



**Njogu v Attorney General & another (Constitutional Petition  
E043 of 2024) [2025] KEHC 301 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 301 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CONSTITUTIONAL PETITION E043 OF 2024**

**DO CHEPKWONY, J**

**JANUARY 24, 2025**

**JUDGMENT**

**IN THE MATTER OF: APPOINTMENT OF THE INDEPENDENT  
ELECTORAL BOUNDARIES COMMISSION (IEBC) SELECT COMMITTEE**

**AND**

**IN THE MATTER OF: REGIONAL BALANCE**

**AND**

**IN THE MATTER OF: PERSONS LIVING WITH DISABILITY**

**BETWEEN**

**BONIFACE NJOGU ..... PETITIONER**

**AND**

**HON. ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**CLERK TO THE SENATE/SECRETARY TO THE PARLIAMENTARY SERVICE**

**COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner filed a Petition dated 25th October, 2024, which he characterizes as a matter of public interest and which is now before this Court for determination.
2. According to the Petitioner, on 22<sup>nd</sup> October, 2024, the High Court at Milimani delivered a Judgment in HCCA No.E1056 of 2024, consolidated with HCCA No.1081 of 2024, directing the Minority Coalition Party to conduct fresh voting and appointment of the Independent Electoral and Boundaries Commission (IEBC) Select Committee. Consequently, on 23<sup>rd</sup> October, 2024, the Azimio



One Kenya Party, also known as the Minority Coalition Party, announced its nominee for the Minority Coalition cluster, namely Dr. Amb. Koki Muli.

3. In light of that announcement, and pursuant to the mandate conferred upon it under Section 2B of the First Schedule of the Independent Electoral Boundaries Commission (Amendment) Act, 2024, the 2<sup>nd</sup> Respondent was poised to forward the following names to the President of Kenya for appointment: Dr. Nelson Makanda, Ms. Fatuma Saman, Dr. Amb. Koki Muli, Mr. Evans Misati, Mr. Nicodemus Bore Kipchirchir, Mr. Andrew Tanui Kipkoech, Ms. Caroline Kituku, Prof. Adams Oloo, and Ms. Linda Koome.
4. According to the Petitioner, this list does not reflect regional balance, as four of the nominees, namely Ms. Caroline Kituku, Dr. Amb. Koki Muli, Mr. Andrew Tanui Kipkoech, and Mr. Nicodemus Bore Kipchirchir, are all from the same ethnic background and region. Additionally, the Petitioner argues that the list fails to account for persons living with disabilities, thus contravening Articles 10 and 54(2) of *the Constitution*.
5. It is worth-noting that Article 54(2) of *the Constitution* specifically obliges the State to progressively realize the principle that at least five percent (5%) of public elective and appointive positions are held by persons living with disabilities.
6. The Petitioner further states that Section 2B of the First Schedule to the Independent Electoral Boundaries Commission (Amendment) Act, 2024 requires the nomination process be transparent and competitive. However, he argues that this was not followed and goes on to state that in his view, the Minority Coalition Party the Coalition Party simply appointed its nominee without conducting a transparent or competitive election.
7. Consequently, the Petitioner has urged that the Court declares that the aforementioned list of nominees fails to meet the principles set out under Article 10 and 54 (2) of *the Constitution*, more particularly with respect to inclusiveness and representation of people living with disability, and proceeds to seek for an Order of Certiorari to quash both the List of Nominees to the Independent Electoral Boundaries Commission Selection Panel and any resultant actions taken by the Respondents.
8. The 1<sup>st</sup> Respondent opposed the Petition through Grounds of Opposition dated 29<sup>th</sup> October, 2024, and the same are summarized as follows: That the Petition lacks merit, as it is not practical to achieve complete regional or ethnic balance in the nomination of members to the Independent Electoral Boundaries Commission, given that the selection process involves the election of appointees. He submits that the Petitioner has not produced sufficient evidence to support his allegations on lack of inclusiveness as required under Section 108 of the *Evidence Act*.
9. Further, the 1<sup>st</sup> Respondent submits that since the membership of the Commission is limited to nine (9) members, it is impractical to represent all ethnic groups in Kenya on the Independent Electoral Boundaries Commission Selection Panel. And lastly, that the Petitioner has impugned the composition of the selection panel without first challenging its constitutionality or offering an alternative selection process.
10. On its part, the 2<sup>nd</sup> Respondent also opposed the Petition through a Replying Affidavit sworn on the 6<sup>th</sup> November, 2024 by Jeremiah Nyegenye, the Clerk of the Senate/Secretary of Parliamentary Service Commission. It is its position that the said List of Nominees complied with the requirements of the Independent Electoral Boundaries Commission (Amendment) Act, 2024.
11. By consent of the counsel for the parties, the court directed that the Petition be disposed of by way of written submissions. The record will show that all parties filed their respective submissions with the



Petitioner filing his submissions dated 19<sup>th</sup> November, 2024, while the 1<sup>st</sup> Respondent's submissions are dated 22<sup>nd</sup> November, 2024, and the 2<sup>nd</sup> Respondent's submissions are dated 2<sup>nd</sup> November 2024. I have read through and considered the arguments by counsel for the parties in these submissions for determination.

### **Petitioner's Submission**

12. In his submissions, the Petitioner identifies two issues for determination, being:-
  - a. Firstly, whether the composition of the nominees offends Articles 10 and 54(2) of *the Constitution* of Kenya, 2010: and,
  - b. Whether the nomination process in the minority coalition party was in accordance with Independent Electoral Boundaries Commission (Amendment) Act.
13. With regard to the first issue, the Petitioner asserts that Article 10(2)(b) of *the Constitution* enshrines the national values and principles of inclusiveness, which bind all state organs and persons when interpreting and applying *the Constitution*. He argues that the list forwarded by the 2<sup>nd</sup> Respondent does not reflect such inclusiveness because four of the nominees hail from the same region and ethnicity. Specifically, the Petitioner maintains that two nominees are Kamba while two others are Kalenjin, thus resulting in only seven ethnic communities being represented on the panel. In support of this stance, the Applicant has cited among other authorities, the case of IEBC –vs- National Super Alliance (NASA) & 7 Others [2017] KECA 436 (KLR).
14. On the second issue, the Petitioner contends that Article 54(2) of the Constitution mandates the inclusion of persons with disabilities in any elective or appointive positions. According to the Petitioner, none of the listed nominees is a person living with disability, whereas Article 54(2) of *the Constitution* would require that at least one appointee falls under that category. In support of this argument, the Petitioner relies on the case of Rose Wairimu Kamau & 3 Others –vs- IEBC, Civil Appeal No.169 of 2013, and Ahmed & 3 Others –vs- Governor, Mandera County Government & 5 Others; Elias & 32 Others (Interested Parties) [2023] KEELRC 556 (KLR).
15. Finally, regarding whether the nomination process within the Minority Coalition Party complied with the Independent Electoral Boundaries Commission (Amendment) Act, the Petitioner stresses that the First Schedule to the Act is couched in mandatory terms concerning the procedure for appointing the Chairperson and Members of the Independent Electoral Boundaries Commission. He asserts that these nominating bodies must select nominees through a transparent and competitive process. Contrary to this requirement, and in violation of the High Court Judgment delivered on 22<sup>nd</sup> October, 2024, the Minority Coalition Party allegedly announced its appointee without any transparent elective process. Therefore, the Petitioner maintains that the selection criteria remains unknown, and thus there was no transparency, as dictated by law. Based on these arguments, the Petitioner seeks the orders outlined in his Petition be granted.

### **1<sup>st</sup> Respondent's Submissions**

16. In the 1<sup>st</sup> Respondent's submissions, three issues were identified for determination, being:-
  - a. Whether it is possible to achieve regional/ethnic balance where the membership of the Independent Electoral Boundaries Commission selection panel is limited to a fixed number of nine (9) members;
  - b. whether the doctrine of necessity applies given the current vacuum at the Independent Electoral Boundaries Commission; and lastly,



- c. What orders the Honourable Court should issue.
17. On the first issue, the 1st Respondent submits that the Petitioner's claim that the Independent Electoral Boundaries Commission Selection Panel is improperly constituted on ethnic or regional grounds is unsubstantiated. According to the 1<sup>st</sup> Respondent, the Petitioner has not adduced evidence to support his position, contrary to Sections 107 and 109 of the *Evidence Act*. The 1st Respondent asserts that no material has been placed before the Court to indicate that the values of ethnic representation were disregarded. Furthermore, it emphasizes that the Independent Electoral Boundaries Commission statute does not set out a strict formula for achieving ethnic and regional balance in a body limited to nine (9) members hence that discretion is let to the nominating bodies.
18. Secondly, with regard to the doctrine of necessity, the 1<sup>st</sup> Respondent in its submissions argues that there is a pressing need to constitute the Independent Electoral Boundaries Commission because the Commission currently has no members, placing its operations in limbo. It contends that under the doctrine of necessity and public policy, it is imperative to expedite the selection and appointment of Independent Electoral Boundaries Commission Commissioners to avoid a looming constitutional crisis. Given the limited membership, the 1st Respondent believes full realization of the ethnic, regional, and disability balance that is being advocated for by the Petitioner may not be practically feasible, and thus the doctrine of necessity should guide the present circumstances.

## 2<sup>nd</sup> Respondent's Submissions

19. Similarly, the 2<sup>nd</sup> Respondent has raised two issues for determination as follows:-
- a. Whether the list of nominees violates Articles 10 and 54(2) of *the Constitution*; and,
  - b. Whether the nomination process for the minority coalition was conducted in accordance with the Independent Electoral Boundaries Commission (Amendment) Act.
20. On the first issue, the 1<sup>st</sup> Respondent submitted that the First Paragraph of the First Schedule of the *Independent Electoral and Boundaries Commission Act*, 2011 sets out the procedure for nomination and appointment of members to the Selection Panel. It stipulates that a maximum of nine (9) individuals are to be nominated, namely; two persons nominated by the Parliamentary Service Commission, three by the Political Parties Liaison Committee, one by the Institute of Certified Public Accountants of Kenya, and two by the Inter-Religious Council of Kenya. Additionally, all nominees must be Kenyan citizens who satisfy the requirements of Chapter Six of *the Constitution* (leadership and integrity) and must hold a degree from a recognized university.
21. It is further dictated that the nominating bodies must ensure that the process is transparent and competitive and that no more than two-thirds of the nominees are of the same gender, in line with the provisions of Paragraphs 1(2B) and (2C) of the First Schedule to the Independent Electoral Boundaries Commission Act.
22. In this case, the 2<sup>nd</sup> Respondent contends that these requirements have been fulfilled in the list forwarded to the President for appointment, noting that the gender criterion was met given in that it has four (4) females and five (5) males and each nominee is from a different region from the other. Consequently, it argues that Articles 10 and 54(2) of *the Constitution* have not been violated since there is a specific law guiding the appointment of the nominees being the Independent Electoral Boundaries Commission (Amendment) Act, 2024. Moreover, it points out that the Independent Electoral Boundaries Commission (Amendment) Act, 2024 governs the appointment process and does not mandate representation from every ethnic group, particularly given the nine-person membership limit.



Nevertheless, the 2<sup>nd</sup> Respondent maintains that the list forwarded to the president did in fact, ensure a broad regional diversity.

23. Regarding the issue of whether the Minority Coalition Party's nomination process was compliant with the Independent Electoral Boundaries Commission Act, the 2<sup>nd</sup> Respondent notes that this precise question was litigated and decided upon in Milimani HCCA No.E1081 of 2024, where the Court directed that fresh elections for the Minority Coalition cluster be held in strict compliance with Sections 2B and 2C of the Independent Electoral Boundaries Commission Act within 48 hours of the Judgment. According to the 2<sup>nd</sup> Respondent, the nomination was conducted as per that Court orders and moreover, the parties who conducted that nomination are not joined in this present Petition, and thus cannot be condemned unheard.

### **Analysis and Determination**

24. Having carefully evaluated the parties' pleadings (Petition and Responses), and their respective submissions alongside cited case law, this Court finds that the following issues arise for determination: -
- a. Whether the list of nominees to the Independent Electoral Boundaries Commission Selection Panel violates the principles of inclusiveness and the requirement of disability representation under Articles 10 and 54(2) both of *the Constitution* respectively.
  - b. Whether the allegation that the Minority Coalition Party's nomination process lacked transparency and competitiveness is substantiated.
  - c. What reliefs (if any) the court should grant.
25. On the issue of whether the list of nominees to the Independent Electoral Boundaries Commission Selection Panel violates the principles of inclusiveness and the requirement of disability representation as provided for under Articles 10 and 54(2) of *the Constitution*, it is imperative that the court considers what each separate provision entails and its applicability.
26. Article 10 of *the Constitution* demands that all State organs, officers, and persons apply the national values and principles of governance, such as inclusiveness, equity, social justice, and protection of the marginalized, whenever they apply or interpret *the Constitution*, enact or interpret laws, or implement public policy decisions. However, it is now settled in our jurisprudence that the standard is not one of absolute representation of every ethnic or regional group but rather a demonstrable effort towards reflecting Kenya's diversity.
27. In the instant case, the Petitioner argues that having four nominees from two ethnic communities (Kamba and Kalenjin) undermines the principle of inclusiveness. The Petitioner's contention is that such clustering excludes other ethnic groups, thus offending the requirements of Article 10 of *the Constitution*. However, it is trite law in Kenya that the principle of inclusiveness does not require representation of every single ethnic group in every public body. In the case of Independent Electoral and Boundaries Commission (IEBC) –vs- National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR, held as follows:-

“... Consequently, in this appeal, we make a firm determination that Article 10 (2) of *the Constitution* is justiciable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate..”

28. Therefore, in considering whether the list to be forwarded by the 2<sup>nd</sup> Respondent was in contravention of the provisions under Article 10(2) of *the Constitution*, its adherence to inclusivity should be assessed



in the broader context of whether the appointing bodies had a reasonable margin of discretion and whether any other explicit legal prescriptions were violated. In this case, the Independent Electoral Boundaries Commission (Amendment) Act, 2024, under its First Schedule, provides that nine (9) individuals are to be nominated by distinct bodies including Parliamentary Service Commission, Political Parties Liaison Committee, Institute of Certified Public Accountants of Kenya, and the Inter-Religious Council of Kenya. It also provides that each body must carry out a transparent and competitive process without prescribing that each Kenyan community, ethnic group or region must be represented.

29. It is thus this Court's view that the principle of inclusiveness under Article 10(2) of *the Constitution* in context of selecting nominees to the Independent Electoral Boundaries Commission Selection Panel as provided for under the Independent Electoral Boundaries Commission (Amendment) Act, 2024, contemplates a broad diversity particularly regarding gender and integrity as opposed to the selection of specific nominees based on their regional locality, although the discretion is entirely bestowed on the above-mentioned bodies.
30. While inclusivity is mandatory, it does not necessarily translate into a formulaic representation for all of Kenya's ethnic communities, particularly where the statutory framework contemplates a specific number of seats and distinct nominating bodies as in the case herein.
31. Therefore, after reviewing the Replying Affidavit and submissions filed by the 2<sup>nd</sup> Respondent, this Court is persuaded that the nine (9) nominees reflect an overall attempt to ensure regional diversity. The Petitioner's assertion that four are from two specific ethnic groups standing alone is insufficient to invalidate the entire process, especially in the absence of compelling evidence that a significantly broader representation was feasible but was disregarded.
32. On whether the list of nominees violates the provision of Article 54 (2) of *the Constitution*, it is not disputed that the provision provides "that the State shall ensure that at least 5% of members of the public in elective and appointive bodies are persons with disabilities. The Petitioner contends that none of the nominees forwarded to the President is a person living with disability, thus running afoul of this provision. However, it is critical to note that Article 54(2) of *the Constitution* is framed in a language envisaging progressive realization, hence the State is under an obligation to progressively ensure that no less than 5% of public bodies comprise of persons with disabilities.
33. In this Court's view, this requirement means that an appointing authority must take active steps to search for and include qualified candidates with disabilities, subject to the size and nature of the body. Thus, the failure to meet the disability threshold can be excused if the court is satisfied that an institution or body had no qualified persons with disabilities available or that the basis for appointment was not discriminatory.
34. In the instant case, whereas it is not disputed that the final list containing the required nine (9) nominees does not include a person with disability, the Petitioner has not demonstrated that any qualified person living with disability applied or was proposed for nomination but was overlooked or that the appointing bodies acted in bad faith or in disregard of known disabled candidates who met the qualifications listed under the first schedule of the Independent Electoral Boundaries Commission (Amendment) Act, 2024.
35. Accordingly, this Court's finds that the Petitioner's contentions that because the final list lacks a person with disability remains in contravention of Article 54(2) of *the Constitution*, is ipso facto violated. Since, progressive realization demands a demonstration of good-faith and efforts made to identify and include persons with disabilities in the appointment/nomination process, without concrete proof that



these efforts were never made or that a qualified candidate was deliberately excluded, this Court cannot conclude that there was a violation of Article 54(2) of *the Constitution*.

36. Moreover, the Court agrees with the Respondents' submissions that the Independent Electoral Boundaries Commission Selection Panel's statutory composition is finite and capped at nine (9) members. It further goes without saying that *the Constitution* mandates diverse objectives including gender balance, regional balance, inclusion of persons with disabilities, integrity, and so forth, hence where the Petitioner fails to establish that any one of these objectives was manifestly disregarded, the Court must be cautious before interfering with the entire process.
37. Therefore, in the circumstances of this case, this Court finds the Petitioners had advanced insufficient evidence and grounds to warrant this Court declare that the overall process of constituting the Selection Panel contravened the provisions of Articles 10(2) and or 54(2) of *the Constitution*.

### **Whether the Minority Coalition Party's Nomination Process was Transparent and Competitive.**

38. As for whether the Minority Coalition Party's nomination process was transparent and competitive, it is the Petitioner's claim that the Minority Coalition Party merely announced its nominee without proper compliance with Section 2B of the First Schedule to the Independent Electoral Boundaries Commission (Amendment) Act, 2024, which requires a transparent and competitive process. He relies on the High Court orders issued in Milimani HCCA. No. E1056 of 2024 (consolidated with H.C.C.A No. E1081 of 2024), which directed fresh voting by the Minority Coalition Party. On the other hand, the 2<sup>nd</sup> Respondent argues that the Minority Coalition Party's compliance was subject before the High Court and later appealed against to the Court of Appeal and there is no material evidence presented to show that no election was conducted or a non-transparent process occurred.
39. I have read through the record presented before this Court and find it does not contain any evidence to the contrary in this regard, such as affidavits from aggrieved participants within the Minority Coalition Party, that the nomination was a sham or that a non-transparent process was conducted at all. This Court also observes that the Minority Coalition Party, the very entity whose process the Petitioner impugns was not joined in these proceedings as a party. The rule of natural justice against condemning a person or entity unheard equally applies to Constitutional Petitions.
40. In the circumstances, the Court must conclude that the Petitioner has not discharged the evidential burden as required under Sections 107 and 109 of the *Evidence Act* to show that the Minority Coalition Party defied or subverted the High Court's orders or the statutory procedures as he alleges.
41. In this Petition, this Court finds that based on the material presented before it, the Petitioner's arguments remain and stand largely unsubstantiated and uncorroborated, thus, it cannot invalidate the Minority Coalition Party's nomination solely on speculation.

### **Conclusion**

42. Having established that the Petitioner has not proven the alleged constitutional and statutory violations, the main orders sought being a declaration that the Independent Electoral Boundaries Commission Select Committee offends Articles 10 and 54(2) of *the Constitution*, and an order of certiorari to quash the list of nominees to the Independent Electoral Boundaries Commission Selection Panel are not merited on the available evidence.
43. Consequently, the Petition dated 25<sup>th</sup> October, 2024 is found lacking merit and is hereby dismissed.
44. Each party shall bear its own costs.



It is so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 24<sup>TH</sup> DAY OF JANUARY 2025.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

M/S Karue holding brief for Mr. Malenya counsel for Petitioner

Mr. Wambulwa counsel for 2<sup>nd</sup> Respondent

Court Assistant - Martin

