



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ELECTION PETITION NO.14 OF 2013**

**THE ELECTIONS ACT, 2011.**

**IN THE MATTER OF: CONTRAVENTION OF ARTICLES 90(1) (2) AND (3) OF THE  
CONSTITUTION OF KENYA.**

**IN THE MATTER OF: CONTRAVENTION OF SECTIONS 98(I) d AND (2) OF THE  
CONSTITUTION OF KENYA.**

**IN THE MATTER OF: CONTRAVENTION OF SECTION 34 & 36 OF THE ELECTIONS ACT  
2011.**

**IN THE MATTER OF: THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)  
PETITION RULES, 2013.**

**IN THE MATTER OF CONTRAVENTION OF SECTION 73 OF THE NATIONAL ALLIANCE  
PARTY NOMINATION RULES.**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF REGULATION 54 (1) AND (3) OF  
THE ELECTIONS (GENERAL) REGULATIONS 2012**

**BEN NJOROGE.....1<sup>ST</sup> PETITIONER**

**GODLIVER NANJIRA OMONDI.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**INDEPENDENT ELECTORAL BOUNDARIES**

**COMMISSION (I.E.B.C).....1<sup>ST</sup> RESPONDENT**

**LINET KEMUNTO NYAKERIGA.....2<sup>ND</sup> RESPONDENT**

**HEROLD KIMUNGE KIPCHUMBA.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

On 4<sup>th</sup> March 2013, Kenya underwent its first general elections under the 2010 Constitution. Kenyans participated in a momentous election in exercise of their democratic right to choose their leaders.

Elections were by way of polls and nomination as provided in the Elections Act were concluded thereby culminating to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent being nominated to the Senate. The dispute before this court is on an election on nomination in which a nominee is elected pursuant to the strength of the elected seats which his or her party garnered in the elections. This kind of election differs from the direct elections where candidates are specifically chosen by the people through a secret ballot.

The 1<sup>st</sup> Petitioner a member of TNA is a person with physical disability who relies on crutches for his mobility owing to the fact that his lower limbs were affected by polio when he was a child. The 2<sup>nd</sup> Petitioner is a member of ODM and a person with physical disability who relies entirely on a wheel chair for her mobility owing to the fact that she is living with cerebral palsy. The 1<sup>st</sup> Respondent is a commission established by Article 88 of the Constitution charged with the mandate of supervising elections to any elective body or office established under the Constitution. The 2<sup>nd</sup> Respondent is a member of TNA and a person living with visual disability having been born with the disability and the 3<sup>rd</sup> Respondent is a member of ODM and a person living with physical disability.

### **PETITIONER'S CASE**

On 12<sup>th</sup> April 2013, the petitioners filed this petition in Court being dissatisfied by the 1<sup>st</sup> Respondent's action of getting the names of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to the Senate. In the petition, the petitioners state that they were filled with hope after the promulgation of the Constitution because for the first time persons with disability and other marginalized persons would be accorded fair treatment and more so fair representation in matters affecting the country. That the Constitution under Article 97, 98 and 177 provided for how marginalized groups would be represented in the National Assembly, Senate and the County Assemblies and specifically Article 98(1) (d) of the Constitution provided that other than the elected members of the Senate there were to be two members, being one man and one woman representing persons with disability. These members described in Article 98(1) (d) of the Constitution were meant to be elected in accordance with Article 90 of the Constitution. Article 90 (1) provides that the Election of Members in Article 98(1) (d) shall be on the basis of proportional representation and by use of party lists meaning that parties are to be allocated slots proportional to the number of seats they had garnered and the members were to be selected from the party lists that each party submitted to the 1<sup>st</sup> Respondent before election. Further, Article 90(2) of the Constitution states that the 1<sup>st</sup> Respondent shall be responsible for the conduct and supervision of elections for the said seats where prior to the said elections they ought to have confirmed that the party lists issued by various parties have;

- i. Only appropriate number of qualified candidates;
- ii. Alternates between male and female candidates;
- iii. Reflects the regional diversity and;
- iv. Ethnic diversity of the people of Kenya;

Article 90(2) (b) of the Constitution provides that the names on the party list should be in the priority in which they are listed in a way that at the point of elections, the 1<sup>st</sup> Respondent only selects the names for candidates in the priority in which they appear.

It is the petitioners' contention that after the said processes were complete, both Petitioners emerged as the best candidates and were listed as 1<sup>st</sup> on their respective party lists while the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents emerged 2<sup>nd</sup> in both TNA and ODM party lists respectively.

It is the Petitioners argument that after the general elections, the 1<sup>st</sup> Respondent in contravention of Article 90(2) (b) of the Constitution and without any reason chose to interfere with the priority of the names as listed and published the names of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as duly nominated TNA and ODM representatives for persons with disability in Senate respectively vide a Gazette Notice published on the 20<sup>th</sup> March 2013. They further allege that just before gazettelement, the 1<sup>st</sup> petitioner had been informed of the intention by the 1<sup>st</sup> Respondent to publish names of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents but

when he met the 1<sup>st</sup> Respondent's chairperson Isaack Hassan, he was informed that he had a good case but that the names of the nominees had already been forwarded to the government printers thus his remedy would be to go to Court.

The petitioners further state that the 2<sup>nd</sup> Respondent despite not qualified to be on the TNA party list by virtue of her not being a member of TNA and not applying for the said position as required by Section 34(8) of the Elections Act and Rule 73 of the TNA nomination rules was nominated. To buttress this fact further the petitioners stated that in the 2<sup>nd</sup> Respondent's acceptance letter, she confirmed that she was not a member of TNA and had not applied for the said position. They also alleged that the actions of the 1<sup>st</sup> Respondent in appointing the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were in contravention of the law owing to the fact that it was not in tandem with Article 90 of the Constitution which requires that the names on party lists should be on priority. They premised their petition on the following grounds:-

- a. That the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners exercised their rights under Article 38 of the Constitution by participating in activities of their respective political parties where they applied to be nominated in their respective party lists as representatives of person with disability in the Senate as provided by Article 98(1)(d) of the Constitution.
- b. That both the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners emerged the best candidates and expected to be given priority in the event their parties got slots for representation they would have 1<sup>st</sup> priority in appointment to Senate.
- c. That after the General Elections, both TNA and ODM were entitled to one seat each to the Senate for representatives of persons with disability.
- d. That in contravention of the legitimate expectation created by Article 90(2) (b) of the Constitution the 1<sup>st</sup> Respondent gazetted the names of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's as the duly nominated representative of person with disability and skipped the names of the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners on the respective party lists.
- e. They contend that the 1<sup>st</sup> Respondent failed to carry out its duty of ensuring that all persons on the respective party lists are qualified candidates as required by Regulation 54(5) of the Elections (General) Regulations, 2012 which was to be met by each candidate.

That as a result of the said failure by the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent's name found its way into the TNA party lists for nominated senators for persons with disability yet she was and still is not a member of TNA, never applied for the said position in the party and had not produced any document in evidence that she met the threshold required under Article 99 of the Constitution. In the end, out of the unlawful actions of the 1<sup>st</sup> Respondent, the Petitioners' right to legitimate expectation had been contravened and Senate has unqualified members besides if the 1<sup>st</sup> Respondent's unlawful actions are not remedied as prayed, this will not only uphold the unfair administrative action meted against the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners but will affect future elections.

The petitioners therefore pray that;

- a. The honourable Court be pleased to issue a declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners are the duly elected candidates to the Senate as representatives of persons with disability as provided for under Article 98 (1) (d) of the Constitution.
- b. The Honourable Court be pleased to issue a declaration that the Election of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to the Senate as representatives of persons with disability under Article 98(1) (d) of the Constitution was unlawful and should be declared void.
- c. The honourable Court be pleased to issue a declaration that the 1<sup>st</sup> Respondent contravened the provisions of Article 90(2) (a) (b) (c) of the Constitution, together with Sections 34(5) (6) (8) and 36(2) of the Election Act and Regulation 54(1) (3) (5) of the Elections (General) regulations, 2012 by electing the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as representatives of persons with disability in Senate.
- d. The Honourable Court be pleased to nullify the election of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as representatives of persons with disability in Senate pursuant to Article 98 (1) (d) of the

Constitution which also contravened section 36(2) of the Elections Act.

- e. That the 1<sup>st</sup> Respondent also failed to carry out its duty of ensuring that all persons on the respective party lists are qualified candidates as required by Regulation 54(5) of the Election (General Regulations, 2012).
- f. That the honourable Court be pleased to nullify the gazette of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent as representatives of persons with disability in Senate conveyed through the Kenya Gazette Notice No 3508 of 20<sup>th</sup> March 2013.
- g. That this honourable Court be pleased to issue mandatory orders to compel the 1<sup>st</sup> Respondent to elect the 1<sup>st</sup> and 2<sup>nd</sup> Petitioner as representatives of persons with disabilities to the Senate pursuant to Article 98 (1) (d) of the Constitution by publishing a Gazette Notice electing the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners to the Senate.
- h. That costs should be borne by the 1<sup>st</sup> Respondent.

In support of the petition, the 1<sup>st</sup> Petitioner swore his affidavit and stated that he is a duly registered member of The National Alliance Party and a person with physical disability. He deposed that the Constitution created special seats for representatives of persons with disability in:

- a. The National assembly under Article 97(1) (c) of the Constitution.
- b. The Senate under Article 98(2) (d) of the Constitution
- c. The County Assembly under the Article 177(1) (c) of the Constitution.

That more specifically and in relation to this matter, Article 98(1) (d) of the Constitution provided that other than the elected Members of Senate there were to be two members, being one man and one woman representing persons with disability who were to be elected in accordance with Article 90 of the Constitution. That having well read and explained to him by his party and the 1<sup>st</sup> Respondent's officials, he deemed himself competent to represent the plight of disabled persons in Senate. He thus went through the rigorous process of applying for nomination so that his name would be on the party list for nominated Senate member to represent persons with disability. That the said process required him and that he met all qualifications as set under Article 99 of the Constitution. That after the nomination process was complete, he was listed the 1<sup>st</sup> nominee on the TNA party list and was followed by the 2<sup>nd</sup> Respondent in the list. That on the other hand, ODM had also carried out its nominations where the 2<sup>nd</sup> Petitioner was listed first in the party list while the 3<sup>rd</sup> Respondent was listed second.

That after the elections, both TNA and ODM were entitled to one slot each at the Senate for representatives of persons with disability which was determined based on the seats both parties garnered and according to proportional representation. That the 1<sup>st</sup> Respondent in contravention of Article 90(2) (b) of the Constitution and without any reason interfered with the priority of the names as listed and published. That upon further scrutiny on how the 1<sup>st</sup> Respondent handled the nomination exercise, he realized that they accepted and nominated the 2<sup>nd</sup> Respondent despite the fact that she did not qualify to be on TNA party list as she was not a member of TNA neither had she applied for the said position as required by section 34(8) of the Elections Act and Rule 73 of the TNA nomination rules. That the 2<sup>nd</sup> Respondent's acceptance letter annexed to the petition confirmed that she was indeed not a member of TNA and had not applied for the position.

The 2<sup>nd</sup> Petitioner also swore her supporting affidavit to support the petition on 12<sup>th</sup> April 2013 in which she stated that she was a registered member of ODM. That when she read the Constitution and understood that Article 97 (1) (c), 177(1) (c) and 98 (1) (d) accorded the opportunity for the disabled persons and opportunity of equitable representation in the county assembly National Assembly and Senate she took up the opportunity and applied for Senate nominee. Article 90 (2) (b) of the Constitution had directed political parties to create party lists for individuals who would qualify to be representatives of the people in the priority in which their names would appear on the list out of the possible two. That after participating in the nomination process she was listed 1<sup>st</sup> in the ODM list and the 1<sup>st</sup> Respondent accepted the list as it was. That after elections both TNA and ODM had one slots each for nominating a

person with disability to the Senate as per Article 98 (1) (d) of the Constitution. That in complete disregard to the list the 1<sup>st</sup> Respondent picked the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and gazetted them. That these actions were in contravention of Article 90 of the Constitution. She also contends that the 3<sup>rd</sup> Respondent was a contestant in the elections in Saimo/Kipsaraman Ward in the county of Baringo North therefore the 3<sup>rd</sup> Respondent ran for two concurrent elections an action which was illegitimate and completely unjustified and ought to have been noted by the 1<sup>st</sup> Respondent. That owing to the fact that the 3<sup>rd</sup> Respondent had participated in the elections he ought to have been automatically disqualified from running for the special seats as special seats were not meant to reward persons who had run for other elective seats and lost but they were for vulnerable people in the society who would otherwise not win.

### **1<sup>ST</sup> RESPONDENT'S CASE**

The 1<sup>st</sup> Respondent denied the allegations made by the petitioners and stated that elections in Kenya were governed by a set of regime which included the Constitution, the Elections Act 2011 and the Rules and Regulations made therefrom. That the elections of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent were conducted as provided by the set of legal regime and no breach of the Constitution, Statute or rules and regulations occurred during the process. The elections and gazette of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents names in Gazette Notice No 3508 on 20<sup>th</sup> March 2013 as Members of Parliament did not deviate from the normative process and procedures and was not lawful. That the 1<sup>st</sup> Respondent affirms and avers that there was no interference or improper motive on the election of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents which election was conducted and the result delivered in strict compliance with the latter, spirit and object of the Constitution. That the 1<sup>st</sup> Respondent in receiving party lists from all political parties that participated in the elections received party lists respecting the seats under Article 98 (1) (d) of the Constitution from TNA and ODM pursuant to and in compliance with Article 90 of the Constitution and Section 34 of the Elections Act, 2011 That TNA submitted two persons being the 1<sup>st</sup> Petitioner who is physically disabled and the 1<sup>st</sup> Respondent who is visually disabled. ODM submitted two persons being the 2<sup>nd</sup> Petitioner and the 3<sup>rd</sup> Respondent who are both physically disabled. That after the General Elections both TNA and ODM were entitled to one seat each under Article 98 of the Constitution and the two names were allocated to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and their names gazetted on 20<sup>th</sup> March 2013 in Gazette Notice No 3508. To achieve the principle of diversity and to ensure the two disability are represented it became Constitutionally necessary to allocate the two seats such as to have one physically disabled member and one visually disabled member and since TNA had one nominee being visually disabled, to strike the balance ODM was allocated the physical disability nominee. Further the 1<sup>st</sup> Respondent had to comply with the mandatory requirement that the two members be male and female therefore TNA was allocated the female seat while ODM was allocated the male seat. That at no time did the petitioners meet the chairman of the 1<sup>st</sup> Respondent and denied the statements that the Isaack Hassan stated that that they had a good case and that their remedy was in the Court. Through their Senior Legal officer, Moses Kipkoge, the 1<sup>st</sup> Respondent swore a replying affidavit 30<sup>th</sup> April 2013 and reiterated the contents of the response to petition filed by the 1<sup>st</sup> Respondent in verbatim.

### **2<sup>ND</sup> AND 3<sup>RD</sup> RESPONDENTS' CASE**

The 2<sup>nd</sup> Respondent, Linet Kemunto Nyakeriga filed her response to the petition on 30<sup>th</sup> April 2013. In her response she stated that she is visually impaired and a nominated member of the Senate from the TNA party having been gazette vide Gazette Notice No 3508 representing persons with disability. That her nomination as senator was in accordance with the Constitution, the Elections Act 2011 and The National Alliance Party Nomination Rules. That she was nominated after meeting all the qualifications she was therefore nominated on merit. She denied the allegation that she wrote an acceptance letter confirming that she was not a member of TNA and that she had not applied for the position. To buttress her position that she was a TNA member she swore an affidavit on 28<sup>th</sup> April 2013 where she stated that she was a registered member of TNA and annexed a copy of her membership card. That upon her registration she applied for the position of Member of Parliament to the Senate under disability therefore she did not

author the letter that had been annexed to the petition.

There was also the affidavit of George Onyango Oloo in supporting the response to petition by the 2<sup>nd</sup> Respondent that was sworn on 28<sup>th</sup> April 2013 which stated that he was the Secretary General of TNA party .He stated that the 2<sup>nd</sup> Respondent is a member of TNA Party to which her name was forwarded to the 1<sup>st</sup> Respondent for consideration as a TNA nominee for Senator for persons with disability and that it was not true as alleged by the 1<sup>st</sup> Petitioner that the 2<sup>nd</sup> Respondents nomination were in contravention of the Constitution ,the Elections Act 2011 and the National Alliance Nomination Rules.

The 2<sup>nd</sup> Respondent further swore a further affidavit on 31<sup>st</sup> May 2013. She stated that she applied to be a member of TNA on 24<sup>th</sup> December 2012 and issued with a membership card upon the payment of Ksh 10.Her membership card No being 4534708 was verified and confirmed by the TNA Secretary General. She also stated that the systems and structural flaws at the Registrar of Political Parties delayed the membership update and she should not be punished for mistakes of structural failures which were beyond her contemplation .She also stated that she represents persons with physical disability and can adequately represent the hopes and aspirations of the 1st and 2nd Petitioners. A further supplementary affidavit sworn on 3<sup>rd</sup> June 2013 by the 2nd Respondent stated that IEBC through the office of the Registrar of Political Parties in a letter dated 3<sup>rd</sup> June 2013 confirmed that the 2nd Respondent was indeed a member of TNA.

The 3<sup>rd</sup> Respondent swore his affidavit in reply to the petition on 18<sup>th</sup> July 2013. This reply to petition was filed later than the stipulated time for filling pleadings but the 3<sup>rd</sup> Respondent explained to the Court and other parties to this petition that he was involved in an accident that led to him being hospitalized and it was until his discharge he filed his reply. He deposed in his affidavit that he is a member of ODM party having applied for nomination in late November 2012 and was exempted from paying the requisite fee in the Persons with disability category. He stated that he was duly nominated as a senator to represent special interests as envisaged by the Article 98 (1) (d) of the Constitution. That the 1<sup>st</sup> Respondent under Article 90 of the Constitution:-

- a. Selected a person living with skin colour challenges (albinism) for the Member of the National Assembly from the then Central Province for ODM party.
- b. Selected a visually challenged person from the then Nyanza Province for TNA party.
- c. Selected the 3<sup>rd</sup> Respondent as the physically challenged person from the Rift Valley province.
- d. This balanced the regions the ethnicity and diversity of the different categories of disability.
- e. The nomination meets the Constitutional and legal threshold of regional diversity and ethnic diversity of the people of Kenya.
- f. The underpinning value that inform Article 90 (2) (b) of the Constitution is that the 1<sup>st</sup> Respondent has to balance and harmonize all the Constitutional values in the Preamble Article 10, 27, 98 (1) (d) Constitution and states that the nomination complies with Article 10,27 and 28(1) (d) of the Constitution as read with section 34,35 and 36 of the Elections Act 2011.He further stated that had the 1<sup>st</sup> Respondent selected the petitioner it would have occasioned a gross injustice as ODM party picked Hon Isaac Mwaura from the then Central province who already represents persons with disability.

That interfering with the decision of the IEBC will result in an injustice in that it will remove the only visually challenged nominee from the list of nominations and bring on board the Petitioners who are both physically challenged. That this will breach the Constitution because the 1st Petitioner and Isaac Mwaura already came from the same region and this will not reflect the map of Kenya in accordance with Article 90(2) (c) of the Constitution and it will breach the requirement of the ethnic diversity. That it will violate the basic structure, values and principles of Constitutions. Further the 2nd and 3rd Respondents are entitled to political rights under Article 38 as read with Article 27 and 90 (2) (b) (c ) of the Constitution and that the 1st Respondent followed section 36 (2) of the election Act and section 37(1) contemplates that once a nomination list is honored it is valid for five years.

He stated that the Petitioners were mistaken to invoke the doctrine of legitimate expectation under Article 10 of the Constitution in that having been duly nominated the 3rd Respondent is entitled to invoke the doctrine of legitimate expectation as both the 2nd and 3rd Respondent are legitimately, able and competent in representing the special interests of the disabled whom he was nominated to represent. That overturning the decision of the 1st Respondent will breach section 83 of the Election Act 2011 and will interfere with the decision of the 1st Respondent and it will subsequently offend international law and conventions especially Article 22,23,24, 25 of the Women's protocol to the African Charter on Human and People's rights. That paragraph 7 of the petition described him as the nominated senator representing persons with disability and he has done his work with all the determination and commitment and it is only fair and just that the prayers sought in paragraph 34(b) & (d) of the petition are not justified as the nomination and/or election of the 2nd and 3rd Respondents was lawful. That he has already demonstrated that the 1st Respondent acted lawfully, therefore the nomination of the 2nd and 3rd Respondents is valid and should not be interfered with. That the 1st Respondent in arriving at the decision, acted in good faith and in accord with the Constitution. That the 2nd Petitioner is not marginalized as she is the national chairperson of the Disabled Persons Association and earns huge allowances. That she is in a position of power to make a difference even without being nominated to the Senate. That she holds a powerful office in the disabled fraternity and will not suffer any prejudice or injustice in anyway. In response to the 2nd Petitioner's affidavit dated 12th April 2013 the 3rd Respondent responds that the 2nd Petitioner has not come to Court with clean hands as she did not disclose that she is the National chairperson, for the disabled persons Association. In response to paragraph 5, 6 and 7 the listing was based on zebra principles not necessarily meritocracy and it is not denied that he was in the list and that the 1st Respondent properly exercised their discretion to select him with a view to balance regional diversity and ethnic interests. The 1st Respondent exercised its mandate properly by selecting a combination that was in accord with the Constitution and reflects the map of Kenya therefore he was properly and legally nominated in accordance to the Constitution and the law and urges the Court to dismiss this petition and each party to bear their own costs.

### **ISSUES FOR DETERMINATION**

The mandate of any election Court is to ensure that the true manifestation of the Constitution as well as the electoral laws with respect to any particular elective position is upheld. This was stated in the Court of Appeal case of **Mumo Matemu –vs- Trustee Society of Human Rights Alliance & others C.A No 290 of 2013** that , *“The court is entitled to review the process of appointments to state or public officers for procedural infirmities as well as for legality .A proper review to ensure the procedural soundness of the appointment process includes an examination of the process to determine if the appointing authority conducted a proper inquiry to ensure that the person appointed meets the Constitutional requirements”* In determining this election petition this court must be guided by the Constitution which is the supreme law, the Elections Act, 2011 the Elections (General) Regulations, 2012 and all other relevant and enabling legislation. This court has been implored to consider the interpretation of the Constitution in a holistic approach as guided in decided cases. In the Ugandan case of **Tinyefuza –vs Attorney General, Constitutional Petition 1 of 2006** Munyindo DCJ observed of that, *“.....the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the Constitution...all provisions concerning an issue should be considered all together, the Constitution must be looked at as a whole”* Further the Court of Appeal in the case of **Centre for Rights Education and Awareness and Another vs John Harun Mwau & 6 others, Civil Appeal No.74 of 82 of 2012** the court stated that, *“....These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statutes which in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest – meaning that the court should strive to avoid adopting a construction*

which is in any way adverse to public interest, economic, social and political or otherwise....’In making a finding on the issues raised on Articles of the Constitution that affect this petition this Court acknowledges that it has the duty to look at the Constitution holistically.

### **BURDEN OF PROOF**

The burden of proving any allegation of electoral breach, misconduct and/or irregularity lies squarely upon the petitioner. The legal principle is that ‘*he who alleges must prove*’. In the case of **GEDION MWANGANGI WAMBUA VS. IEBC & 2 OTHERS E.P. 4 OF 2013** it was held that it is a presumption of law that elections were properly conducted and as such the burden is always upon the petitioner to prove otherwise. This was further buttressed in the case of **JOHO VS. NYANGE & ANOTHER (2008) 3 KLR E.P**, where the court in upholding the position that the burden of proof lies with the petitioner held that ,“*Election petitions are no ordinary suits but disputes in rem of great public importance. They should not be taken lightly and generalized allegations are not the kind of evidence required in such proceedings. Election petitions should be proved by cogent, credible and consistent evidence.....The burden of proof in election petitions lies with the petitioner as he is the person who seeks to nullify an election .....*”.

With these principles in mind, I shall now deal with the specific issues for determination in this petition. I have carefully considered the pleadings and submissions together with the authorities relied on. Parties agreed on the following issues for determination during the pre- trial conference on 27<sup>th</sup> June 2013.

1. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were validly elected within the meaning of Article 98 (1) (d) as read with Article 90 of the Constitution.
2. What is the mandate of the 1<sup>st</sup> Respondent under Article 90 as read with Article 98 (1) (d) of the Constitution?
3. Who shall bear the costs of this petition?

Parties also agreed to conduct this petition by way of submissions. This court in determining the issues agreed is guided by the provisions of Article 259(1) of the Constitution with regards to the principles applicable in the construction of the interpretation of the Constitution together with other legislation. This Article provides that (1) *This Constitution shall be interpreted in a manner that –*

- a. *promotes its purposes, values and principles;*
- b. *advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;*
- c. *permits the development of the law; and*
- d. *contributes to good governance.*

### **ISSUE NO.1 whether the 2nd and 3rd Respondents were validly elected within the meaning of Article 98 (1) (d) as read with Article 90 of the Constitution.**

The petitioners state that political parties submitted their respective party lists on 30<sup>th</sup> January 2013 to the 1<sup>st</sup> Respondent for scrutiny to determine whether the political parties nominated the individuals on the party lists according to the Constitution, statute and party nomination rules. It is the petitioners’ submissions that the 1<sup>st</sup> Respondent made no corrections or verifications on the lists and accepted the lists as they were. That after the general elections the 1<sup>st</sup> Respondent in playing its supervisory mandate determined that both TNA and ODM were entitled to one slot each in the persons with disability category. That despite the list being closed the 1<sup>st</sup> Respondent decided to skip the petitioners in their respective lists and selected the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent. The petitioners contend that Article 90 of the Constitution was put in place to ensure that persons who were vulnerable and could not vie for seats successfully to be considered as special persons and given nomination and relied on the case of **Commissioner for the Implementation of the Constitution –vs- AG & Others** .They stated that this

has distributed roles in connection with the special seats between political parties, the 1<sup>st</sup> Respondent and the people of Kenya in that political parties choose from among their members candidates for the election of the special seats and determining the priority as between such candidates. The petitioners counsel submitted that the 1<sup>st</sup> Respondent wants to introduce the appointment of nominees through the back door as was done in section 33 of the repealed Constitution. The 1<sup>st</sup> Respondents responsibility of ensuring that the lists submitted by the political parties conform to the requirements of the Constitution as well as other laws and that the candidates are qualified to contest for those positions. That once the 1<sup>st</sup> Respondent had determined that the list was fully compliant then it had no mandate to interfere with the party list. For this argument the petitioners relied on the case of **Commission for the implementation of the Constitution –vs the AG & others CA 351 of 2012** and stated that the if the 1<sup>st</sup> Respondent is allowed to select persons as they wish in their party lists, this will take the electoral process back to the previous Constitution and this would bring absurdity if the 1<sup>st</sup> Respondent had powers to deny any person duly elected by the people of Kenya a chance to serve the people. They contend that the action of the 1<sup>st</sup> Respondent was contrary to the law and was an abuse of the process in that it violated clear provisions of the Constitution by a body that has sworn to defend the Constitution, it violated the spirit of the new Constitution by eliminating merit based system of election to the special seats as entrenched in the Constitution and substituting it with corruption and nepotism prone system of direct selection of candidates to these seats .That it violated the rights of political parties to determine who among their candidates got to occupy the seats .They relied on the case of **National Gender and Equality Commission -vs- IEBC and others Petition Number 147 of 2013** which stated that, *“This means that the IEBC and other commissioners must work in concert to ensure that the rights of persons with special interest identified by Article 90 are realized”* The petitioners also distinguished section 33 of the repealed Constitution and Article 90 of the current Constitution Mr. Arwa submitted it was put in place to ensure that the mischief created by Section 33 of the Constitution was remedied .The selection process created by section 33 was unfair to the special interest groups as the said seats were used as a dumping ground for election losers. For this he relied on the case of the **Commissioner for the implementation of the Constitution –vs- the Attorney General &Others in Civil Appeals 351 of 2012**

On the other hand the 1<sup>st</sup> Respondent submitted that while observing its duty as a Constitutional commission it took into account the category of disability as provided under Regulation 55 (2), the need for equity in the distribution of the only available party /special seats under Article 98 (1) (d) of the Constitution in keeping with its obligations to observe the national values and principles of governance which include equity. That the electoral system complies with the principle of fair representation of persons with disability as provided in Article 87 of the Constitution and the principle of diversity is met. That Article 94 (2) expressed that in conducting the elections in the manner in which they did they satisfied the objectives to promote Constitutionalism and ensured that the nominees that appeared on the party lists were qualified .that they complied with their parties which party lists confirmed the status of the petitioners and Respondents to both TNA and ODM. He relied on the case of **Commissioner for the Implementation of the Constitution –vs- the AG & others [2013]e KLR** where the Court Of Appeal held that, *“Article 90 of the Constitution decrees that the party lists must comply with two discernible principles namely: The requirement for gender equity in that the qualified candidates must be listed in order of priority but that order must alternate between men and women .The requirement for the lists to reflect the regional and ethnic diversity of the people of Kenya .This is meant to ensure that no ethnic group or religion dominates the lists provided by the parties. The exception being the county assembly”*

**Further Section 73 of TNA Nomination Rules** states that in identifying persons for party lists for the National Assembly and the Senate the party list selection panel shall apply the following guidelines.

- a. That every person listed on a party list shall have applied for the position.
- b. That every person so listed shall have met the requirements for that position in these guidelines and any other written law.
- c. **That the party list represents the diversity of the people of Kenya**
- d. That there shall be consideration for youth, women, persons with disabilities and marginalized and minority groups
- e. That every person so listed shall have been active in the propagation of the party’s principles and

objectives on a national scale.

The 2<sup>nd</sup> Petitioner annexed the party list formula and Rules of Submission On the part for the Senate (Person with Disability) Party List were that:-

1. The Senate (Persons with Disability) party list must have 8 names of the qualified persons with disability nominees, having one woman and man.
2. The nominees to the party list must have similar qualifications as those required of candidates contesting for elections as members of the Senate.
3. In order to meet the requirement of regional diversity not more than one nominee in the party list shall be a registered voter in the same county.
4. In order to meet the requirement of ethnic diversity not more than one nominee in the party list shall be from the same ethnic community.

It is not in dispute that the lists as presented to the 1<sup>st</sup> Respondent comprising of the petitioners and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were qualified in their respective parties otherwise the parties would not have forwarded their names to the 1<sup>st</sup> Respondent. They must have complied with the party list formula and Rules of Submission where each political party participating in the general election has to submit the following requirements apply to all party lists. At section (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.

On whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were validly elected, the 1<sup>st</sup> petitioner contends that the Article 92 (2) (b) of the Constitution required a candidate to be qualified in order to be listed in the party list. They contend that the 2<sup>nd</sup> Respondent was not qualified for the reason that Rule 73 of the TNA Nomination Rules required amongst other requirements that every person listed on a party list shall have applied for the position and that every person so listed shall have met the requirements for that position in those guidelines and any other written law. The 1<sup>st</sup> petitioner submitted that the 2<sup>nd</sup> Respondent never applied to be nominated as a member of the Senate pursuant to Article 98 (1) (d) of the Constitution as required by the party nominations. They state that this position was confirmed by the 2<sup>nd</sup> Respondents acceptance letter dated 22<sup>nd</sup> March 2013 where she stated that *“Sir, I really appreciate for considering me to such a big position especially noting that I never applied for any of the seats neither as a senator or any other”* They allege that the letter was read and explained to her by her brother.

That the 1<sup>st</sup> petitioner produced copies of the documents he used to apply for his nomination forms and submitted that the 1<sup>st</sup> Respondent dealt with and issued nominations to a stranger being the 2<sup>nd</sup> Respondent whom they had no knowledge of. The 1<sup>st</sup> Petitioner also contends that the 2<sup>nd</sup> Respondent was not a member of TNA by the time she was nominated by TNA. The petitioner carried out a search from the Political parties register and received confirmation that the 2<sup>nd</sup> Respondent was not a member of TNA. He states that the card evidenced by the 2<sup>nd</sup> Respondent was not signed by her as she constantly signed using her thumb print and her name superimposed on the said card. He contends that the 2<sup>nd</sup> Respondent only became a member on 3<sup>rd</sup> June 2013. He cited Rule 2 (f) of TNA Nomination Rules which required that for one to be a member she had to pay a fee. He also quoted a paragraph of the letter purported to have been authored by the 2<sup>nd</sup> Respondent that stated that, *“You as well allowed TNA to submit my name to your good commission even without having registered myself as a member of TNA to date. I promise that once they resume their membership registration exercise, I will apply for registration as a member of TNA”*

The 1<sup>st</sup> Respondent stated that the allocation of the seats to the respondents met the need to offer a fair representation of various categories of disabilities as recognized by the court. He further submitted that it was important to state that TNA party membership of the 2<sup>nd</sup> Respondent was confirmed by the secretary general of TNA George Onyango Oloo in an affidavit sworn on 28<sup>th</sup> April 2013.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that the purported letter that was exhibited by the petitioner was not factual as the 2<sup>nd</sup> Respondent was visually challenged and could not see the contents of the letter. That the letter is not written in braille confirming that the same was a forgery by the 1<sup>st</sup> Petitioner and misrepresented to the 2<sup>nd</sup> Respondents as congratulatory message. They further submitted that the respondents were qualified in all aspects to be nominated as they met the legal and Constitutional threshold since they were male and women respectively and their nomination reflects regional diversity as one comes from Rift Valley and other from Nyanza. The 2<sup>nd</sup> Respondent also explained how she was nominated and that her account was not controverted by the petitioners. She denied that she was not a member of TNA and produced a letter from the Registrar of Political Parties confirming that she is indeed a member of TNA.

On the 3<sup>rd</sup> Respondent's lack of qualification the 2<sup>nd</sup> Petitioner stated that the 3<sup>rd</sup> Respondent was participating in two elections. The 2<sup>nd</sup> Petitioner attached a list from ODM which showed that the 3<sup>rd</sup> Respondent was nominated to run for another election being county ward representatives in Saimo /Kipsaraman ward in Baringo North Constituency, Baringo County. She contends that elections for persons who can otherwise run for other elective posts should be allowed to do so and if they lost they should not be rewarded. It was meant to the most benefit vulnerable persons in the society. That the 3<sup>rd</sup> Respondent has sufficient muscle to run for competitive elections and was not entitled to run for the proportional representative elections. His name was submitted for two parallel elections despite the fact that under Article 98 (1) (d) of the Constitution was meant for the most vulnerable of groups-persons who had no muscle to receive nominations to run for another political seat.

This court appreciates that the petitioners and the Respondents underwent the nomination exercise in their respective parties to have emerged successful in the lists. Indeed, it is the petitioners' submission that they emerged tops in their respective lists followed by the respondents.

This court in making the finding on whether or not the 2<sup>nd</sup> Respondent was a registered member of TNA and whether she was qualified for the nomination, is of the view that this allegation is an allegation that should have been raised before the general elections were conducted as they are referred to as pre-election disputes and the 1<sup>st</sup> Respondent should have arbitrated on this issue. I say so because the 1<sup>st</sup> Respondent through its Gazette Notice No 139 dated 3<sup>rd</sup> December 2012 had published the Rules of procedure on settlement of disputes. This instrument defined a dispute to mean a complaint, challenge, and claim or contest relating to any stage of the electoral process and includes an objection to the acceptance of the nomination papers of a candidate by the Returning Officer. The 1<sup>st</sup> Petitioner had the right to lodge this complaint under Rule 5 where he would have been heard and a determination made by the 1<sup>st</sup> Respondent. This court therefore will not determine the issue of the registration and qualification of the 2<sup>nd</sup> Respondent since the 1<sup>st</sup> Petitioner had not exhausted other dispute resolution mechanism that have been provided by the law under Article 88 (4) (e) of the Constitution and Section 74 (1) of the Elections. The court also notes that the 1<sup>st</sup> Petitioner acknowledged that the party list that was presented by TNA was valid and went ahead and stated that he was listed as No 1 followed by the 2<sup>nd</sup> Respondent. It cannot therefore be possible for the 1<sup>st</sup> Petitioner to affirm that the 2<sup>nd</sup> Respondent was validly in the list then turn around again and say she was not qualified. The 1<sup>st</sup> Petitioner has produced a letter purportedly authored by the 2<sup>nd</sup> Respondent stating that she acknowledged her nomination to the Senate despite her not being a Member of TNA. There are facts that need to be looked at in this letter; The 2<sup>nd</sup> Respondent is visually blind, it is the 2<sup>nd</sup> Respondents submission that she was told that the letter contained a congratulatory message. I will therefore take the contents of this letter with a pinch of salt and chastise her brother for lying to her since it seems that this letter was meant to be used against her in this petition. There is also the affidavit of George Onyango Oloo the Secretary General of TNA stating that the 2<sup>nd</sup> Respondent is a registered member of TNA. This goes in line with the requirements of section 17 (a) and 18 of the Political parties Act. Section 17 (1) (a) states that, "*A political party shall maintain at its head office and at each of its county office in the prescribed form an accurate and authentic record of a register of its members in a form prescribed in the second schedule.* Further Section 18 (1) of the Political Parties Act state that *the Registrar may issue a written notice in the prescribed form to the chairperson or*

secretary general of a political party to furnish for inspection by the Registrar the records required to be maintained under section 17 or such information as is reasonably required by the Registrar to ensure compliance with the provisions of this Act. This confirms that each political party was a custodian of the registers of their members. Therefore, the 1<sup>st</sup> Petitioner's claim that the 2<sup>nd</sup> Respondent was not a member of TNA and was not validly nominated by the party fails for lack of sufficient proof in this claim.

There is also the claim by the 2<sup>nd</sup> Petitioner that the 3<sup>rd</sup> Respondent had participated in the poll elections on 4<sup>th</sup> March 2013 as a ward representative in Saimo /Kipsaraman ward and therefore he could not be nominated having had the opportunity to contest and failed the nomination meant that the 1<sup>st</sup> Respondent rewarded a loser. The 1<sup>st</sup> Petitioner annexed a schedule that showed that the 3<sup>rd</sup> Respondent was cleared by ODM to run for the election in Saimo/Kipsaraman ward.

She also stated that the elections were meant for persons who were vulnerable and cited the case of **Commissioner of the Implementation of the Constitution –vs- The Attorney General & Others in Civil Appeal No 351 of 2012** where the Court of Appeal in barring the names of the presidential candidate and Deputy Presidential candidate in a party list held that, “...that the interpretation of Article 97 (1) (c) of the Constitution invites the application of the esjudem rule. The youth, persons with disability and workers clearly fall in the category of the marginalized the disadvantaged and the vulnerable .Those who are sufficiently empowered to muscle their way generally speaking into inner sanctums of political and state power.” The 1<sup>st</sup> Respondent did not adequately respond to this allegation and the only defence it had was that the Harold Kimunge Kipchumba who was gazetted by the 1<sup>st</sup> Respondent in Gazette Notice 3508 was different from the Harold Kipchumba who was cleared by ODM to vie for the Saimo /Kipsaraman in Baringo North. While this court appreciates section 34 (9) of the Elections Act, the same statute only provides for the president and the deputy president but is silent on the other candidates. Therefore, the 2<sup>nd</sup> Petitioner's claim that the 3<sup>rd</sup> Respondent had previously participated in the poll elections was not sufficiently proved and this claim is subsequently dismissed. I subsequently hold that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents being members in their respective parties qualified for nominations and also find that the list was valid as presented by the political parties.

#### **ISSUE NO 2 What is the mandate of the 1st Respondent under Article 90 as read with Article 98 (1) (d) of the Constitution?**

This court after reading and listening to the submissions recognizes the mandate given to the 1st Respondent by the Constitution under **Article 88. (1) (4)** which states that, “ *The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—*

*(d) the regulation of the process by which parties nominate candidates for elections;*

*(k) the monitoring of compliance with the legislation required by Article 82 (1) (b) relating to nomination of candidates by parties”.*

The role of IEBC in conducting and supervising the elections is located in the context of the Article 90 which is given effect by the provisions of the Elections Act under sections 35, 36 and 37 to provide the framework for the implementation of Article 90. Its responsibility under the Constitution is clear and definite and one that cannot be handed over nor can it be compromised for whatever reason. The requirements of the Constitution and the law must be seen to have been complied with. IEBC is obliged in accepting party lists to ensure that the provisions of the statutes are adhered to .Regulation 55 (2) of the General Regulations also empowers the IEBC to ensure that the party lists comply with the requirements of the Constitution, the Elections Act and the Regulations.

With regards to this petition the sections that the 1st Respondent in designating the seats had to comply with are:-

**Article 90** which provides that:-

(1) 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 county assemblies under 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 the seats 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 party list reflects the regional and ethnic diversity of the people of Kenya.

(3) The seats referred to in clause (1) shall be allocated to political parties in proportion to the total number of seats won by candidates of the political party at the general election.

**Article 98. (1) (d)** which provides that the Senate consists of two members, being one man and one woman, representing persons with disabilities;

The relevant sections under the Act are listed below.

**Section 34. of the Elections Act which provides:-**

(1) The election of members for the National Assembly, Senate and county assemblies for party list seats specified under Articles 97 (1) (c) and 98 (1) (b) (c) and (d) and Article 177 (1) (b) and (c) of the Constitution shall be on the basis of proportional representation and in accordance with Article 90 of the Constitution.

(2) A political party which nominates a candidate for election under Article 97 (1) (a) and (b) shall submit to the Commission a party list in accordance with Article 97 (1) (c) of the Constitution.

(3) A political party which nominates a candidate for election under Article 98 (1) (a) shall submit to the Commission a party list in accordance with Article 98 (1) (b) and (c) of the Constitution.

(4) A political party which nominates a candidate for election under Article 177 (1) (a) shall submit to the Commission a party list in accordance with Article 177 (1) (b) and (c) of the Constitution.

(5) The party lists under subsection (2), (3) and (4) shall be submitted in order of priority.

(6) The party lists submitted to the Commission under this section shall be in accordance with the Constitution or nomination rules of the political party concerned.

(7) The party lists submitted to the Commission shall be valid for the term of Parliament.

(8) A person who is nominated by a political party under subsection (2), (3) and (4) shall be a person who is a member of the political party on preceding the date of submission of the party list by the political party.

**Section 36. of the Elections Act provides**

- (1) A party list submitted by a political party under Article 98 (1) (d) of the Constitution shall include two candidates
- (2) A party list submitted under subsection (1) (a), (c); (d), (e) and (f) shall contain alternates between male and female candidates in the priority in which they are listed.
- (4) Within thirty days after the declaration of the election results, the Commission shall designate, from each qualifying list, the party representatives on the basis of proportional representation.
- (6) The allocation of seats by the Commission under Article 98 (1) (b), (c) and (d) of the Constitution shall be proportional to the number of seats won by the party under Article 98 (1) (a) of the Constitution.

### **The Elections (General) Regulations Rules**

**Rule 54. (1)** Each political party shall submit to the Commission a party list of all persons who would stand elected if the party were entitled to seats in the National Assembly, Senate or the County Assembly, as the case may be on the basis of proportional representation in accordance with Article 90 of the Constitution and sections 34, 35, 36 and 37 of the Act.

(2) The party list referred to in sub regulation (1) shall contain the name, address, age, sex, disability and category of disability, phone number, occupation, elective post sought and such other qualifications as are provided under the Constitution and the Act.

(3) A party list submitted under sub regulation (1) shall be in accordance with section 36 of the Act, and shall be-

(a) by signed by the authorized official of the political party submitting the party list; and

(b) be submitted in hard copy and in electronic form.

(4) Each political party list nominee shall after nomination, submit to the Commission a letter stating his or her intention to serve if nominated.

(5) The Commission may reject a nominee submitted by a political party for any elective post if that nominee is not qualified to be elected to the office for which the nomination is sought as specified under the Constitution or the Act.

(6) The rejection by the Commission of a nominee under this regulation shall not invalidate the entire party list submitted by the political party.

(7) The Commission, after making the decision to reject a nominee, informs the political party concerned of that decision and requests that political party to submit another name within such time as the Commission shall determine.

(8) The Commission shall publish the final party list in at least two newspapers with nationwide circulation.

**Rule 55. (1)** The party list contemplated under regulation 54 shall be prepared in accordance with the nomination rules of the political party.

(2) The Commission may reject any party list that does not comply with the requirements of the Constitution, the Act or these Regulations.

(3) The political party whose party list or nominee has been rejected by the Commission under sub regulation (2) shall resubmit the party list or nominee within such period as the Commission may specify.

(4) A political party submitting a party list under regulation 54 shall submit a declaration to the effect that the political party has complied with its rules relating to the nomination of the names contained in the list.

I now turn to the mandate of the 1<sup>st</sup> Respondent as posed in this issue. IEBC received the party list. Under Article 90 (1) and Article 98 (1) (d) this is the subject of this petition. Elections were to be on the basis of proportional representation by use of a party list. The word proportional representation as per the **Black's Law Dictionary 9<sup>th</sup> Edition** means an *electoral system that allocates seats to each political party group in proportion to its popular party strength*. In this election our laws provides for proportional representation through party lists which were to be used to facilitate the election of persons to occupy various seats. Under Article 98 (1) (d), the Senate was to consist of two members one man and one woman representing persons with disabilities. Having received the party list, IEBC under Article 90 was to ensure that the party list comprised the appropriate number of qualified candidates and alternate between male and female candidates in the priority in which they were listed. The petitioners contention is that IEBC did not comply with this requirement and on the other hand the 1<sup>st</sup> Respondent argues that they applied the formula that “the number of seats won by a political party divided by the total number of seats multiplied by available seat” where after TNA and ODM became entitled to one seat each of the two seats under Article 98 (1) (d) of the Constitution. That the two seats were allocated to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent and their names published in Gazette Notice No 3508. That to achieve the principle of diversity and to ensure that the two disabilities (physical and visual) are represented, it became Constitutionally necessary to allocate the two seats such as to have one physically disabled member and one visually disabled member. Since TNA had one of its nominees being visually disabled, in order to strike the balance TNA nominee with visual disability, the 2<sup>nd</sup> Respondent was allocated a seat despite being listed number two.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent argued that since TNA had already nominated Isaac Mwaura who is a person with albinism and is from Central, Kenya the 1<sup>st</sup> Respondent had a Constitutional responsibility of ensuring the requirement of regional and ethnic diversity by nominating the 2<sup>nd</sup> Respondent and the fact that Kanaiza Daisy Nyongesa had been nominated from Western province then it was imperative for the 1<sup>st</sup> Respondent to nominate the 3<sup>rd</sup> Respondent from Rift Valley province. I respectfully disagree with the submissions of the learned counsel for the reasons that the nominations of Hon. Mwaura and Hon Nyongesa were from different categories that of members nominated to the National Assembly and members nominated to the Senate to represent the youth respectively. In making this allocations Parliament was aware of the proportional requirement in the allocation of seats.

Back to the mandate of the 1<sup>st</sup> Respondent, the crucial article of the Constitution is Article 90 (2) (b). I note that IEBC did not return the list and therefore they considered them valid. Under Article 90 (1) (b) it had to look at the proportional representation coupled with the requirement of sub article (b) that the candidates were qualified and that they were alternates of men and women in priority of which they were listed. The parties complied by submitting male and female candidates and they prioritized them. The wording of Article 98 (2) (c) in my view is mandatory in that IEBC's mandate was to consider the party lists in order of priority in which the nominees were listed. To argue that they had to achieve the principle of diversity and to ensure the two disabilities of physical and visual were represented and that they had to strike a balance in my view was wrong in light of Article 90 (2) (b) of the Constitution. I note that no disability is superior to another neither no disability is vulnerable to another. Disability is not inability. I say so for I take judicial notice that in the current Parliament we have Members of Parliament who are disabled and have performed their duties as required by the law and have performed their duties with ease and satisfaction. I also note that the 3<sup>rd</sup> Respondent has had the opportunity of holding public office which I greatly applaud.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in their submissions highlighted international conventions and treaties that support this petition as Article 13,2, of the African Charter on Human and Peoples Rights, Article 23 of the Women's Protocol in ensuring protection of women with disabilities and ensuring that the rights of women with disabilities are free from violence and are treated with dignity. I appreciate the highlighted instruments but this court has to read them in line with the Constitution of Kenya and in light of the claim

of the petitioners.

It has been held that if there is some appearance of compliance with the principles laid down in the Constitution and the law in the conduct of an election an election court will be slow in upsetting the will of the people as expressed in the results unless the noncompliance with the law affects such results. The question this court is asked to consider is whether the 1<sup>st</sup> Respondent acted in compliance with the requirements of the Constitution and the Elections Act. In the case of **Re Kensington North Parliamentary Election [1960]2 ALLER 150** Streatfield stated that, “*it is for this court to make up its mind on the evidence as a whole whether there was a substantial compliance with the law as to elections or whether the act or omission affected the result*”. I am also persuaded by the case of **Kabatsi –vs Anifa Kawooya & Anor Election Petition No 25 of 2005** where the court held that, “*An election is a process encompassing several activities from nomination of candidates through to the final declaration of the duly elected candidate. If any one of the activities is flawed through failure to comply with the applicable law it affects the quality of the electoral process and subject to the gravity of flaw it is bound to affect the election results ....If any declaration is invalid by reason of noncompliance with the applicable law it affects the quality and result of the electoral process*” It is clear from the submissions that the 2<sup>nd</sup> Respondent while designating the seats to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not follow the law as required of them to the latter in Article 90 (2) (b). The 1<sup>st</sup> Respondent was required to ensure that while they designated the seats they considered the list on priority and in alternates of woman and man. What the 1<sup>st</sup> Respondent did was to designate the number two in the TNA and ODM lists which is contrary.

This Court wholly associates itself with the Court of Appeal case of **Attorney General of Tanzania –vs- Rev Christopher Mtikila [ 2010]2 EA** where it was held that, “*The court can never disregard clear words of a provision of the Constitution*” In the case of **Morgan & Others –vs- Simpson & Another [1974] ALL ER 722** the court stated the principles upon which an election could be nullified as, “*an election court was required to declare as election invalid if irregularities in the conduct of elections had been such that it could not be said the election had been conducted as to be substantially in accordance with the law as to elections or if the irregularities had affected the results*”

This court finds that the 1<sup>st</sup> Respondent contravened the provisions of Article 90 (2) (b) of the Constitution and the sections 34 (5) (6) (8) and 36 (2) of the Elections Act such that the contravention affected the results of the elections and that the gazette persons in Gazette Notice No.3508 did not reflect the will of the people.

I therefore declare that the election of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent contravened the provisions of Article 90 (2) (a) (b) (c) of the Constitution as representatives of persons with disability in Senate pursuant to Article 98 (1) (d) of the Constitution. The election of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent is therefore nullified. Gazette Notice No 3508 to the extent of the gazette of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents is nullified. I find that the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners as representatives of persons with disability were duly nominated and qualified to be elected pursuant to Article 98 (1) (d) of the Constitution. IEBC shall publish a Gazette Notice electing the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners to the Senate.

### ISSUE NO 3. Who pays Costs?

Costs usually follow event. Pursuant to Rule 34 (1) (a) and (b) of The Elections (Parliamentary and County Elections) Petition Rules 2012, this Court is granted power to specify the total amount of costs that shall be paid in a petition. This Court has discretion to grant the costs. Having found that the 1<sup>st</sup> Respondent has contravened the provisions of the law this court finds that the 1<sup>st</sup> Respondent shall pay of Ksh 2, 000,000 to the petitioners as costs. No costs to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The Ksh 500,000 that had been deposited in court by the petitioners should be refunded to them forthwith.

Orders Accordingly.

I wish to thank Counsels for their preparations, arguments and submissions.

Dated, Signed and delivered in Court this 27th September 2013

**R.E OUGO**

**JUDGE**

In the presence of:-

Mr. J.O .Arwa .....for the Petitioners

Mr.Isaack Odhiambo h/b for Mr. Murugu.....for the 1st Respondent

Mr. E. Ondieki..... for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent

Mary Kamau.....Court Clerk