



REPUBLIC OF KENYA



**Situma & 2 others v Kiboi (Election Petition Appeal E002 of 2023)
[2023] KEHC 21451 (KLR) (1 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21451 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
ELECTION PETITION APPEAL E002 OF 2023**

AC MRIMA, J

AUGUST 1, 2023

BETWEEN

ANNE KHAKASA SITUMA 1ST APPELLANT

**FORUM FOR RESTORATION OF DEMOCRACY (FORD –
KENYA) 2ND APPELLANT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 3RD
APPELLANT**

AND

LYDIA CHELIMO KIBOI RESPONDENT

*(Being an appeal arising from the judgment of Hon. Samuel K. Mutai, SRM, delivered on
20th March 2023 in Kitale Chief Magistrates Court Election Petition No. E001 of 2022)*

JUDGMENT

Introduction:

1. The dispute, subject of this judgment, has its roots in Article 177 of *the Constitution* which provides for Membership of County Assembly.
2. It is primarily centred on Political Parties' intricacies that ultimately yield publication and gazettelement of Party Lists for nomination of persons into Parliament and County Assemblies by the Independent Electoral and Boundaries Commission.

Background:

3. The events that precipitated the appeal herein can be traced to the decision of both Forum for Restoration of Democracy- Kenya (hereinafter 'FORD-K' or the '2nd Appellant'), and Political Parties Dispute Tribunal (hereinafter 'PPDT' or 'The Tribunal').



4. In the August, 2022 General Election cycle, Lydia Chelimo Kiboi, the Respondent herein, applied to her party, FORD-K for inclusion of her name in the Trans-Nzoia County Assembly Gender Top-Up List category for purposes of nomination.
5. When Independent Electoral and Boundaries Commission (hereinafter 'IEBC' or 'Commission' or '3rd Appellant') published the Political Parties Nomination List, the Respondent's name was included in the Bungoma County Gender Top-Up List as opposed to that of Trans-Nzoia County.
6. Disgruntled, the Respondent raised the issue with her party, FORD-K indicating that her name had erroneously been included in the Bungoma County Gender Top-Up List, despite being an Ogiek/Ndorobo, hailing from Endebes Sub-County, Matubei Ward in Trans-Nzoia County, a marginalized and minority community.
7. The Respondent urged FORD-K to rectify the error by transferring her name to Trans-Nzoia County.
8. FORD-K declined the Respondent's request for among other reasons; that it had already submitted its nominees to IEBC, that it had not received any formal application from the Respondent showing interest to be nominated to the County Assembly and that the Respondent had not submitted Chapter Six documents.
9. Subsequently, the Respondent escalated the dispute to PPDT explaining her predicament. She complained, inter-alia, that she had paid FORD-K application fees and despite coming from a recognized minority and marginalized communities in Trans-Nzoia County, only Luhya and Kalenjin nominees were in the list to the exclusion of other communities.
10. At the PPDT, the Respondent sought the following reliefs: -
 - a. An order directing the Respondent to amend its Bungoma Gender Top Up by deleting the Complainant's name therein and transferring it to the Trans-Nzoia Gender Top Up List and prioritized at number 1 for being the most qualified.
 - b. In the alternative to (a) above, the interested party amends the Respondent's Bungoma Gender Top Up by deleting the Complainants' name therein and transferring it to the Trans-Nzoia Gender Top Up List and prioritized at number 1 for being the most qualified candidate for gazette.
 - c. Costs of the complaint be borne by the Respondent.
11. Upon considering the rival arguments, The Tribunal in their judgment of 8th August, 2022 was of the finding that, since the dispute was between a member of a political party and a political party, it had jurisdiction under Section 40 of [Political Parties Act](#) to resolve it.
12. It was further its finding that it had jurisdiction to handle disputes arising from party nominations since the Respondent herein had unsuccessfully attempted to resolve the dispute through Internal Dispute Resolution Mechanism.
13. In the end, the Tribunal found that the Respondent's application to FORD-K to be included in Gender Top-Up List was proper in form and substance despite not having attached Chapter-six clearances.
14. The Tribunal further found fault in the FORD-Kenya's party list for not having a reason as to why it lacked a representative from Ogiek community and how it reached the conclusion that the Respondent herein was not fit to serve in the Trans-Nzoia County Assembly where she resides.



15. On the foregoing, the Tribunal found the exclusion of the Respondent herein to have infringed on her rights. Accordingly, FORD-K was ordered to amend its Bungoma County Assembly Party Nomination List by deleting the Respondent's name in Gender Top-Up Category and inserting it in Trans-Nzoia County Assembly and to forward it to IEBC for publication.

The Petition:

16. The Respondent instituted Election Petition No. 1 of 2022 against FORD-K, IEBC and Ann Khakasa Situma (hereinafter referred to as 'the Petition') for reasons that, despite the Tribunal deciding in her favour, FORD-K and IEBC had contemptuously refused to comply with the Tribunal's Orders.
17. In the case, the Respondent asserted that FORD-K had deliberately failed to comply with the mandatory provisions of *the Constitution*, The *Elections Act*, Elections (General) Regulations, Elections (Party Primaries and Party Lists) Regulations, Regulations set out by IEBC in Gazette Notice No. 6378 of 3rd June 2022 and its own Nomination and Election Rules.
18. The Respondent urged the trial Court to make a finding that FORD-K failed to ensure compliance with *the Constitution* under Articles 21, 10, 27(6), 56(a), 88(5) and 90 on the duty to protect *the Constitution*, observe national values and principles of governance, put in place affirmative action programmes for minorities and marginalized groups and IEBC's constitutional obligation in the conduct of elections respectively.
19. Statutorily, the Respondent grounded her Petition on provision of Section 7(2) of *County Governments Act* which obligates political party nominating persons to ensure diversity.
20. It was her case that under Section 34 of the *Elections Act*, the election of members for the County Assemblies for party list under Article 177(1)(b) of *the Constitution* ought to be made on the basis of proportional representation.
21. She further claimed that, in view of the Tribunal's judgment, the purported nomination and allocation of the seat to Ann Khakasa Situma, 3rd Respondent herein, under Gender Top Up list by IEBC as the beneficiary of FORD-K's nomination in Trans-Nzoia County was null and void.
22. The Appellants herein variously opposed the Petition. It was FORD-K's case that as of 14th July 2022, when the Respondent herein wrote to it a letter proposing two names to be considered, it had already submitted nominees to IEBC and it had not received any formal application from the Respondent herein.
23. FORD-K, however, pleaded that when it got an opportunity to amend its party list on IEBC's instructions, the Respondent's name was included and the list submitted to IEBC on 21st July 2021.
24. FORD-K claimed that the Respondent failed to raise her grievance in its Internal Dispute Resolution Mechanism forum in the laid down procedure.
25. It also was its case that the Respondent's complaint was one that related to issues that fell within pre-election category of disputes and not for determination by an Election Court.
26. Further to the foregoing, FORD-K contested the trial Court's jurisdiction stating that the dispute had previously been presented in a judicial forum and as such, it was res-judicata and the Election Court was divested of jurisdiction.
27. IEBC, the 3rd Appellant herein, responded to the Petition stating that it received and reviewed FORD-K's party list and upon finding it to be non-compliant, requested FORD-K to review it.



28. It was its case that FORD-K reviewed the list and included the Respondent herein in the Gender Top Up list for Bungoma County.
29. It asserted that on 27th July 2022, it published the reviewed list in the Star and Standard Newspapers which yielded in the Respondent's complaint before the PPDT.
30. The 3rd Appellant claimed that it did not receive any amended Gender Top up list from FORD-K as decreed by PPDT judgment and as such did not have any material it could use to allocate a different party list from the one earlier submitted.
31. It was IEBC's case that there was no adverse order against it by the PPDT and none was sought against it at the PPDT by the Respondent herein.
32. It was its case that it was not served with any Court order barring it from publishing the allocated list in the Kenya Gazette and to that extent claimed that the Respondent had not demonstrated how it failed the nomination process.
33. Ann Khakasa Situma, the 1st Appellant herein, challenged the Petition stating that she applied for nomination as Member of County Assembly Trans-Nzoia County under Gender Top Up category and upon fulfilling all the party requirements, IEBC, in performing its constitutional mandate, gazetted her as nominated member of County Assembly.
34. Upon considering the totality of the foregoing arguments, the Election Court, in its decision of 20th March 2023 found that, being an Election Court, it had jurisdiction since the 1st Appellant had assumed office of a nominated member of County Assembly. It observed that the 1st Appellant's nomination could only be challenged by way of an Election Petition.
35. On the question as to whether the FORD-K's party list had been submitted to IEBC in compliance with *the Constitution* and the applicable laws and regulations, the Election Court observed that from the evidence, FORD-K failed to comply with Section 34(6) of the *Elections Act* and Rule 15 of its own party rules.
36. The Election Court observed that the list of Applicants nominated was generated by an Ad-Hoc Committee whereas Rule 15 of FORD-K nomination rules mandated the Ward Executive Committee to generate the list of applicants for nomination.
37. The Election Court also faulted FORD-K for not being transparent in its nomination process for failing to issue a notice inviting members to apply for nomination.
38. As regards nomination of the 1st Appellant herein, the Election Court observed that her purported application for nomination, gazettelement and swearing-in as a Member of County Assembly was without any evidence that she indeed applied for the position and was interviewed by the Ward Executive Committee.
39. The Election Court observed that FORD-K never availed any documents for the 1st Appellant as well as the minutes from Ward Executive Committee.
40. On the foregoing, the Election Court was of the position that due process was not followed in generation of the party list and as such, the list submitted on 23rd June 2023 to the IEBC and its subsequent amended party list were null and void ab initio.
41. Accordingly, the Court allowed the Petition declaring that the Party list was not generated and submitted in compliance with *the Constitution* and Election Act. It also declared the allocation of the special seat to the 1st Appellant herein as null and void and to that end, quashed it.



42. Finally, the Court quashed FORD-K's Gender Top Up list for Trans-Nzoia County and directed a fresh process be organised in compliance with the Constitution and the law within 60 days of the judgment.
43. The foregoing proceedings and decision of the Election Court yielded the instant appeal.

The Appeal:

44. Three appeals were lodged against the judgment of the Election Court. They are Election Appeal No. E001 of 2023, Election Appeal No. E002 of 2023 and Election Appeal No. E003 of 2023.
45. The appeals were consolidated and Election Appeal No. E002 of 2023 became the lead appeal. A synopsis of each appeal follows.

The 1st Appellant's case:

46. The 1st Appellant herein, Ann Khakasa Situma, filed Election Appeal No. E002 of 2023.
47. In her Memorandum of Appeal dated 15th April, 2023, Ann Khakasa Situma challenged the Election Court's judgment on the following grounds: -
 1. The learned magistrate erred in law by entertaining the Election Petition No. E001 of 2022 when it did not have jurisdiction to hear and determine the same.
 2. The learned magistrate erred in law and entertained an election petition that was statute barred.
 3. The learned magistrate misconstrued facts, evidence and the relevant to the election petition before him and as a result arrived at the wrong conclusion.
 4. The learned trial magistrate erred in law by allowing the election petition when the Petitioner had not proved the same to the required standard.
 5. The learned trial magistrate erred in law by failing to give an analysis of the law, facts evidence before arriving at the conclusion of his judgment of 20.3.2023.
 6. The learned trial magistrate erred in law by failing to consider the arguments raised by the Respondents in the submissions in the Chief Magistrates Court Election Petition No. E001 of 2022 and as a result arrived at the wrong conclusion.
 7. The learned trial magistrate erred in law by shifting the burden of proof from the Petitioner to the respondents in the Petition.
48. The 1st Appellant prayed for the following reliefs: -
 - a. The Judgment in the Chief Magistrates Court Election Petition No. E001 of 2022 and the decree be set aside
 - b. The Respondent herein to be condemned to pay costs.

The 2nd Appellant's case:

49. Ford-Kenya was equally aggrieved by the Election Court's decision. In its memorandum of appeal dated 22nd March 2023, its grounds of appeal were as follows: -
 1. That the learned trial magistrate erred in failing to find that the entire Petition was res-judicata and an abuse of the court process.



2. That the learned trial magistrate erred in law and in fact by finding that the 3rd Respondent was not lawfully nominated contrary to the evidence and applicable legal instruments that were presented before the Court.
 3. That the learned Trial Magistrate erred in law and in fact in finding that the Appellant's gender Top-Up Party list for Trans-Nzoia County Assembly published by the 2nd Respondent in the Standard Newspaper of Wednesday, July 27th, 2022 was not generated and submitted in compliance with the law, a finding which had no basis in the evidence and applicable law to the Petition that was presented and prosecuted before the trial court.
 4. That the learned Trial Magistrate's decision of 20th March 2023 is contrary to the tendered evidence and applicable law, it is a miscarriage of justice and sets a bad precedent unless set aside by this appellate court.
50. The 2nd Appellant prayed for the following reliefs: -
- a. The judgment as delivered on 20th March 2023 in Kitale Magistrates Court Election Petition No. E001 of 2022 be and is hereby set aside.
 - b. All that proceedings as instituted by the 1st Respondent in Kitale Magistrate Court Election Petition No. E001 of 2022 be and is hereby dismissed with costs.
 - c. Costs of this Appeal be borne by the 1st Respondent.

The 3rd Appellant's case:

51. In its Memorandum of Appeal dated 17th April 2023, IEBC challenged the trial Court's decision on the following grounds: -
1. The learned magistrate erred in law by delving and inquiring into pre-election dispute matters which belonged to the domain of the Political Parties Dispute Tribunal.
 2. The learned Magistrate erred in law in disregarding the evidence of the Appellant's witness to the effect that the appellant had complied with the decision of Political Parties Dispute Tribunal of 8th August 2022.
 3. The learned trial Magistrate erred in law by nullifying the nomination of the 3rd Respondent despite it being established beyond dispute that the Appellant and 2nd Respondent had complied with the decision of the political Parties Disputes Tribunal of 8th August 2022.
 4. The learned Magistrate erred in law in failing to find that the dispute before her had to be determined within the confines of the orders of the Political Parties Disputes Tribunal in its decision of 8th August 2022.
 5. The learned Magistrate erred in law by failing to give weight to, consider and fathom the Appellant's written submissions and authorities presented to him.
 6. The learned Magistrate erred in law by holding that the Petitioner had proved her case to the required standard.
 7. The learned magistrate erred in law in making an order of costs against the Appellant despite not making any findings of wrongdoing on the Appellant's part.
52. The 3rd Appellant prayed for the following reliefs: -



- a. That this appeal be allowed and the Judgment of the lower Court be set aside.
- b. That the Petition against the Appellant in the lower Court be dismissed in its entirety.
- c. That the Costs of this appeal and the Lower Court be borne by the Respondent herein.
- d. Any other or further relief the Honourable Court shall deem fit and just to grant.

The Appellants' submissions:

The 1st Appellant:

53. In support of her case, the 1st Appellant filed written submissions dated 29th May 2023.
54. The 1st Appellant submitted that when the Respondent herein, Lydia Chelimo Kiboi, went to PPDT, here name was included in the list for Trans-Nzoia County and she never asked her name to be prioritized.
55. It was submitted that the Respondent never appealed against the PPDT's decision for not prioritizing her name and as such, the Election Court was wrong to entertain the Petition when no specific order of the PPDT prioritized the Respondent's name.
56. It was submitted that in her oral evidence, the Respondent desired her name to be prioritized but never appealed against the decision of the PPDT.
57. The 1st Appellant submitted that the finding of the Tribunal had nothing to do with her being prioritized on the party list of Trans-Nzoia County and the Respondent never commenced any proceedings challenging her inclusion in the list of Trans-Nzoia County Assembly for FORD-K party.
58. To that end, the 1st Appellant submitted that the trial Court sat to preside over issues that ought to have been dealt with by PPDT despite the provision of section 40 of *Political Parties Act* which barred the trial Court from entertaining such dispute.
59. The 1st Appellant submitted that there was no basis upon which the trial Court case was premised against her after the tribunal's ruling was complied with.
60. It was further her submission that the Respondent expected to be ranked No.1 in the Party list yet such an order was not granted by the Tribunal.
61. To lend credence to the foregoing, the 1st Appellant referred to the Respondent's evidence where she told the trial Court that she wanted to be prioritized in the party list since she is from a marginalized and minority community, a request that was not in the prayers.
62. The 1st Appellant further referred to the evidence of the 3rd Appellant whose testimony was that FORD-K presented to IEBC in the amended list whereby the Respondent's name was listed at No. 21.
63. On the foregoing, the 1st Appellant submitted that the trial Court abandoned the issues derived from evidence and tried its own issues not raised by the Respondent in the Tribunal.
64. Tied to the foregoing, it was the 1st Appellant's case that, the Respondent, having not proved that she was excluded in the party list, had not discharged the burden of proof in accordance to section 7 of the *Evidence Act*.



65. The Court of Appeal decision in Election Petition Appeal No 24 of 2018, John Lokitare Lidinyo -vs- IEBC & 2 Others was relied on where it was observed: -

...the appellant failed to prima facie produce cogent and credible evidence to prove the allegation that he had won the Kisumu County Gubernatorial election or could warrant the evidentiary burden to shift to the Respondents. Accordingly, we find that the trial Judge did not err in the application of the legal and evidentiary burden of proof.

66. In closing, the 1st Appellant submitted that the trial Court's judgment was not compliant with Order 21 Rule 4 of the Civil Procedure Rules that requires it to contain a concise statement of the case, points for determination, the decision and reasons thereof.

67. It was submitted that the points for determination, the reasons for the decision and an analysis of the evidence and the law was not given by the trial Court.

68. It was its case that since Section 75 of the *Elections Act* limits High Court's jurisdiction to areas of law only, the trial Court was under an obligation to evaluate issues of fact before reaching its conclusion.

69. In the end, the 1st Appellant urged its appeal to be allowed and the trial Court's decision be set aside with costs.

The 2nd Appellant:

70. The 2nd Appellant submitted that vide its letter of 15th July 2022, it asked FORD-K to review and re-submit the party list it, a fact which it (FORD-K) did through its letter of 21st July 2022.

71. It was its case that the Respondent herein submitted her forms for consideration for nomination as Member of County Assembly on 27th July, 2022 to FORD-K's Headquarters in Nairobi, and IEBC, on the same day published the party's' list of nominees in the Standard newspaper.

72. It was the 2nd Appellant's submission that on 30th July 2022, the Respondent wrote to FORD-K's Internal Dispute Resolution Mechanism Panel requesting for rectification of the Party list by transferring her name from Bungoma County to Trans-Nzoia County.

73. It was its case that the Internal Dispute Resolution Board wrote to the Respondent advising on how to lodge a complaint with the Board.

74. The 2nd Appellant submitted that instead of the Respondent complying with its directions, she opted to lodge a complaint before the PPDT.

75. It was the 2nd Appellant's submission that following the PPDT's decision of 8th August 2022, IEBC, in its letter of 7th September 2022, advised to be forwarded a revised Party List of all affected areas in compliance with Tribunal Orders within 24 hours.

76. FORD-K submitted that it complied with IEBC's directions and accordingly removed the Respondent's name from Bungoma County Gender Top Up List and included it in Trans-Nzoia's County Gender Top Up List and submitted it to IEBC on 8th September 2022 where it was received and stamped.

77. The 2nd Appellant stated that shortly thereafter, they were served with Election Petition lodged by the Respondent.

78. Based on the judgment of the trial Court, the 2nd Appellant framed the following issues for determination; whether the trial Court had jurisdiction; whether allocation of the special seat to the 1st



- Appellant was compliant with judgment and decree of PPDT; whether the Respondent was estopped from challenging the validity of the 2nd Appellant's party list; and, whether the Gender top up list of Trans-Nzoia was generated and submitted in compliance with the law and its own rules on nomination of candidates.
79. On the first issue of jurisdiction, the 2nd Appellant submitted that the trial Court lacked jurisdiction on the basis that the subject matter of the Petition was a pre-election dispute and that the entire Petition was res-judicata and an abuse of Court process.
 80. On the first limb, the 2nd Appellant submitted that since the dispute arose prior to general elections held on 9th August 2022, it fell within the legal parlance of a pre-election dispute.
 81. Based on the foregoing, FORD-K submitted that the proper forum for adjudication of the dispute was IEBC's Dispute Resolution Committee or PPDT and on appeal to the High Court.
 82. The 2nd Appellant submitted that as at 27th July 2022, the time when the dispute arose, the Magistrates Court then, having not been gazetted as an Election Court would have no jurisdiction to entertain such a pre-election dispute.
 83. The 2nd Appellant was of the position that the Election Court would only be invited to preside over disputes upon gazettement of the nominated members on disputes after Gazettement which case happened on 9th September, 2022.
 84. To buttress the foregoing, the 2nd Appellant relied on the Supreme Court in *Moses Mwangi & 14 Others -vs- Independent Electoral and Boundaries Commission & 5 Others* (2016) eKLR where the Court discussed at length when a dispute ceases to become a pre-election dispute.
 85. Further reference was made to the decision of the High Court in *National Gender and Equality Commission -vs- IEBC & Another* (2013) eKLR where it was observed: -

.... We shall therefore order IEBC to publish as required by Regulation 54(8) of the General Regulations the Party lists of those parties which have qualified under Article 90(3). Thereafter, any person dissatisfied with the party list shall be at liberty to file a complaint with IEBC in accordance with Article 88(4)(e) as read with section 74 of the *Elections Act*.
 86. To put to rest the question of jurisdiction, the 2nd Appellant further relied on the Supreme Court in *Sammy Ndu'ngu Waity -vs IEBC & 3 Others* where it was observed: -

.... Pursuant to Article 88(4)(e) of *the Constitution*, the commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election Petitions and disputes subsequent to the declaration of election results.
 87. The 2nd Appellant submitted that the Respondent relied on similar facts and provisions of the law, namely Articles 2, 10,19,20,27,47, 48, 50, 90, and 177(1) of *the Constitution* both before the PPDT and the trial Court.
 88. The 2nd Appellant was of the position that where a ground has been urged in a pre-election dispute, the same cannot be invoked in urging an Election Dispute before a Court.
 89. The 2nd Appellant found support of the foregoing argument in *Sammy Ndu'ngu Waity -vs IEBC & 3 Others* where the Supreme Court observed: -



- ii. Where a pre-election dispute has been conclusively resolved by the IEBC, PPDT or the High Court sitting as a Judicial Review Court, or in exercise of its supervisory jurisdiction under Article 165(3) and (6) of *the Constitution*, such dispute shall not be a ground in a Petition to the Election Court.
90. The 2nd Appellant was, therefore, of the position that the trial Court was not properly seized on the Election Petition and since the Respondent did not complain against the 1st Appellant in a pre-election dispute, based on the decision in Sammy Ndu'ngu Waity -vs IEBC & 3 Others she was bound not to complain in any other forum. In the case it was observed: -
- iv. Where a person knew or ought to have known the facts forming the basis of a pre-election dispute and chooses through any action or omission, not to present the same for resolution to the such dispute shall not be a ground in a Petition to the Election Court.
91. It was the 2nd Appellant's case that the Respondent having knowledge of the listing of 27th July 2022 deliberately opted not to challenge it before the PPDT and cannot now remove the issue from the ambit of a pre-election dispute.
92. The 2nd Appellant further faulted the trial Court for failing to distinguish between publication of a party list and gazettement of nominees from the published party list.
93. It was its case that publication as done on 27th July 2022 was not gazettement and that pre-election dispute did not cease to exist on the said date. The 2nd Appellant submitted that pre-election dispute remains as such prior, during and after the Gazettement as well as upon assumption of office.
94. On the limb of res-judicata, the 2nd Appellant submitted that the parties in the Election Petition were the same as the parties before PPDT and had their fair share of opportunity to raise all their grievances in respect of the subject matter.
95. It was the 2nd Appellant's case that the enhancement of prayers in the Election Petition upon Gazettement as compared to the suit at the PPDT could not save the Election Petition from defence of res-judicata.
96. By entertaining the Election Petition and granting the orders thereon, it was submitted, the trial Court caused confusion in matters Gender Top Up because on the one hand, there is a binding Tribunal Order which directed the 2nd Appellant to amend the Party List and include the Respondent and on the other, at the instance of the Respondent, and Election Court Order that directed the nullification of the same party list and generation of a fresh one.
97. On the issue whether the Respondent ought to be estopped from challenging the validity of the 2nd Appellant's party list, it was the 2nd Appellant's case that the Respondent was granted her prayer of amendment and inclusion but the Tribunal decline to place her as No. 1 on priority.
98. The 2nd Appellant submitted that had the Respondent succeeded before the Tribunal in getting placed on Priority No.1 in the amended list, the Election Petition would not have been instituted.
99. It was urged that the Respondent ought not to be allowed approbate and reprobate by seeking to be included in the 2nd Respondent's Party list deeming it valid and at the same time seeking it to be quashed for being invalid.
100. To drive home the foregoing, it was submitted that in Royal Ngao Holdings Limited -vs- N.K Brothers Limited & Another (2021) eKLR, it was held that when a person having a choice between two courses



of conduct, opts for one course, such is to be treated as having made an election from which he cannot resile.

101. On the issue of whether the nomination of the 1st and 2nd Appellants was contrary to the evidence and applicable laws, it was submitted that under Article 90 of *the Constitution*, there is the requirement of gender equity and regional and ethnic diversity.
102. The 2nd Appellant submitted that it is the responsibility of the Political Parties to choose their preferred candidates and rank them in order of priority of preference.
103. On the last issue on the question whether the 2nd Appellant's Gender Top Up List was generated and submitted in compliance with the law and its own rules on nomination, it was submitted that there was no evidence tendered by the Respondent before the trial Court proving otherwise.
104. The 2nd Appellant submitted that learned trial magistrate wholly relied on evidence extracted from cross examination by the Petitioner of the 2nd Appellant.
105. It was its case that the act of designating the party representatives from each qualifying list on the basis of proportional representation is simply the act of picking representatives from the Party List in which they are nominated and declaring them duly elected representatives of Special Seats by way of gazettelement.
106. In the end, the 2nd Appellant beseeched the Court to allow the appeal as prayed.

The 3rd Appellant:

107. The 3rd Appellant's submissions centred primarily on the fact that before the Tribunal, the Respondent was not granted the prayer to be prioritized as No. 1 in the in the Trans-Nzoia County Gender Top Up List.
108. It was IEBC's case that the Respondent did not make any complaint against the inclusion of the 1st Appellant or any other candidate and did not raise any issues regarding non-compliance of Regulation 15 of its nomination and election Rules.
109. The 3rd Respondent faulted the Respondent for squandering the opportunity to raise the foregoing and added that once it received the amended list.
110. It also was its case that its obligation was to ensure that list complies with *the Constitution* and Regulation but had no means, in view of the fact that the list was submitted a day before of verifying the complaints raised in the Petition once the political party submitted the amended list.
111. The 3rd Appellant submitted that the amended list submitted on 8th September 2022 had no patent non-compliance since it had an alternating male and female nominees as required by section 36(2) of the *Elections Act*.
112. The 3rd Appellant submitted that membership to party list should ideally be settled prior to the date of the general elections and that Courts should be slow to interfere with the list submitted by the party especially where inclusion of persons in the list is not challenged before the Party, the IEBC or the PPDT.
113. The 3rd Appellant submitted further that the Court ought to have exercised deference to a political party's right to determine the order of priority and ensure the Political party's internal disputes resolution mechanism were exhausted.



114. To buttress the foregoing, the Court of Appeal in *Lydia Nyaguthii -vs- IEBC and 17 Others* (2017) eKLR was referred to where it was observed: -

We must express the view that the constituting scheme vests, to some extent an unregulated power to the political parties to regulate and formulate the list of candidates, and a secondary power to the Commission to supervise, with the Court retaining the ultimate and final authority to address and determine instances of violation or infringement of fundamental rights.

115. On the issue of costs, the 3rd Appellant submitted that the trial Court erred for ordering costs against it when there was no adverse finding against it in the trial Court's judgment.

The Respondent's case:

116. Lydia Chelimo Kiboi challenged the appeals through written submissions dated 30th June, 2023.
117. According to the Respondent, the Election Court's jurisdiction for normative seats kicks in immediately IEBC gazettes the nominees as they are considered duly elected.
118. As regards the challenge on res-judicata, it was the Respondent's case that the complaint filed before the PPDT did not address issues raised in the Petition before the trial Court and as such, could not be barred by the doctrine.
119. To further assert the foregoing, the Respondent submitted that the central question for determination before the trial Court and before this Court is whether Trans-Nzoia Gender Top-up List was generated and submitted in compliance with *the Constitution* and the *Elections Act*, Elections (General) Regulations 2012, Elections (Party Primaries and Party Lists) Regulations, 2017 and the FORD-K's nominations and Election Rules.
120. To lend credence to the foregoing, the Respondent submitted that the Lists were developed by an Ad Hoc Committee instead of Ward Executive Committee.
121. It was the Respondent's position that the trial Court was right in its finding that the 1st Appellant's nomination could only be challenged by way of an Election Petition since it was instituted after the 1st Appellant had been gazetted and assumed office.
122. It was the Respondent's submission that the 2nd Appellant unsuccessfully argued the jurisdictional contest before the PPDT and at the trial Court and that the appeal by the 2nd Appellant before the High Court in Nairobi Civil Appeal No. E634 of 2022 challenging the outcome of PPDT was dismissed.
123. The Respondent further submitted that she only learnt of the purported compliance of the PPDT judgment when the 2nd Appellant filed its pleadings in the trial Court.
124. It was her case that the letter dated 7th September 2022 from the IEBC Chairman requesting FORD-K to comply with PPDT's Orders and FORD-K's letter of response of 8th September 2023 were not copied to her or her lawyers and no explanation was made to her on how the amended list placing her at No. 21, the last on the list was arrived at.
125. In view of the foregoing, the Respondent stated that upon gazettelement of the 1st Petitioner as the nominated person, since she had litigated her case before the PPDT, her only recourse was the Election Court.



126. The Respondent relied on National Gender and Equality Commission -vs- IEBC & Another (2013) eKLR which was cited with approval by the Supreme Court in Moses Mwigigi & 14 Others -vs- Independent Electoral and Boundaries Commission & 5 Others (2016) eKLR.
127. The Respondent contested propriety of the 1st Appellant's nomination by submitting that before the trial Court that she did not produce her application for the position and was her evidence that she did not know the criteria that was used.
128. The Respondent submitted that without the 1st Appellant's application before the trial Court, she cannot be said to have applied for nomination in the first place.
129. The Respondent further discredited the Appellants' claim that she did not exhaust internal dispute resolution mechanisms submitting that it was not achievable because the 2nd Appellant left her in the dark on all the processes involved.
130. The Respondent submitted that it was not proper for IEBC to canvass directly with the 2nd Appellant over compliance with PPDT judgment to her exclusion when she is the one who filed the complaint in the first place.
131. It was her case that it ceased being a Party/IEBC affair when she took the matter to the trial Court and it was improper to be shown of the communication between the 2nd and 3rd Appellant at the hearing of the Petition.
132. While relying on National Gender and Equality Commission -vs- IEBC & Another (supra), the Respondent submitted that, the failure of the 2nd Appellant to follow the law rendered the list null and void. In the case, it was observed: -

... Despite what we have stated, we agree with submission by Mr. Lando, Learned Counsel for KNCHR that the process of developing the party list must at a minimum bear the hallmarks of a democratic, transparent and participatory society....
133. The Respondent further faulted the IEBC for failing to ensure that the amended list complied with Section 27(1) of the *Elections Act* which requires political parties to submit their nomination rules at least three months before nomination of its candidates.
134. In the end, the Respondent urged Court uphold the trial Court's judgment and to dismiss the three appeals for lack of merit.

Issues for Determination:

135. Having considered the record, two main issues emerge for determination as follows: -
 - i. Whether the trial Court had jurisdiction over the dispute.
 - ii. If the answer in (i) above is in the affirmative, whether the 2nd Appellant's nomination process was in consonance with *the Constitution* and the law.
136. The above issues shall be considered in seriatim.

Analysis:

137. The duty called to this Court is to be found in the wording of Section 75(4) of the *Elections Act*. As the appellate Court, this Court is called upon to revisit the record but limited to settling matters of law only.



138. As to what constitutes a question of law, the Supreme Court of Kenya in *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 7 Others* Sup. Ct. Petition No. 2B of 2014 (2014) eKLR rendered itself as follows: -

We benefit, in this regard, from the learned Judgment of the Supreme Court of the Philippines, in the cases of *Republic v. Malabanan*, G.R. No. 169067, October 632 SCRA 338, 345 and *New Rural Bank of Guimba v. Fermina S Abad and Rafael Susan*; G.R. No. 161818 (2008), where it was thus held:

“We reiterate the distinction between a question of law and a question of fact. A question of law exists when the doubt or controversy concerns the correct application of law or jurisprudence to a certain set of facts; or when the issue does not call for an examination of the probative value of the evidence presented, the truth or falsehood of facts being admitted. A question of fact exists when the doubt or difference arises as to the truth or falsehood of facts or when the query invites calibration of the whole evidence considering mainly the credibility of the witness, the existence and relevancy of specific surrounding circumstances, as well as their relation to each other and to the whole, and to the probability of the situation.

... Flowing from these guiding principles, it follows that a petition which requires the appellate Court to re-examine the probative value of the evidence tendered at the trial Court, or invites the Court to calibrate any such evidence, especially calling into question the credibility of witnesses, ought not to be admitted. We believe that these principles strike a balance between the need for an appellate Court to proceed from a position of deference to the trial Judge and the trial record, on the one hand, and the trial Judge’s commitment to the highest standards of knowledge, technical competence, and probity in electoral – dispute adjudication, on the other hand.

139. As to whether the issue of jurisdiction is a question of law, the Supreme Court of Kenya in *Petition No. 7 of 2013, Mary Wambui Munene v. Peter Gichuki Kingara and Six Others*, [2014] eKLR, affirmed its earlier position in *Samuel Kamau Macharia & Anther -vs- Kenya Commercial Bank Limited Kenya & 2 Others* (2010) eKLR in observing that: -

... jurisdiction is a pure ‘question of law’ and should be resolved on priority basis.

140. This Court will, hence, deal with the said issue.

a. Whether the Election Court had jurisdiction over the dispute:

141. As a matter of priority, any Court, when called upon to adjudicate any dispute must ascertain that it is clothed with the requisite jurisdiction. Its significance cannot be gainsaid.

142. In *Petition E345 of 2021, Nornael Okello G’Oganyo v Independent Electoral Commission Selection Panel & 2 others; Independent Electoral and Boundaries Commission & 6 others (Interested Parties)* [2022] eKLR this Court spoke to jurisdiction in the following manner: -

20. Jurisdiction is defined in *Halsbury’s Laws of England* (4th Ed.) Vol. 9 as “...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.”. *Black’s Law Dictionary*, 9th Edition, defines jurisdiction as the Court’s power to entertain, hear and determine a dispute before it.



21. In Words and Phrases Legally Defined Vol. 3, John Beecroft Saunders defines jurisdiction as follows:

By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

22. That, jurisdiction is so central in judicial proceedings, is a well settled principle in law. A Court acting without jurisdiction is acting in vain. All it engages in is nullity. Nyarangi, JA, in Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited [1989] KLR 1 expressed himself as follows on the issue of jurisdiction: -

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...

23. Indeed, so determinative is the issue of jurisdiction such that it can be raised at any stage of the proceedings. The Court of Appeal in Jamal Salim v Yusuf Abdulahi Abdi & another Civil Appeal No. 103 of 2016 [2018] eKLR stated as follows: -

Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in Adero & Another vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577, as follows;

- 1)
- 2) The jurisdiction either exists or does not ab initio ...
- 3) Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
- 4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.

24. On the centrality of jurisdiction, the Court of Appeal in Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR stated that: -

.... So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of



a polite but ultimate futile undertaking of proceedings that will end in barren *cui-de-sac*. Courts, like nature, must not sit in vain.

25. On the source of a Court's jurisdiction, the Supreme Court of Kenya in *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others* (2012) eKLR stated as follows: -

A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

26. And, in *Orange Democratic Movement v Yusuf Ali Mohamed & 5 others* [2018] eKLR, the Court of Appeal further stated: -

(44) ... a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court.

143. The genesis of the dispute that culminated with the instant appeal are not at cross roads. Simply put, the Respondent herein applied for nomination into the Party Gender Top Up List to her party, Ford-K. She hailed from the Trans Nzoia County. The Party eventually released its list where the Respondent was instead listed as hailing from Bungoma County.
144. The Respondent invoked the Ford-K's internal dispute mechanism, but she was not successful as she was asked to appropriately lodge the complaint. The Respondent then moved to the PPDT where she filed a complaint. She mainly sought for the amendment of the Party list so that her name would be moved from Bungoma County into Trans Nzoia County and that she be listed as No. 1 in the Party list.
145. The PPDT partly allowed the complaint. Ford-K was ordered to amend the List accordingly such that the Respondent appears in the Trans Nzoia County category. The PPDT, however, did not order that the Respondent's name be placed as No. 1 in the List.
146. Ford-K complied with the order of the PPDT by directing IEBC in moving the name of the Respondent from Bungoma County into Trans Nzoia County. She was placed as No. 21 in the Party list.



147. The Respondent then filed the Election Petition before the Magistracy challenging the Party list. The Petition was eventually allowed where the list was found not to comply with *the Constitution*, the law and the party rules and a fresh Party list ordered to be re-submitted to IEBC.
148. It is on the foregoing that the Appellants largely argue that the Election Court lacked jurisdiction since the dispute was primarily a pre-election dispute and as such, it could not mutate to an election dispute as contemplated in Section 75(1A) of the *Elections Act*.
149. On her part, the Respondent contended that the Election Court had jurisdiction over the dispute since the central question for determination before the trial Court and before this Court was whether Trans-Nzoia Gender Top-up List was generated and submitted in compliance with *the Constitution* and the *Elections Act*, Elections (General) Regulations 2012, Elections (Party Primaries and Party Lists) Regulations, 2017 and the FORD-K's nominations and Election Rules.
150. Further, the Respondent averred that upon gazette of the 1st Petitioner as the nominated person, and since she had litigated her case before the PPDT, then her only recourse was to the Election Court.
151. This Court is alive to the position that the law regarding election disputes in Kenya is by now, and to a very large extent, fairly well settled. In particular, with regards to pre-election disputes, the decision by the Supreme Court of Kenya in Petition No. 33 of 2018 Sammy Ndung'u Waity v Independent Electoral & Boundaries Commission & 3 others [2019] eKLR stands out.
152. In the said matter, the Supreme Court made a robust and detailed venture into both pre-election disputes and election disputes. The Court considered *the Constitution*, the law and various decisions including from comparable jurisdictions and thereafter reconciled the operational zoning of the PPDT, IEBC and the Election Court regarding election disputes resolution.
153. The Apex Court had the following to say in part: -
- (69) So what is the interface between Articles 88(4)(e) and Article 105(1) of *the Constitution* as read with Section 75(1) of the *Elections Act*? How should we approach these provisions so as, instead of rendering any of them inoperable, we strengthen the scheme of electoral dispute resolution? The starting point in our view is to recognize the mandate of the IEBC or any other Organ such as the PPDT, of resolving pre-election disputes, including those relating to or arising from nominations, whether such disputes revolve around the qualification of a candidate or otherwise. The next logical step is to ensure that an election court or the judicial process for that matter is not helpless when faced with a critical factor to determine the validity of an election. This twin approach ensures that Article 88(4)(e) of *the Constitution* is not rendered inoperable while at the same time preserving the efficacy and functionality of an election court under article 105 of *the Constitution*. To achieve this noble objective, we think that now is the time to issue certain guiding principles.
- (i) All pre-election disputes, including those relating to or arising from nominations, should be brought for resolution to the IEBC or PPDT as the case may be in the first instance.
- (ii) Where a pre-election dispute has been conclusively resolved by the IEBC, PPDT, or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of *the Constitution*, such dispute shall not be a ground in a petition to the election Court.
- (iii) Where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of *the Constitution*. The High Court shall hear



and determine the dispute before the elections and in accordance with the Constitutional timelines.

- (iv) Where a person knew or ought to have known of the facts forming the basis of a pre-election dispute and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the election Court.
- (v) The action or inaction in (4) above shall not prevent a person from presenting the dispute for resolution to the High Court, sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of *the Constitution*, even after the determination of an election petition.
- (vi) In determining the validity of an election under Article 105 of *the Constitution* or Section 75 (1) of the *Elections Act*, an election court may look into a pre-election dispute if it determines that such dispute goes to the root of the election and that the petitioner was not aware or could not have been aware of the facts forming the basis of that dispute before the election. (emphasis added).

154. Guided by the foregoing principles, this Court now turns to the case at hand.

155. The Respondent's dispute, no doubt, was in respect of the Ford-K's Gender Top Up Party list as generated by the party. It was, therefore, a dispute between a member of a political party and a political party.

156. With such a dispute at hand, Section 40 of the *Political Parties Act*, No. 11 of 2011 sets in. The provision is on the jurisdiction of the PPDT and it states as follows: -

40. Jurisdiction of Tribunal:

- 1. The Tribunal shall determine –
 - (a) disputes between the members of a political party;
 - (b) disputes between a member of a political party and a political party;
 - (c) disputes between political parties;
 - (d) disputes between an independent candidate and a political party;
 - (e) disputes between coalition partners; and
 - (f) appeals from decisions of the Registrar under this Act;
 - (fa) disputes arising out of party primaries.
- 2. Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms.

157. The Respondent began her quest before the Ford-K's internal dispute resolution committee. She was not successful. She then moved to the PPDT.

158. The dispute was, therefore, a pre-election dispute and the Respondent, rightfully so, submitted herself to the jurisdiction of the PPDT.

159. There was, however, the argument by the Respondent that her claim before the Election Court was whether Trans-Nzoia Gender Top-up List was generated and submitted in compliance with *the*



- Constitution and the Elections Act, Elections (General) Regulations 2012, Elections (Party Primaries and Party Lists) Regulations, 2017 and the FORD-K's nominations and Election Rules and, therefore, not a pre-election dispute.
160. Section 4 of the Independent Electoral and Boundaries Commission Act, No. 9 of 2011 (hereinafter referred to as 'the IEBC Act') provides for functions of the Commission. One of such functions is in Section 4(e) as follows: -
- (e) the settlement of electoral disputes including disputes relating to or arising from nominations, but excluding election petitions and disputes subsequent to the declaration of election results;
161. Therefore, if the Respondent had reservations in her party's Gender Top Up List, then even if she opted not to pursue the issue through the PPDT, she still had an option of invoking Section 4(e) of the IEBC Act and lodge a complaint before the IEBC Dispute Resolution Committee (hereinafter referred to as 'the DRC') over the party's nomination by way of party list.
162. Further, in appropriate scenarios, the Respondent would even have filed a Constitutional Petition challenging the constitutionality of the Party list or initiated judicial review proceedings or would have invited the High Court to exercise its supervisory jurisdiction under Article 165(3) and (6) of the Constitution over the matter. The Respondent, however, took none of such actions.
163. From the above, two cardinal outcomes arise. The first one is that the Respondent did not appeal against the decision of PPDT even after the Tribunal declined to order that she be placed as the first person in the Gender Top Up list. It is obvious that had she been placed in the first position, then the Election Petition would not have been filed.
165. The second outcome is that the Respondent did not challenge the party list through the IEBC DRC or at all.
166. It would appear that after the IEBC gazetted the nominations, the Respondent abandoned the legal route she had initiated through the PPDT and instead moved the dispute into the Election Court.
167. Such an approach was dealt with by the Supreme Court in the Sammy Ndung'u Waity v Independent Electoral & Boundaries Commission & 3 others case (supra) where the Court was emphatic that the approach lacked any legal leg to stand on. It was not legally permissible for the Respondent to transfer the dispute which had been determined by the Tribunal into an Election Court.
168. As the Respondent's dispute was a pre-election one, then she had the only option of pursuing the avenue she had begun. If she was dissatisfied with the findings of the PPDT, then Section 41(2) of the Political Parties Act allowed the Respondent to lodge an appeal to the High Court on points of law and facts and a further appeal on points of law to the Court of Appeal. The decision of the Court of Appeal would then be final.
169. With such a finding, this Court, therefore, holds that the Election Court lacked jurisdiction to entertain the dispute before it which was a pre-election one.
170. Having found as such, suffice to state that the Respondent's quest to challenge the constitutionality and legality of the Party list is yet extinguished. As guided by the Supreme Court, a challenge can still be maintained in the High Court, 'sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165(3) and (6) of the Constitution, even after the determination of an election petition' regardless of whether the Respondent took any action or not against the Party list in the first instance.



171. This Court now returns the verdict that the first issue is answered in the negative. As such, the second issue is not for determination.

Disposition:

172. Deriving from the above discussion, the following final Orders hereby issue: -

- a. All the appeals, being Election Appeal No. 1 of 2023, Election Appeal No. 2 of 2023 and Election Appeal No. 3 of 2023, are merited and are hereby allowed.
- b. The judgment of the Election Court in Kitale Chief Magistrates Court Election Petition No. E001 of 2022, Lydia Chelimo Kiboi -vs- FORD-K & Others, rendered on 20th March, 2023 be and is hereby set aside in its entirety for lack of the Election Court's jurisdiction.
- c. Kitale Chief Magistrates Court Election Petition No. E001 of 2022, Lydia Chelimo Kiboi -vs- FORD-K & Others be and is hereby dismissed.
- d. For clarity, Anne Khakasa Situma, stands duly elected as a Member of the County Assembly of Trans Nzoia by way of nomination vide the Ford-Kenya's Gender Top Up Party List.
- e. Going by the nature of the dispute and the possibility of further challenges, each party shall bear its own costs.
- f. In the event any security for costs in this matter was made, the same shall be returned to the depositor.
- g. A Certificate of the determination of the Election Petition and this Appeal shall issue to the Independent Electoral and Boundaries Commission and the Speaker of the County Assembly of Trans Nzoia County.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 1ST DAY OF AUGUST, 2023.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Nyamu, Learned Counsel for the 1st Appellant.

Miss. Bett for Mr. Millimo, Learned Counsel for the 2nd Appellant.

Miss. Kagori for Mr. Burugu, Learned Counsel for the 3rd Appellant.

Mr. Mbiti, Learned Counsel for the Respondent.

Regina/Chemutai – Court Assistants.

