that the High Court had been called upon to deal with touched on the constitutionality and the legality of the nomination list submitted to the commission pursuant to the relevant provisions of the Constitution and the Elections Act by TNA as a party with respect to Nyandarua County Assembly.
- xiii. Declaratory reliefs had been sought. Under **Article 23(1)** of the Constitution vide which the appellants sought redress over alleged violations arising from the nomination exercise. The declaratory reliefs sought fell within redress reliefs permitted under **Article 23(3) (a) (b) (c) and (f)** namely an order for a declaration of rights, an injunction, a conservatory order and an order for judicial review. We therefore find that the High Court unjustifiably withheld jurisdiction.
- xiv. The question we have to pose to ourselves in view of the finding in **(xiii)** above is whether we should remit the matter back to the High Court or finally determine it ourselves. **Section 3** of the Appellate Jurisdiction Act (supra) donates to us the power exercisable by the High Court in its original jurisdiction. This gives us the jurisdictional foundation to perform in this appeal the task the High Court should have performed in the Judicial Review and the petitions litigation. The task the High Court had been called upon to perform touched on assessing and analyzing the facts before

it and then determining whether to grant or withhold the reliefs that had been sought from it and give reasons either way.

We now turn to the relevant constitutional, statutory and regulatory provisions:

36. CONSTRUCTION OF THE CONSTITUTIONAL AND STATUTORY PROVISIONS.

The rival arguments herein above invite us to construe and or interpret the relevant constitutional and legislative provisions of law relied upon by either side. In construing and or interpreting, we have been invited, and rightly so, to be guided by the provisions of **Article 2, Article 259 and 260** of the **Constitution**. These stipulate that in the exercise of our Constitutional interpretative and construction mandate, we are enjoined to ensure that the Constitution has primacy and or supremacy over all other legislative provisions and to render any such provision void to the extent of their inconsistency. **Article 259** on the other hand enjoins us to interpret the Constitution in a manner that promotes its purposes, values and principles; that advances the rule of law and the human rights and fundamental freedoms in the Bill of rights; that permits the development of the law and contributes to good governance and in accordance with the doctrine of interpretation that the law is always speaking. On this note, we fully associate ourselves with the sentiments expressed by this Court in the decision in the case of **Suleiman Said Shabhal versus Independent Electoral and Boundaries Commission & 3 others [2014] eKLR.**

“Article 2(4) of the Constitution is clear enough that legislation that is inconsistent with the Constitution is void to the extent of the inconsistency.

The provisions further stipulates that any act or omission in contravention of the Constitution is invalid. We do not believe that it would be promoting the purposes of the Constitution, or advancing its principles and values or contributing to good governance to ignore Article 2(4), and hold on the facts of this case that a statute that is blatantly violating the Constitution can form the foundation of valid legal claim. At a time when the constitution of Kenya is still in its early years of interpretation, the idea that statutory enactments contrary to the Constitution can claim even fleeting validity should not be countenanced let alone entertained holding otherwise would be contributing to the erosion of the supremacy and prominence of the Constitution in the hierarchy of legal norms.”

Whereas Article 260 of the Constitution provides guidelines on certain definitions. Of concern to us is the definition on **“disability”** which includes any physical, senses , mental, psychological or other impairment condition or illness that has or is perceived by significant sections of the community to have, a persistence or long term effect on an individual’s ability to carry out ordinary day- to-day activities; a **“marginalized community”** meaning a community that because of its relatively small population or for any other reason, has been unable to participate fully in the integrated social and economic life of Kenya as a whole; and **“Youth”**, to mean the collectivity of all individuals in the Republic who have attained the age of eighteen years, but have not attained the age of thirty five years.

As for legislative interpretation, vis avis Constitutional interpretation, see the decision in the ***Suleiman Said Shabhal case (supra)*** for the propositions that (i) the edict in Article 2(4) speaks for itself. The letter and spirit of the above provisions leaves no doubt in our minds that is, in consistent with the Constitution is not a mere irregularity but a nullity; (ii) an act of a legislative nature repugnant to the Constitution is void (***Marbury versus Madison, 5U.S. 137*** followed); (iii) an unconstitutional act is not a law; it confers no rights, it impose no protection, it creates no office, it is in legal contemplation it is an in operative as though it had never been passed (***Norton versus Shelby County [1886] 118 U.S. 425, 65. CT 1121, 30C. Ed 178*** approved). Also in ***Protus Buliba Shikuku versus Attorney General [2012] eKLR Nambuye, Aroni, JJ*** drew inspiration from the decision in the case of ***Reyes versus the Queen [2002] 2 AC 235,*** a decision of the privy council for the proposition that:-

“where an issue arises as to the meaning of the law, the Court has to resolve that issue and having done so, it must interpret the constitution to decide whether the enacted law is

incompatible or not; two that when called upon to interpret the constitution, the Court must begin its task of constitutional interpretation by carefully considering the language used in the constitution...A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilection and moral values into the constitution but it is required to consider the substance of the fundamental right at issue and ensure contemporaneous protection of that right in the light of evolving moral standards that mark the progress of a maturing society...”

Article 88 of the Constitution established the Commission and stipulates its mandate. Among these is mandate “(k)”. It reads: -

“the monitoring of compliance with the legislation required by

Article 82(1) (b) relating to nomination of candidates by parties.

(5) The commission shall exercise its powers and perform its functions in accordance with the constitution and national legislation”. (Black’s law)

The legislations referred to in Article 82 of the Constitution are the Independent Electoral and Boundaries Commission Act Chapter 7A (revised 2012); the Elections Act chapter 7 revised Edition 2012 [2011]; the intergovernmental Relations Act Chapter 5G revised Edition 2012; and the County Government Act Chapter 265.

Article 90(1) of the Constitution makes provision for nomination to County Assemblies to be on proportional basis by use of party lists, and provides

“Elections for the seats in Parliament provided for under Articles 97 (1)

(c) and 98 (1) (b) (c) and (d), and for the members of the county assemblies under Article 177(1) (b) and (c), shall be on the basis of proportional representation by use of party lists.

2. *The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) and shall ensure that:-*
 - a. *each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided for under clause (1), within the time prescribed by national legislation;*
 - b. *except in the case of seat provided for under Article 98 (1) (b), each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed; and*
 - c. *except in the case of county assembly seats, each list reflects the regional and ethnic diversity of the people of Kenya.”*

There is a rider that with the exception of County Assemblies the National Party lists have to reflect the regional and Ethnic diversity of the people of Kenya. Article 100 of the Constitution underscores the need for the promotion of marginalized “**groups**” especially women, persons with disability, youths, Ethnic and other minority and majority communities. **Articles 174** and **175** of the Constitution enshrines principles on devolution and 2/3rds gender rule. **Article 177** on the other hand makes provision for the composition of membership for county governments.

These fall into two categories. The first category is for those acquiring membership through elections. The second category acquires membership through nomination which is meant to cater for the gender equality issue, and marginalized groups including persons with disability and the youth. **Article 197**

underscores the need to ensure that not more than two-thirds of the members of the county Assemblies or committees are of the same gender.

Section 34 of the **Elections Act** enjoins the nominating party to ensure the list comprises only party members, adheres to the rule on proportional representation;

Section 34 (5) of the **Election Act** stipulates,

“The party lists under subsections (2), (3) and (4) shall be submitted in order of priority.”

Section 34 (10) of the Elections Act prohibits amendment of any list submitted during the term of Parliament or the county assembly as the case may be.

Section 35 of the Act requires that the political party does submit its party list to the commission on the same day as the day designated for submission to the commission by political parties of nomination of candidates for an election.

Section 36 of the Elections Act makes provision *inter alia* that nominations to County Assemblies as stipulated by **Article 177(1) (b)**. **Section 36 (1)** of the **Elections Act** stipulates:-

“A party list submitted by a political party under-

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

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

There is no provision that an equal number of slots be given to each ward.

Section 36 (2) of the **Elections Act** stipulates,

“A party list submitted under sub section (1) (a), (c), (d), (e) and (f) shall contain alternatives between male and female candidates in the priority in which they are listed.” (Emphasis ours).

34. ASSESSMENT OF REGULATORY PROVISIONS AND PARTY LIST GUIDELINES.

The Commission published the contested lists in accordance with Regulations 54-56 of the Elections General Regulations [2012]. In summary, it is required that parties submit their lists of nominees alongside of those vying for elective positions signed by an authorized official of the party; in hard copy. The Commissions’ authority to reject a nominee is limited to those vying for elective positions and only in instances where such nominees are not eligible for election; the Commission is obligated to publish the final list in two newspapers with nationwide circulation, the nominations must be in accordance with party nomination rules; the Commission is at liberty to reject any list that is not in compliance with the Constitution, election law and the regulations; and the party submitting a nominee list has to furnish a declaration that the nomination exercise had been carried out in accordance with its party rules.

Of relevance is Regulation 55(3) which stipulates

“a party can resubmit a compliant list...”

The Commission also issued guidelines to political parties, The Party List Formula and

Rules of Submission”. It set out the following requirements:-

b. **Each party list comprises of the appropriate number of qualified candidates; and alternates between male and female candidates in the priority in which they are listed. However this criterion does not apply to Senate Women Party List Article 98 (1) (b) of the Constitution) as all 16 nominees are women.**

c. **The names in the party list shall be in order of priority.**

(d) **The party list shall be a closed list, that is the list may not be amended after it has been submitted to the Commission.**

OUR JURISDICTION

Based on our assessment of the analysis of the law and evidence, we will now determine the first issue which is whether we are properly seized of this matter. This arises from the Respondents contention that the 4th through to the 18th Respondents whose nominations the Appellants separately seek to fault having been gazetted, they are deemed to have been duly elected. And therefore the only proper procedure open to the appellants is through the filing of an election petition(s) within the stipulated twenty eight (28) days of the gazettement, as provided for, in **Article 82(2)** of the Constitution and **section 76(1) (a)** of the Elections Act (supra); Secondly that since the issue of degazettement of the 4th through to the 18th Respondents was never an issue before the other two forums that handled the matter culminating in this appeal; we have no jurisdiction to make any pronouncement on that issue and therefore the Appellants stand non suited. We should therefore down our tools.

It is now trite that a court devoid of jurisdiction has no business adjudicating over any matter. It is obligated to down its tools the moment it realizes or its attention is drawn to its lack of jurisdiction, as proceeding otherwise would be nothing but an exercise in futility. See the case of the **Owners of the Motor Vehicle Vessel MV Lillians versus Caltex Oil (k) Ltd (supra)**. We are categorical that we have jurisdiction because, firstly the appeals emanate from two High Court decisions. By virtue of the provision in **Article 164(3) (a)**, there is a constitutional mandate donated to this Court to hear all appeals emanating from the High Court. This constitutional mandate is supplemented by the mandate bestowed upon us by **section 3** of the Appellate Jurisdiction Act (supra). This provision bestows upon this Court a statutory mandate not only to hear but to exercise an original jurisdiction where necessary in the same manner as exercised by the High Court. We wish to adopt our observations above under xiv on assessment of evidence and therefore reiterate that we are properly seized of this matter and both sets of Appellants are procedurally before us. Lastly this Court in the decision in the case of **Rose Wairimu Kamau and 3 others versus the Independent Electoral and Boundaries Commission (Supra)** has already ruled that where the complaint subject of an appeal before it had been lodged before the commission (IEBC) and then resulting from the decision of the IEBC a complaint lodged before the High Court over the same issue before gazettement, any subsequent gazettement of the beneficiaries of the IEBC and High Court decisions are not immune to any resulting negative decision from this Court in so far as the gazettement is concerned. We have revisited the reasoning in that decision and agree entirely that it states the correct position in law. This is because once a thing is said to have been void *ab initio*, anything done in its furtherance is also void *ab initio* and cannot bestow any rights to any party in its furtherance thereof. (See **Mac Foy versus United Africa Co. Limited [1961] 3 ALL ER 1169**).

At page 1172 paragraph 1 **Lord Denning** as he then was had this to say:

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the Court to set it a side. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so...”

Since the decision in the case of **Mac Foy** (supra) this Court has numerously pronounced itself on issues of nullity of proceedings. In the case of **Yalwala versus Indimuli & another [1989] eKLR** wherein the Court rendered ex parte proceedings null and void *ab initio* on account of failure to effect proper service

of summons to enter appearance. In the case of **National Bank of Kenya Ltd versus Wilson Ndolo Ayah [2009] eKLR** in which the Court while upholding the request to declare a charge and an instrument of guarantee drawn by an unqualified advocate ruled inter alia thus:-

“It is public policy that citizens obey the law of the Land. Likewise it is good policy that Courts enforce the law and avoid perpetrations of acts of illegality. (ii) allowing such acts to stand is in effect a perpetuation of the illegality; (iii) it is public policy that Courts should not aid in the perpetuation of illegality.”

In the case of **Suleiman Said ShabhaL versus Independent Electoral & Boundaries Commission & 3 others [2014] eKLR** while drawing inspiration from the decision in **Mac Foy versus United Africa Co. Limited (supra)** this Court observed thus:-

“Lord Denning distinguished between an act that is a mere irregularity and one that is a nullity. A mere irregularity is not void but voidable. An act that is voidable is valid until it is made or declared void. It ceases to have effect after it is declared void; it is not void ab initio; what has been done or accomplished pursuant to that act is not affected by the declaration. On the other hand a nullity is really something that is void, a nothing right from the beginning.”

In the same decision and on the same basis declared the appeal before it incompetent.

Lastly in the decision in **Suleiman Rahimtulla Omar & another versus Musa Harsi**

Farhiye & 5 others [2014] eKLR in which this Court upheld the finding of the learned trial Judge that considering that as early as 1992 Somalia was to the International Community a failed State, it had no government capable of accrediting any ambassador or other diplomats including those who were serving the former government before its fall in 1991; that by 1994 when at the time a decision was made to dispose of the official Somali Ambassador’s residence in Nairobi, the government of Kenya did not recognize the existence of the Somali Embassy in Kenya and its former diplomats went ahead to affirm the holding that the same trial Judge was within the law when he ruled that the transaction affecting both the execution and sealing of the sale documents for the aforesaid Somali Ambassador’s house in Nairobi was null and *void ab-initio* for lack of authority, power and competence and that issue of fraud was secondary to the appeal.

Drawing inspiration from the above assessed case law there is clear indication that the courts of law usually frown on acts of illegalities and this should not either be perpetuated or allowed to pass. Likewise herein, we have the jurisdiction to state that any illegality noted should not be condoned or perpetuated.

The second question for determination is whether the High Court had jurisdiction to entertain the matter in issue. It is common ground that the Appellants first approached the Commission Dispute Resolution Committee for a resolution. They lost in that forum. They approached the seat of justice in the High Court by way of constitutional petitions and Judicial Review. It is correctly submitted by the respondents and as conceded by the Appellants that indeed they sought constitutional reliefs in the form of judicial review and a petition. The parameters for granting relief by way of judicial review have long been settled. See the case of **Republic versus Vice Chancellor Jomo Kenyatta University of Agriculture and Technology Exparte Cecilia Mwathi & another (supra)**

The above legal position notwithstanding, the appellants have invited us to find that what was before the High Court were not only a purely judicial review and Constitutional petition mandate but a judicial review and Constitutional petition stemming from both constitutional and statutory provisions for interpretation. The High Court therefore erroneously declined jurisdiction. **Article 165(3) (b)** donates mandate to the High Court to determine any question as to whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

It is therefore our view that the High Court has powers to determine any issue arising from and incidental to the denial, violation, infringement of a right or fundamental freedom. Furthermore limiting any provision of the Constitution otherwise than as provided is not and cannot be accepted in an open and democratic society. The role of the court is not to second guess the wisdom of the people of Kenya, but to endeavor to achieve the hopes and aspirations of the people. And where there is no absurdity, inconsistency, hardship or anomaly the Constitution is supreme and any act that is in violation of any constitutional provision is void to the extent that it is an abrogation and derogation of the will of the people. (see advisor observations under xii, xiii on assessment of evidence.

ON MERIT

We say without much elaboration that Appellant's complaints rested mainly on both the Constitution, statutory and regulatory validity of the nomination of the 4th through to the 18th Respondents as nominated representatives to the Nyandarua County Assembly. They have pointed out to us both Constitutional, statutory/Electoral law and Regulatory/Electoral Regulations) provisions that go to demonstrate that such nominations are clearly indicated to be governed by Constitutional provisions on the one hand and the Electoral law and the relevant regulations, made there under (under the Electoral law) on the other hand. The two jurisdictions are intertwined. There is no way the High Court could have severed one from the other. We do not hesitate to state and reiterate our earlier stand that the High Court had the mandate to handle both.

As mentioned earlier on in this judgment, the reliefs that the Appellants in Civil Appeal No. 238/2013 sought fell squarely within those constitutionally permitted under **Article 23** of the Constitution 2010 thereof, namely declaration of rights, issuance of an injunctive relief, issuance of conservatory orders, a declaration of invalidity of any law that denies, deletes, infringes or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24, an order for compensation and an order for judicial review. Those sought by the Appellants in Civil Appeal No. 224 of 2013 were also within the ambit of the High Courts' jurisdiction in so far as these Appellants had requested the High Court to fault those nominations on account of their unconstitutionality, illegality and irregularity through an order of certiorari. We therefore find that the High Court erroneously downed its tools a second time. As observed under general observation, a discharge of this mandate should have entailed the High Court to pay homage to the provisions of order 21 Rule 4 of the Civil Procedure Rules 2010. This rule enjoined the

High Court to summarize the facts forming each set of the judicial review and petition applications before each bench, identify the issues for determination, apply the law to the issues raised in each application and then arrive at a determination in one way or the other and then give reasons either way.

The appellants have posed questions for our determination in the disposal of the issues in controversy herein. These can safely be summed up into the three questions that the appellant in CA 238/2013 posed namely:-

- a. ***Whether the list of TNA nominees to the Nyandarua county assembly as published by the respondent offends the provisions of Articles 10 and 90 of the Constitution.***
- b. ***Whether the list of TNA nominees to the Nyandarua Assembly as published by the respondent should be nullified for being unconstitutional.***
- c. ***Whether the respondent should be compelled to publish a fresh list in conformity to the list confirmed by TNA on 16th March, 2013.***

The third issue for our consideration can be clustered into the above three specified grounds. The appeal before us arises from the interpretation of the Constitution, statutory and regulatory provisions and an assessment of the evidence as highlighted above. It is not disputed that TNA purported to submit two party lists of candidates for the Nyandarua County Assembly on the 26th February, 2013, of which were published by the Commission on 15th and 16th May, 2013. The question that immediately comes to mind is whether TNA intended to submit two party lists with different names? Of course of paramount

importance, is who has the mandate to determine the final list of nominees to the County Assembly?

From our perusal of the two lists, it is abundantly clear that the names were different and we do not know whether the two lists were presented variously on the same day or simultaneously together. We have endeavored to set out above in the body of the judgment, the content of the two lists as published both on the 15th and 16th May, 2013. It is the validity of these two lists that we have been called upon to interrogate.

Our understanding of the word “**lists**” is that it is meant to refer to the lists both for elective and nomination positions, but one list for each category. This mandate is donated under **Article 177** of the **Constitution** and **Section 34** of the Elections Act.

Next, the Commission was to ensure that the list for nomination comprised two segments. The first segment is that which applied to special categories namely those of persons with disability, the youth and the marginalised. This list was expected to contain a total of eight (8) names whose arrangement was to pay heed to the gender equality rule, and alternating of male/female and then indicate whether the proposed nominee had been proposed as a person with a disability, a marginalized person or as a youth. The second category list would comprise the list for other regular nominees namely fifty in number being reflective of the twenty five (25) wards within Nyandarua County. This list too had to adhere to the gender balance rule that is whereby the listing alternates male/female. The list also had to pay heed to proportional representation of all the wards competing for such nomination within the Nyandarua County. Compliance with this requirement is mandatory under **Article 91** of the Constitution.

The purpose of the party list is to avoid instances of favoritism, and other improper motives and influences, easy of concealment, and difficult to detect by the end of the exercise.

Nomination of candidates to the party lists involves sending names to the Commission after the candidate has been screened by his/her party through an election or a mode of selection conducted by his/her party. In our view once a political party has sent a list of candidates for nomination to the Commission, the political party cannot withdraw the candidate list or substitute a candidate unless and until it presents or adduces verifiable reasons to the Commission for withdrawal or substitution which must be done within the period specified by the Act or regulation made thereunder.

We presume that there are only three ways in which the list could be modified, that it must have been lodged wholly in one list or withdrawn and replaced with another compliant list, to correct an apparent error, mistake and/or fundamental injustice, primarily in the latter, and ultimately in the former. That is not what happened herein as what we have before us indicates that two party lists were submitted by TNA on 26th February 2013, and when they appear to have realised that the two previously submitted lists were not compliant, they erroneously made an attempt to regularize the position by submitting yet another apparently compliant list, out of time on 16th March 2013.

In ordinary cases, it may be more convenient and satisfactory to make a compliant list in the first instance to avoid cases of abuse and misuse of power unless there exists some extraordinary circumstances that might render the intervention necessary. We must express the view that the constitutional scheme vests, to some extent an unregulated power to the political parties to regulate and formulate the list of candidates, and a secondary power to the Commission to supervise, with the Court retaining the ultimate and final authority to address and determine instances of violation or infringement of fundamental rights.

As neither of the party lists was withdrawn by TNA, the only conclusion that can be drawn is that with respect to the nominations for Nyandarua County Assembly, two party lists were submitted by TNA, which was contrary to the requirements of law. On its part the Commission submitted that in order to arrive at the final list of nominees, it selected persons from the two party lists, and in doing so, argued that it was within its powers and in the interest of constitutional expediency.

It is in our view that this is not what was intended or contemplated by the Constitution, the Elections Act, or indeed the relevant regulations made thereunder and Commission’s guidelines. What was envisaged

was that the Commission was mandated to receive one closed party list from which it would select qualifying persons on the list on a priority basis. If the list was not compliant, it was mandated to reject that list, and make way for the party to resubmit another list. And where a particular candidate failed to qualify, to select the next person on the list who satisfied the relevant gender and constitutional requirements. What was not authorized was firstly, for the Commission to receive and publish two party lists, and secondly to rely upon both party lists as the basis for the selection of nominees for the final party lists for the Nyandarua County Assembly.

Clearly, and we so find, the Commission exceeded its mandate to receive the two party lists and to publish both. It further overstepped its legitimate mandate by purporting to moderate while relying on two party lists, to the extent that it rendered the final party list together with all the nominees selected by the Commission null and void.

This Court in the case of Lydia Mathia Vs. Naisula Lesuuda & another Civil Appeal No. 287 of 2013 (UR) stated thus,

“The appellant has framed her case as if it was exclusively the duty of the IEBC to ensure compliance with Article 90(2) (c). She contends that the IEBC, having failed to discharge that duty, she must be left to be as the nominated woman senator. It is not in dispute that the IEBC has a clear constitutional mandate under that provisions, to ensure that the party list respect regional and ethnic diversity. In addition, Article 82 of the Constitution requires Parliament to enact legislation on election, which should, among other things, make provision for the nomination of candidates for elections. The contemplated legislation is clearly the Election Act. Article 88(4) (k) of the Constitution, expressly vests in the IEBC the responsibility of monitoring compliance with the legislation enacted under Article 82(1) (b) relating to nomination with the candidates by political parties, while Article 88(5) demands that the IEBC shall exercise its powers and perform its functions in accordance with the Constitution and national legislation. These are express constitutional directives that the IEBC can’t run away from.

It is equally evident that all political parties bear as heavy a duty as the IEBC as far as respecting and upholding of the Constitution is concerned. Under Article 3(1) of the Constitution every “person” has an obligation to respect, to uphold and to defend the Constitution. The national values set out in Article 10 bind “all persons” whenever they apply or interpret the Constitution. Under the Political Parties Act, 2011, there is an implied duty that all political parties shall uphold the principles and values of the Constitution. This is the reason why section 21 (1) (d) of the Act provides that failure to respect the national values and principles of the Constitution is a ground for deregistration of a political party. Accordingly we have absolutely no difficulty in finding that the TNA political party is a legal “person” for the purposes of Article 3 and 10 of the Constitution and that it was obliged to respect its party list for nominated women senators. For the avoidance of doubt, registration of the TNA as apolitical party under the Political Parties Act, 2011 constituted it a legal person under section 16(1) of the Act.

The evidence on record indicates that TNA did not observe the requirements of Article 90(2) (c) when it prepared its party list and it subsequently conceded as much when it sought to substitute a compliant list on 16th March. The IEBC equally failed in its constitutional duty by allowing a list that did not comply with the Constitution to be subjected to the election. That both these institutions failed in their constitutional duty should not, in our opinion be allowed to frustrate and undermine clear constitutional values and principles.

...

The definition of “party lists” under section 2 of the Elections Act suggested ownership of the list by the political party that has prepared it. The practice, indeed the law is that the power over who gets the reserved seats resides with the parties themselves and no other authority.”

But in the present appeal, the Constitution required the party list to be prepared taking into account some specified principles and values. This was not done. To the extent that the party list did not observe constitutional demands, it cannot claim any legal or constitutional sanctity. We also note that the ‘amendment’ of the list by the IEBC did not entail bringing in any new name or any radical alteration of the propriety; it entails selection of the person next on the list who would satisfy the constitutional requirement. (emphasis ours) We associate ourselves fully with the sentiments expressed above.

The national values and principles enunciated in **Article 10** of the Kenya Constitution 2010 relevant to matters under interrogation herein are the rule of law, equity, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability. As stipulated in sub article (i), these bind all state organs, state officers, public officers and all persons whenever they apply or interpret the constitution, or any law or are involved in making or implementing public policy decisions.

From the reasoning in the ***Lydia Mathia*** case (Supra) the Commission is a state organ, its officials, state officials and therefore public officers must to discharge both constitutional, legislative and regulatory functions as mandated. It was therefore duly bound to apply these values in the discharge of its function, in accordance with the relevant constitutional legislative and regulatory provisions governing the discharge of the said mandate. TNA, the entity mandated by law creating it to originate the party list in its corporate capacity is a legal person with capacity to sue and be sued and is self-efficacy. It therefore falls into the category of persons envisaged under **Article 10**. Its function of preparation of the nomination lists is both constitutional legislative as well as regulatory.

Since the above mentioned entities acted outside their respective mandates, there is justification for this Court to intervene. One way of intervening is to go by the apparent compliant list submitted by TNA on 16th March, 2013. This route is foreclosed for the very reason that such a move would be unconstitutional as the said list was submitted out of time. The best way out is to follow the route taken by this Court in the ***Rose Wairimu Kamau case (supra)***, that is to allow appeals and then direct the defaulting party or party to comply. Before we conclude these appeals, we must express that it seems most strange to us that the electoral body would always support the position of the winner no matter whether there is a legal foundation tenable in law or not. It does not seem to us that the commission was set up to justify or vindicate itself in order to show it is infallible. We appreciate election by nature are conducted by women and men who are susceptible to human error. It is our view that it is neat and right for the Commission to either remain an impartial arbitrator or always take the correct position of the law and facts. It cannot be a coincidence that the commission always is on the side of the winner even if such a position looks absurd and/or preposterous. Such a conduct foments public anger and resentment towards the mandate of the Commission. The Commission should always remain or have a tag of an independent arbitrator, faithful to the constitution and statutory powers granted to it. It should always present the whole evidence in favour or against both parties and not act in any manner to obstruct the truth and align itself with a particular party.

Taking the totality of the above assessment, we are therefore in the premises inclined to allow both appeals and we proceed to make the following final orders in each Appeal separately as hereunder.

Civil Appeal No. 224 of 2013.

1. Appeal No. 224 of 2013 is allowed.
2. The order of the High Court dated the 12th day of July, 2013 be and is hereby set aside, and substituted with an order of certiorari to issue to bringing into the High Court and quashing the decision and or judgment of the Commission is Dispute Resolution Committee made on 7th June, 2013 and revoking the two TNA nominee party lists published by the Commission on 15th and 16th May, 2013 of Nyandarua County Assembly, and in its place substitute an order that the 2nd Respondent, TNA be and is hereby ordered and directed to submit within the next seven (7) days

from the date hereof two distinct valid and proper party lists of nominees under section

36(1) (e) and (f) of the Election Act pursuant to Article 90(2) (b) and Article 177

(1) (b) and (c) of the Constitution of Kenya.

3. Upon complying with No 2 above, the 1st respondent, the Commission (IEBC) be and is hereby ordered and directed to qualify and select qualified persons from the resubmitted compliant party list to be validly nominated to Nyandarua County Assembly within the next seven (7) days of receipt of the aforementioned party lists from TNA.
4. That portion of Kenya Gazette Notice No. 9794 volume XCV-105 published on the 17th day of July, 2013 listing the 4th through the 18th respondents (both inclusive) as the valid nominees to Nyandarua County Assembly be and is hereby revoked.
5. Thereafter parties to proceed according to law.
6. Costs to the appellants to be borne by TNA and the Commission in equal proportions.
6. **Civil Appeal No. 238/2013.**
 1. The appeal is allowed.
 2. The order of the High Court dated the 12th day of July, 2013 is set aside and substituted with the following two declarations:
 - a. That a declaration be and is hereby issued and declared that the 1st Respondent commission's list of nominees to the Nyandarua County Assembly published in their website violates Article 90, 98,174 and 177 of the Constitution.
 - b. A declaration be and is hereby issued and declared that the lists of nominees to the Nyandarua County Assembly as published by the Respondent in its website is unconstitutional to the extent that it purports to discriminate against Ndaragwa, Olkalao, and Oljororok Constituencies.
 - c. The order of the High Court dated the 12th day of July, 2013 be and is hereby set aside, and substituted with the declarations in number 2 above declaring that the decision and or judgment of the Commission Dispute Resolution Committee made on 7th June, 2013 and revoking the two TNA nominee party list published on 15th and 16th May, 2013 of Nyandarua County Assembly, and in its place substitute an order that the 2nd Respondent TNA be and is hereby ordered and directed to submit within the next seven (7) days from the date hereof two distinct valid and proper party lists of nominees under section **36(1) (e) and (f) of the Election Act** pursuant to **Article 90(2) (b) and Article 177 (1) (b) and (c) of the Constitution of Kenya.**
 4. Upon complying with No 3 above, the 1st respondent, the Commission (IEBC) be and is hereby ordered and directed to qualify and select qualified persons from the resubmitted compliant party list to be validly nominated to Nyandarua County Assembly within the next seven (7) days of receipt of the aforementioned party lists from TNA.
 5. That portion of the Kenya Gazette Notice No. 9794 volume XCV-105 published on the 17th day of July, 2013 listing the 4th through the 18th interested parties (both inclusive) as the valid nominees to Nyandarua County Assembly be and is hereby revoked.
 6. Thereafter parties to proceed according to law.
 7. Costs to the appellants to be borne by TNA and the Commission in equal proportions.

We wish to thank the parties for bringing this Appeal which raises fundamental and far reaching issues of constitutional and legislative interpretation, of which we were called upon to render a decision to the best of our ability and understanding. We believe that we have rendered our judgment in strict loyalty to the dictates of the Constitution and our oath of office. In particular, the Appellants herein deserve credit for the fortitude and resilience they portrayed in pursuing this Appeal which is of great public interest. Our appreciation also goes to all the parties for their industry in the legal research, and the professionalism demonstrated in the conduct of this Appeal.

Dated and Delivered at Nairobi this 23rd day of JANUARY, 2015.

R.N. NAMBUYE

JUDGE OF APPEAL

M.A. WARSAME

JUDGE OF APPEAL

A.K. MURGOR

JUDGE OF APPEAL

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

DEPUTY REGISTRAR