



**REPUBLIC OF KENYA**

**IN THE PRINCIPAL MAGISTRATE'S COURT AT KABARNET**

**ELECTION PETITION NO. 1 OF 2017**

ESTHER CHELIMO.....1<sup>ST</sup> PETITIONER  
VERONICA KIMOI KIMITEI .....2<sup>ND</sup> PETITIONER  
MARYLINE JERONO KOIMA .....3<sup>RD</sup> PETITIONER

**VERSUS**

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMITTEE...1<sup>ST</sup> RESPONDENT  
JUBILEE PARTY.....2<sup>ND</sup> RESPONDENT  
CHARLES BOWEN.....3<sup>RD</sup> RESPONDENT  
PURITY TALLAM.....4<sup>TH</sup> RESPONDENT  
CHERUTICH FRANCISCA JEPKUTO.....5<sup>TH</sup> RESPONDENT  
SAPHINA CHELAGAT.....6<sup>TH</sup> RESPONDENT  
KIPTALA JERUTO.....7<sup>TH</sup> RESPONDENT  
KAKEREL EUNICE CHEPRANYEI.....8<sup>TH</sup> RESPONDENT  
CHERUS MAUREEN JEPKOSGEI .....9<sup>TH</sup> RESPONDENT  
CAROLINE CHEBICHII KESSEI.....10<sup>TH</sup> RESPONDENT  
FRANCISCA JEPSENGON CHEBURET.....11<sup>TH</sup> RESPONDENT  
DIANA SIRITI.....12<sup>TH</sup> RESPONDENT  
KENYA AFRICAN NATIONAL UNION.....13<sup>TH</sup> RESPONDENT

**JUDGMENT**

The 3 petitioners herein filed this petition against the 13 respondents and prayed for orders that:-

- (i) The list of nominated MCA's published in Kenya gazette Vol. CXIX- NO124 OF 28/8/17 be declared unconstitutional and the same be nullified as the same was not in accordance with article 81 of the constitution.
- (ii) That the said list of nominated members of county assembly does not take into consideration the right of the marginalized and those with disabilities.

As a consequences of prayers (i) & (ii) the court to declare that the Baringo county MCA list to be nullified and the Laws relating to the vacancy in the office of the Governor to ensue.

The petitioners prayed for any other orders that the court may deem fit to grant and cost to be borne in the cause.

The three petitioners filed affidavits in support of the petition to which they attached ONLY a copy of the gazette notice VOL. CXIX-NO124 which they were challenging.

The petitioners had described all the respondent and stated that the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> respondents were residents of Baringo County and nominated members of the County Assembly of Baringo and that the 10<sup>th</sup> respondent was resident of Uasin Gishu county in the Republic of Kenya and a nominated member of the county Assembly of Baringo.

They stated further that the 1<sup>st</sup> respondent was a constitutional body established under chapter 15 of the constitution of Kenya whereas the 2<sup>nd</sup> respondent and 13<sup>th</sup> respondents were political parties registered under Political Parties Act in the Republic of Kenya.

The petitioners pleaded that they had issues with three respondents herein.

(1) 10<sup>th</sup> respondent **CAROLINE CHEBICHI KESSEI** because she was a resident of Ainabkoi Uasin Gishu County.

(2) **SAPHINA CHELAGAT** alias **J. JEPKORIR** because she had been nominated twice to county Assembly of Baringo.

(3) **CHARLES KIMITEI BOWEN** because he was 70 years old and working for the Jubilee secretariat Baringo County.

The 1<sup>st</sup> petitioner pleaded in her affidavit briefly that she was a resident of Baringo and that she had applied for nomination in Baringo County after meeting all the required conditions but she was not selected.

That the nomination exercise was not conducted as per the required procedure and she was aggrieved and she had filed a complaint before the political party tribunal under 371/17 and she alleged that she had attached the tribunals proceedings in the affidavit but it was not there.

It was the 1<sup>st</sup> respondent's averment in paragraph 5 and 6 of her affidavit that all the required laws and procedures were never followed in the nominations and that Kabartonjo ward had not been represented in the nominations twice in a row and that there were names of persons who were not residents of Baringo county picked as nominees to the county assembly of Baringo, and that **PURITY TALLAM** was nominated for a second time without good track records and that the 1<sup>st</sup> petitioner was better placed to represent the needs and issues of the women and orphans as she was representative of maendeleo ya wanawake in Baringo.

The second petitioner pleaded in her affidavit briefly that she was a resident of Baringo County and that the nomination exercise for the county assembly of Baringo was not conducted as per the procedure and the laws of Kenya as Ewalel chapchap ward in Baringo County had been given two representatives that is **CHEROTICH FRANSICA JEPKUTO** 5<sup>th</sup> respondent and **FRANSISCA JEPSERGON CHEBURET** the 11<sup>th</sup> respondent leaving out the minority and those with disabilities.

It was the 2<sup>nd</sup> petitioners averment further that they were surprised to see the names of the persons who were not resident of Baringo county in the nominated members' list and that some members who were nominated were not proposed by the political parties and that they were not in the first list which was filed in court but sadly the said or alleged list was never attached or produced to the close of the petition hearing.

The 3<sup>rd</sup> petitioner pleaded on her affidavit briefly that she was a resident of Baringo county and that she had applied for the nominations for the Baringo County Assembly after meeting all the conditions but she was not nominated.

She pleaded that the nominations were not conducted as per the required procedures and laws of Kenya as some members who were nominated were not residents of Baringo county, **PURITY TALLAM** was nominated twice in a row, and the minorities and the marginalized were left out and some nominees were not in the list that was proposed by political parties in the first party list which was allegedly in court but she did not also attach it to her affidavit or in the list of documents to the close of the proceedings.

The petitions had filed an application under certificate of urgency dated 5.9.17 to stop the swearing in of the nominated members of Baringo County but it was overtaken and abandoned.

The 1<sup>st</sup> respondent filed its response to the petition and stated briefly that it acted in accordance to the constitution, elections Act IEBC Act and all regulations pertaining to elections.

It pleaded that the 3<sup>rd</sup> -12<sup>th</sup> respondents were nominated in accordance to the laws and party list forwarded by respective political parties and the nomination exercise was free, fair, transparent and credible and complied with the constitution, elections Act and all relevant laws regulating the conduct of elections in Kenya.

The 1<sup>st</sup> respondent stated further that it had received party list from the 2<sup>nd</sup> respondent on 18.7.17 and from 13<sup>th</sup> respondent on 19<sup>th</sup> July 2017 which they used to conduct the nomination exercise for the Baringo County Assembly.

It was thus the 1<sup>st</sup> respondent's response that the gazette notice of 28.8.17 was valid, lawful and legitimate and the nomination of **CAROLINE KESSEI, SAPHINA CHELAGAT** and **CHARLES BOWEN** was valid and allegations against them was baseless and

that the nomination of persons with disability fell under marginalized list together with women and ethnic minorities and it was a legal requirement to nominate marginalized groups.

They prayed for the dismissal of the petition with costs.

The 2<sup>nd</sup> respondent filed their response and pleaded briefly that it had received several thousand applications for nomination for the few slots that were available and it had to come up with a criteria in which it was to fill the slots out of the many applicants and it was not possible to consider all the applicant's and it had complied with all the requirements in law to pick the nominee and it had prepared a party list which they used to have the members of the County Assembly of Baringo nominated and gazetted by IEBC.

The 2<sup>nd</sup> respondent pleaded further that there was no evidence that the petitioners had applied for nominations and that they were successful and that the 2<sup>nd</sup> respondent had complied with all the laws in the exercise and that all categories were considered in the nominations for Baringo County Assembly.

The 2<sup>nd</sup> respondent prayed for the dismissal of the petition with costs.

All the other respondents filed their pleadings and prayed for the dismissal of the petition with cost.

The matter proceeded for the hearing of the main petition.

**PW1 ESTHER JELIMO CHEBET** the 1<sup>st</sup> petitioner informed the court that she was female adult and resident of Kabartonjo ward of Baringo North sub county Tiriodonin location, Lelian sub location within Baringo County.

She stated that she was a registered voter at kabarnet primary school center and a member of the jubilee party.

It was her evidence that she carried out campaigns for several persons who were seeking posts as MCA, MP and other members who included one Cheptumo area MP and MCA Kipchioo who won their respective posts.

She stated further that as one of the supporters she was promised to be rewarded and when the nomination posts were advertised on 9.6.17 for jubilee party she had applied as she had all the required items but when the shortlisted names were gazetted on 30.6.17 her name was not there.

She stated further that in July another list had come out from IEBC where in some names were repeated and it included persons from disabled together with minority people and marginalized.

Pw1 gave the names of the disabled as one EDWIN KIPSEREM KANDIE who was allegedly present in court on the date of trial from KANU and RHODGES KIPKURUI and Regina Sarich from jubilee but they were never nominated nor were their names gazetted.

Pw1 had filed a case before the election dispute tribunal against jubilee under number 371/2017 wherein she succeeded and jubilee party was asked to reconstitute its party list and after 1<sup>st</sup> of August there was another gazetting of members but the persons with disability were not there and there was another new name for one Betty Chebet of KANU party who was not in the initial list.

Pw1 stated that on the list there was a name of CHARLES BOWEN who was nominated under the marginalized group whereas he was from the Tugen community which was not a marginalized tribe and she gave the names of the groups that she thought were marginalized as Swahili, Somalis, Elchamus, kikuyu and kisii.

It was pw1's evidence that the names of the marginalized were nominated but they were not gazetted.

Pw1 stated too that she had an issue with the nomination of persons from Baringo North which had five wards, that is Barwesa Bartabwa, kipsaramani, Saimo, Kabartonjo and Saimo Soi wards. She stated that in the 2013 elections, there was a representative from Barwesa ward who was Saphina Chelagat the 6<sup>th</sup> respondent herein, who was nominated again in the year 2017 elections which act had annoyed her.

It was pw1's evidence further that they expected a nomination from a different ward that is Kabartonjo or Saimo Soi.

She stated further that there were the nominated members to the county assembly from Baringo North but they were all from Barwesa ward.

Pw1 gave an outline on representation in the Baringo county assembly by ward as hereunder.

- 1. Baringo North – 3 members two from jubilee and one from KANU all from Barwesa.**
- 2. Baringo Central- Egwalel chapchap ward had two nominees from KANU and one elected MCA.**
- 3. Kapropita ward of Baringo Central had one nominee.**
- 4. Sacho and Tenges wards had no nominees.**

Pw1 stated further that for regional balancing kabartonjo ward, Bartabwa ward and Saimo Soi should have been given a chance.

She stated that Purity Tallam 4<sup>th</sup> respondent was from Kabarnet ward and she was not a resident of Nakuru.

Pw1 stated further that it was IEBC's mandate to scrutinize the list and gazette the nominees as required by law but the watched irregularities which was committed by KANU and jubilee.

Pw1 stated further that she did not know where the 5<sup>th</sup> respondent Cherutich Francisca Jepakuto was from, that the 6<sup>th</sup> respondent was from Barwesa, the 7<sup>th</sup> respondent was Baringo central, 10<sup>th</sup> was from Ainabkoi, 12<sup>th</sup> from Tiaty.

It was pw1's final evidence that her issue was that the disabled and minorities were left out and there was no regional balancing in the nominations.

On cross examination by Nyagaka, pw1 informed the court that:-the 10<sup>th</sup> respondent was from Ainabkoi Uasin Gishu County and Saphina Chelagat was from Barwesa ward.

She stated further that she did not know that the advocate who drew the pleadings was an advocate or not and that she never attached documents for complaint No. 371/2017 to her affidavit.

She stated further that the 7<sup>th</sup> respondent was not a member of Baringo County as she was married in Nairobi.

It was her evidence further that she did not have any grudge against the women who were nominated.

When pw1 was cross examined by Ombasa for 2<sup>nd</sup> respondent she informed the court that she did not attach any documents to prove that she was a registered voter and that when the Jubilee party forwarded the nomination list to IEBC all the categories were there.

On cross examination by Mwaita for the 3<sup>rd</sup> respondent pw1 stated that she had applied for nomination online and she had the membership number but she did not attach the documents to her affidavit but she had sent them to her advocate.

Pw1 stated further that there were people who were nominated to the county assembly but they were not from Baringo county and she gave an example of KIPTALA JERUTO though that was not in her affidavit.

She stated further that the 3<sup>rd</sup> respondent was an old man but there were many old people in Baringo County.

She stated that the marginalized communities in Baringo were Elchamus and Ndoroi and they were both not represented in the County Assembly of Baringo.

She stated further that she had applied under gender top up but she was not nominated among many others and that there was a conflict with the marginalized but the 3<sup>rd</sup> respondent had no control over the same.

When cross examined by IEBC advocate pw1 informed the court that the 3<sup>rd</sup> respondent was not from the marginalized communities or disabled and that when she appealed against the jubilee nominations before the tribunal, jubilee had appealed to the High Court against the tribunal's verdict and the High Court had stated that the list was to stay the way it was and that jubilee could have not amended its list even if it was asked to do so.

It was pw1's evidence further that KANU members had also complained about their party list and it was allowed but she was not aware whether the list was amended or not.

It was pw1's evidence further that IEBC had picked 8 women from jubilee list and it was to ascertain that the law had been followed.

In re-examination pw1 stated that the law was not followed in the nominations and she had the right to challenge the gazettment as the list did not meet the known criteria.

Pw2 veronica kimitei informed the court that she was a female adult and a resident of Baringo County Ewalel chapchap ward Baringo Central Sub County.

She stated that the nominations to the County Assembly of Baringo was not fairly conducted as the disabled were not considered as required together with the minorities and regional balancing.

On cross examination by advocate for IEBC, pw2 stated that she had applied for nomination online on Jubilee Party and the party was required to collect the names and compile a list but she was never short listed and she had challenged the short listed list to Jubilee Party.

She stated further that she had seen the names of the disabled on the list and she mentioned EDWIN and REGINA SARICH but their names were not on the final list and she could not tell why.

She gave the names of the marginalized communities in Baringo County as Swahili, Ndoorois, Elchamus and kisii among many.

She stated that she had no issue with the youth and top up list.

She gave the names of JERUTO KIPTALA and CAROLINE KESSEI as the members who were not from Baringo County.

Pw2 confirmed that PURITY TALLAM 4<sup>th</sup> respondent was nominated in the year 2013 but not by jubilee but by URP but she did not have evidence to that effect.

Pw3 stated further that she never appeared on any of the nomination lists and she did not have any of the nomination lists for jubilee.

She confirmed that she was not satisfied because the disabled marginalized groups were left out and some people were recycled.

When cross examined by Mwaita pw2 stated that she did not attach her nomination papers to her affidavits that were in court and that the 3<sup>rd</sup> respondent should have applied under the category of the old and not under marginalized but he had no control over his nomination.

On reexamination pw2 informed the court that it was not possible to nominate all categories under the gender top up.

Pw2 stated further on reexamination that she was not sure whether the list that was produced in court by IEBC was the real list that was taken to them/ IEBC. And further that old age did not qualify as minority.

Pw3 MARGLINE JERONO KOIMA informed the court that she was a female adult and that she was from Mogotio ward of Baringo County.

She stated that she was a member of the Jubilee party and that she had filed an affidavit in support of the petition before court.

She stated that she had participated in the party preliminaries but she had lost and she was asked not to move to another party but support her colleague and she was to be assisted later.

She had seen an advert for nominations and she had applied online but she was never shortlisted and she was shocked as the nomination rules were never followed.

She stated that when the 1<sup>st</sup> and 2<sup>nd</sup> list for shortlisted members was published all categories were included but when the gazette was done the names of the marginalized and disabled were not included and in place of the marginalized persons the name of CHARLES BOWEN who is a Tugen was nominated and listed whereas he did not qualify as Tugens are the majority community in Baringo County.

The list had three names of persons that were listed as the youth whereas the youth were required to have 2 slots and disabled 2 slots.

It was pw3's evidence that in all the 8 members from jubilee party and 4 from KANU there was no disabled person that was nominated.

Pw3 stated further that there was no regional balance as some wards had received three nominations like Barwesa.

On cross examination by advocate for IEBC [KIBET] pw3 stated that she did not see her name on the newspapers for 30.6.17 and 23.7.17.

Pw3 gave the names of the marginalized groups in Baringo as Nubian, Ndoorois, Elchamus, Muslims and kikuyus.

She stated further that she had read the jubilee party nomination rules and that a person had to apply under one category that is either under youth, persons with disability, ordinary gender or special interest group.

She stated further that Jubilee Party was to receive application of the applicants, put it on the papers, the short listed candidates and send the list to IEBC which was to scrutinize and ensure that the rules had been complied with.

She stated further that she did not know all the nominated persons on the gender top up list and she attempted to identify them and she stated that 1<sup>st</sup> on the list was from Eldama Ravine, 2<sup>nd</sup> from Baringo North, 3<sup>rd</sup> was unknown to her, 4<sup>th</sup> was from Mogotio, 5<sup>th</sup> from Tiaty, 6<sup>th</sup> was unknown to her, 7<sup>th</sup> was from Baringo South, 8<sup>th</sup> was from Eldama Ravine, 9<sup>th</sup> was Baringo North, 10<sup>th</sup> was from Baringo Central and 11<sup>th</sup> was not known to her.

Pw3 stated further that the six constituencies were all represented on the top up list for gender.

On further cross examination by Nyagaka pw3 stated that the only document she attached to the petition was the gazette notice.

She stated further that she did not include LABAI NGORIA FRANCIS and BETTY JEBET BARICHOGO in the petition as they were youth but she did not have an answer why she did not include JULIE KANDIE and CHEPSANG in the petition.

It was pw3's evidence in cross examination that she was member number 27365 in jubilee party and that she did not know the activities in KANU though she had sued them as they had messed in the nomination together with jubilee.

She stated further that BETTY BARICHO was not in any of the list but she did not have the lists in court and that PURITY TALLAM was nominated twice but she had lost when she vied for an MCA post Emining ward as she did not work closely with the people.

Pw3 confirmed on cross examination that she was not minority, marginalized nor disabled.

She stated further that jubilee party had complied with Law and that its list had all categories and that it cannot be faulted herein.

Pw3 confirmed that the gazette notice had persons for gender top up and marginalized but it did not have persons with disability.

Pw3 confirmed that elderly persons were not minorities.

On reexamination pw3 stated that the respondents did not fill the party lists and that IEBC was required to make sure that all categories were represented on the party list but that was not done.

Pw3 stated further that the petition was for the interest of the disabled.

The 3<sup>rd</sup> respondent CHARLES KIMTAI BOWEN informed the court that he was resident of Baringo North, Kaptie location Barwesa ward.

He stated that he was a nominated MCA Baringo County representing the interest of the elderly and interested special groups in Baringo County.

He stated that on 10.6.17 he had seen an advert on the daily paper by jubilee party for applications for nominations in various categories and he had applied as he had met the required conditions. He gave the conditions as, member of the party, registered voter, Kenya citizen, educational level and must meet the provisions of chapter six of the constitution.

He stated that he had looked at the various categories that were listed and he had applied under the marginalized group.

He stated that he had applied under marginalized as he came from kerio valley which was a hardship area and he was among the few old people he considered himself a minority.

It was R3's evidence that he had submitted his application and the successful applicants were gazetted on 23.7.17 and he had found his name present under the marginalized.

He stated that he had seen his name on the Kenya gazette and he was later sworn in as a nominated MCA of Baringo County on 6.9.17.

It was R3's evidence that for any member to be considered for nominations he had to apply and he had to meet the criteria that was set which he did and that was why he was nominated.

R3 stated further that there was regional balance in the nomination for Baringo County as all constituencies were represented.

R3 outlined how regional balance was obtained.

1. Eldama Ravine had two nominees.
2. Baringo South had two nominees.
3. Tiaty had two nominees.
4. Baringo North had two nominees
5. Baringo Central had two nominees.
6. Mogotio had two nominees.

On cross examination R3 informed the court that he was jubilee organizing secretary Baringo County and that he was not aware that he was required to resign before the nominations but he had resigned after and he never went back to the jubilee offices.

It was R3's evidence further that he had applied under marginalized and he was nominated as Kerio valley and marigat are semi-arid areas.

He stated further that he was from Tugen community which was not minority but he was minority as a person.

It was R3's evidence further on cross examination that he had applied under Article 193 of the constitution and that he did not play any role in the nomination exercise as it was conducted from the head office Nairobi.

He stated further that all groups except gender top up fell under the marginalized category.

It was R3's evidence that there was no group that was special than the other and there was no group that was to be picked unless it applied.

RW2 CAROLINE CHEBICHI KESSEI informed the court that she was from Karel Barwesa, North Baringo and that she was a KANU member.

She stated that there were two respondents from KANU in the petition but there was no disabled KANU member in the petition.

It was her evidence further that she felt aggrieved as the petitioners were from jubilee and should have not sued her.

RW2 submitted further that she had applied for nomination and that in total 30 persons were picked for KANU and 30 for jubilee and that one EDWIN KIPSEREM KANDIE was not nominated and that she did not know him personally and that one could not tell that he had applied under disability from the papers and the political parties could have not known that he was a person with disability unless it was indicated.

He stated that the said EDWIN was not nominated because he was on the gender top up list which was meant to satisfy the gender top up requirement.

RW2 stated further that KANU had met the nomination requirements when they submitted their list to IEBC and they were given 4 slots wherein the marginalized got one under youth and under gender top up they got three seats.

RW2 stated further that she was not from Uasin Gishu and that the petition should be dismissed.

RW3 CHEROTICH FRANSISCA CHEPKUTO informed the court that she was from Eldama Ravine ward and a jubilee party member.

She stated that she had vied for primaries for MCA under jubilee party at Eldama Ravine ward and she had become number two and that she applied for nominations and she was successful as she had met all the requirements.

She stated that the petitioners had no issue with gender top up and that they were not disabled as she had seen them in court.

On cross examination RW3 stated that she did not attach any document to her affidavit in court to prove that she had applied for nomination and that she had applied under gender top up.

RW3 stated further that IEBC's rule was to see that the law had been followed which they did in this case.

RW4 PURITY TALLAM informed the court that she was a jubilee member and that she had vied for primaries for MCA for Eming ward and she had managed to get 1292 votes and as the only woman she had done well and she was asked not to vie as an independent member and she was promised to be nominated and she had applied under gender top up and her name was gazetted and there was no condition attached to the nomination rules that she was not required to apply as she had been nominated in the year 2013.

On cross examination RW4 stated that she did not attach any document to her affidavit that she had applied for nominations or that she was shortlisted nor that she was a jubilee member.

RW4 stated further that it was IEBC's duty to gazette the names and that she knew one VINCENT MAPATU who was disabled and had applied under gender top up which was for women.

It was RW4's evidence further on cross examination that in the year 2013 she was nominated under URP which had ceased to exist and that her name was sent to IEBC for gazettment by jubilee party.

She confirmed further that she had applied for nomination like all the other nominated jubilee members and she was nominated and her name was gazetted under gender top up.

She prayed that the nomination be upheld by the court.

**The Laws Governing the nomination of the members of the County Assembly are:-**

***(i) Under the constitution Article 177: membership of County Assembly :- consists of :-***

*(a) Members elected by the registered voters of the wards each ward constituting a single member constituency on the same day as a general election of members of parliament being the second Tuesday in August in every fifth year.*

*(b) The number of special seat members necessary to ensure that no more than two thirds of the members of the assembly*

are of the same gender.

(c) The members of marginalized groups, including persons with disability and the youth, prescribed by an act of parliament.

(d) The speaker

**(ii) The members contemplated in clause I (b) and (c) shall in each case be nominated by political parties in proportion to seats received in that election in that county by each political party under paragraph (a) in accordance with article 90.**

**ELECTIONS ACT SECTION 25: NOMINATIONS AS MEMBERS OF COUNTY ASSEMBLY**

**The act states that**

(i) Unless disqualified under subsection (2) a person qualifies for nomination as a member of the County Assembly if the person:-

(a) Registered as a voter.

(b) Satisfies any educational moral, and ethical requirements prescribed in the constitution and this Act.

(c) Is either:-

(i) nominated by a political party or

(ii) An independent candidate supported by at least five hundred registered voters in the ward concerned.

**(ii) A person is disqualified from being elected a member of County Assembly if the person:-**

(a) Is a state officer or other public officer other than a member of the County Assembly?

(b) Has at any time within five years immediately before the date of election held office as a member of the commission.

(c) Has not been a citizen of Kenya for at least the ten years immediately preceding the date of election.

(d) Is of unsound mind

(e) Is an undischarged bankrupt.

(f) Is serving a sentence of imprisonment of at least six months.

(g) Has been found in accordance with any law to have misused or abused a state office or public office or to have contravened chapter six of the constitution.

(iii) Possibility of appeal, or review of the relevant sentence or decision has been exhausted.

For purposes of this petition the two provisions cited above will be the main guide together with all the other laws the cited authorities the evidence and any other documents that were submitted to the court and adopted as part of the pleadings and on evidence by the parties and so allowed and permitted in law.

The petitioners submitted in brief on points of VERY relevant laws that:-

(i) Article 177 (2) of the Constitution provided for special seat members to the county assemblies nominated by political parties in proportion to the seats received in that elections and thus two political parties jubilee and KANU had qualified do fill the nominations seats for the Baringo County Assembly but nomination exercise was flawed and unconstitutional and fraudulent and since the petitioners were residents of Baringo County they had all the rights to challenge the said nominations.

The petitioners submitted further that the 2<sup>nd</sup> and 13<sup>th</sup> respondent who were mandated to gazette the nominated members had done so and thus gazetted members who were nominated by political parties out of a flawed process which was not open, free fair and transparent as required by the constitution.

The petitioners submitted that the respondents herein did not abide by the provisions of several constitutional provision which included articles 22, 38, 11, 81, 177 and 36 among other provisions.

**ON FACTS**

The petitioner submitted that the respondent had failed to consider the rights of the disabled and the minority and marginalized groups and stated further the really minorities and marginalized groups in Baringo County were kikuyus, kisii, Njemps and that the 3<sup>rd</sup> respondent did not qualify to be considered as the marginalized person or group.

The petitioners submitted further that the 3<sup>rd</sup> respondent was still a jubilee official within Baringo County and he had influenced his nomination and that he had stated that Baringo North was a semi-arid area and that he was over 70 years hence the entitlement to be referred as a marginalized person which to the petitioners was not true as the entire county of Baringo was almost semi-arid and thus the 3<sup>rd</sup> respondent was not able to demonstrate that he deserved to be referred as marginalized and that his argument that he was nominated due to his old age was not true as "old age" was not identified as special interest group requiring special protection as the disabled, youth, women and marginalized.

It was thus the petitioner's submission that the 3<sup>rd</sup> respondent's nomination was unlawful.

It was the petitioners submissions further that the nomination exercise did not have regional balance and other aspects of equity and fairness.

It was the petitioners submissions further that it was only the 4<sup>th</sup>, 5<sup>th</sup> and 10<sup>th</sup> respondent who bothered to file their affidavits in response to the petition of the nominated members and since the ones who filed affidavits did not indicate that they had authority to file the said affidavits on behalf of those who did not and thus they did not challenge the petition.

It was the petitioner's submissions further that there were party lists that were submitted by the political parties which were more inclusive but later altered and or tampered with to include persons who were not in the initial lists and persons who were not residents of Baringo County and that had necessitated the filing of a reference to the political parties tribunal as No. 371 of 2017 by the 1<sup>st</sup> petitioner which was determined in her favour.

The petitioners were also not happy with the alleged recycling of members and they had singled out **SAPHINA CHELAGAT 6<sup>th</sup> respondent and PURITY TALLAM 4<sup>th</sup> respondent.**

It was the petitioners evidence further that the 1<sup>st</sup> respondent which was mandated to conduct elections and other related activities under article 88 (4) and under the IEBC Act 9 of 2011 did not perform its mandate in a transparent manner as it did not conduct the nomination exercise in an open and transparent manner and they did attach the documents to support their claim that they had published the names of the nominees in the daily papers.

The petitioner submitted further that the issue that the petitioners wanted to have the entire gazette notice nullified was not true as the dispute herein was only dealing with Baringo County and also that the issue of the competence of the petitioners advocate was neither here or there and failure to file replying the respondents response was not fatal to the petition.

The petitioners also submitted that the failure to attach documents to their petition was not fatal as that was due to the way the documents were initially filed and that the petitioner were motivated by selfish interests when filing the petition.

The petitioners urged the court to consider the Resident Magistrate in Migori's finding [unreported] to have this petition allowed as prayed for.

The 1<sup>st</sup> respondent submitted briefly that the court had no jurisdiction to hear this matter and that the respondents had the right to move the court of Appeal as they had challenged the nominations at the political tribunal which had the status of the High court and they should have not filed a fresh suit.

The 1<sup>st</sup> respondent submitted further that the nominated members of Baringo County Assembly were all validly nominated as there was no group which was superior to the other as the party list had the youth, minorities, women and persons with disability and the said persons were picked as they were listed from the top downward and disability had no superiority to any other group.

They cited the case of **BEN NJOROGE AND ANOTHER VS IEBC AND 2 OTHER 2015 eKLR.**

The 1<sup>st</sup> respondent submitted that article 26 of the constitution defines marginalized groups and that article 27 (4) was specific against discrimination of any form article 100 specified that there were other groups which were not listed as minorities and deserved nomination and it was their submission that the aged were in the said group.

The 1<sup>st</sup> respondent submitted that there was no law barring the 5<sup>th</sup> and 6<sup>th</sup> respondent to be nominated twice and that the 10<sup>th</sup> respondent could not be disqualified for allegedly coming from Uasin Gishu county as there was no law to that effect and they made reference to section 25 of the Elections Act.

The 1<sup>st</sup> respondent submitted that it had performed its mandate in accordance with the law as provided for under article 88 (1) (4), of the constitution, section 34 (6A) 36(1) of the election Act, Article 77 (1) (b) of the constitution, Regulation 54 and 55 of the general regulations.

They cited the decided case of **MOSES MWANGI AND 14 OTHERS VS IEBC AND 5 OTHERS [2016] eKLR.**

It was the 1<sup>st</sup> respondent's submissions further that it had received party lists from Jubilee and KANU and the lists were referred back to them to review until the lists were agreed upon and that Jubilee party was required deal with the issue on members who were in the list but not registered voters and the members who were in the list but not members of the political party; and the names were put on newspapers for successful persons as required under regulation 54. (8).

It was the 1<sup>st</sup> respondents submission that the persons with disabilities were ranked together with the youth and persons from marginalized groups and thus it was not a must that they be given priority and that was the case the constitution should have so stated.

The 1<sup>st</sup> respondent cited the case of: **COMMISSIONER FOR THE IMPLEMENTATION OF THE CONSTITUTION VS AG AND OTHERS [2013] eKLR.**

It was the 1<sup>st</sup> respondent submission further that the issue of regional balance was not a requirement when dealing with the county assemblies under article 90.

They cited the case of **MOSES MWANGI AND 14 OTHERS VS IEBC AND 5 OTHERS 2016 [eKLR]** and commissioner for the implementation of the **CONSTITUTION VS THE AG AND OTHERS [2013] eKLR.**

The 1<sup>st</sup> respondent states that the unreported case before the Resident Magistrate Migori was not similar to the instant case as in the said case the tribunal's orders were not complied with before the gazette of the names.

It was also the 1<sup>st</sup> respondents submissions that the case of **EDWIN KIPSEREM AND MABATUK VINCENT** was raised as being persons with disabilities but the two had applied under gender top group instead of disabled group and if indeed they were aggrieved they should have appealed against the list to the tribunal.

The 2<sup>nd</sup> respondent briefly submitted that:-

(1) That the 3<sup>rd</sup> -12<sup>th</sup> respondents were validly nominated as they had applied for nominations as required and their names were sent by the 2<sup>nd</sup> respondent that is Jubilee party and 13<sup>th</sup> KANU party to the 1<sup>st</sup> respondent through party list which they evaluated and gazetted as required and they were ultimately sworn in as nominated members of Baringo County and the provisions of Article 90 (2) (a) which mandated the IEBC to supervise the said exercise was complied with together with section 25 (c) of the Elections Act and 35 (b) were all complied with and thus the nominations were properly conducted.

It was the 2<sup>nd</sup> respondent submissions further that the petitioners did not adduce any evidence that the said respondents were not resident of Baringo County as required and they cited the case of **NACK KENYA AND ANOTHER VS IEBC & ANOTHER 2014 eKLR**

The 2<sup>nd</sup> respondent submitted further that the petitioners did not demonstrate that they had applied for nominations and their names acknowledged by the political parties as they alleged.

The 2<sup>nd</sup> respondent submitted further that the Jubilee Party had complied with its own constitution and rule 41:1(d) which provided for the submission of application for nomination as one of its conditions but there were other conditions that were to be adhered to before a person was shortlisted and put on the party list and that an application for nomination was not guarantee that one was to be nominated and the party had sole mandate to nominate eligible persons and submit the list to IEBC for another round of selection on priority basis and gazette.

They cited the case of **LINET KEMUNTO NYAKERIGA AND ANOTHER VS BEN NJOROGE & 2 OTHERS [2014]**

The 2<sup>nd</sup> respondent submitted further that the petitioners did not have any claim against the list submitted to the 1<sup>st</sup> respondent by the 2<sup>nd</sup> respondent as they were not members to the 2<sup>nd</sup> respondent.

They cited the case of **NACK KENYA & ANOTHER VS INDEPENDENT ELECTORAL AND BOUNDARY COMMISSION & ANOTHER [2014] eKLR.** Where it was held that ... it therefore follows that membership to NACK KENYA party was an important pre-requisite for nomination of the 2<sup>nd</sup> respondent to the County Assembly of Garissa and that if she was not a member of the said party at the date of nomination she cannot be said to have been nominated by the party.

The 2<sup>nd</sup> respondent cited another case in **MARY WAIRIMU MURAGUR & 12 OTHERS VS INDEPENDENT ELECTORAL & BOUNDARY COMMISSION & 5 OTHERS 2015 eKLR.**

The 2<sup>nd</sup> respondent submitted further that the orders prayed for by the petitioners could not be enforced and petitions should be dismissed with cost.

The 3<sup>rd</sup> respondent submitted too that the petitioners did not prove that the nominations were conducted in a manner that was legally accepted as held in the case of **GIDEON MWANGANGI WAMBUA VS IEBC & 2 OTHERS ...4 OF [2013] eKLR and section 107 (1) (2) of the Evidence Act.**

It was the 3<sup>rd</sup> respondent's submissions further that the petitioners did not prove that there was no County Regional Balance in the

nomination exercise and that the 3<sup>rd</sup> respondent had demonstrated that indeed there was balance in the nomination as every constituency of Baringo County had been given two slots in the nominations.

The 3<sup>rd</sup> respondent submitted that the petitioners did not prove that they had met all the requirements for the nomination by attaching the documents they had applied with as evidence to the affidavit just as he did by attaching all the documents that were involved in the exercise from the advertisement to the final submission of the application to the Jubilee party for consideration.

The 3<sup>rd</sup> respondent submitted further that the petitioners did not prove that indeed some of the nominated members were not from Jubilee party.

It was the 3<sup>rd</sup> respondent's submission that he was properly nominated as he was from a marginalized region and by virtue that he was 70 years old he was the special interest group.

He stated further that the petitioner's claim was malicious and they had come to court with unclean hands as they had filed the petition selectively against 10 nominated members of Baringo County instead of the entire group which was 15 which meant that there were other persons who will be affected by the court's order if the petition was allowed without being given a chance to be heard.

They urged the court to consider the case of **DAVID KATISA VS DISTRICT LAND REGISTRAR MWANGA 2012 eKLR CIVIL CASE [MIS. APP. NO. 1 OF 2012.**

The 3<sup>rd</sup> respondent stated that he never influenced his nomination.

The 3<sup>rd</sup> respondent demonstrated how the nominated members of Baringo County satisfied the County Regional balance and the categories under which they were nominated as per the party list as *hereunder* :-

**1. BARINGO CENTRAL CONSTITUENCY**

**(1) KIPTALA JERUTO 7<sup>th</sup> respondent Gender Top up.**

**(2) FRANCISCA CHEBURET 11<sup>th</sup> respondent Gender Top up**

**2. BARINGO SOUTH CONSTITUENCY**

**(1) FRANCIS KIBAI .....Marginalized youth**

**(2) JULIA KANDIE .....Gender Top up.**

**3. ELDAMA RAVINE CONSTITUENCY**

**(1) CHERUS MAUREEN 9<sup>th</sup> respondent Gender Top up**

**(2) FRANCISCA CHERUTICH 5<sup>th</sup> respondent Gender Top up.**

**4. TIATY CONSTITUENCY**

**(1) DIANA SIRITI 12<sup>th</sup> respondent Gender Top up**

**(2) KAKEREL EUNICE 8<sup>th</sup> respondent Gender Top Up**

**5. BARINGO NORTH CONSTITUENCY**

**(1) SAPHANIA CHELANGAT 6<sup>th</sup> respondent Gender Top Up.**

**(2) CHARLES K. BOWEN 3<sup>rd</sup> respondent Marginalized /minority**

**6. MOGOTIO CONSTITUENCY**

**(1) PURITY TALLAM 4<sup>th</sup> respondent Gender Top up**

**(2) VALARIE JEPKOSGEI .....Marginalized /youth**

The 3<sup>rd</sup> respondent cited the cases listed hereunder in support of his claim that he was validly nominated under marginalized /minority special interest group.

**(i) SAN ANTONIO SCHOOL DISTRICT VS RODNQUZ 1973 411VS 29**

**(ii) MICAH KIGEN & 2 OTHERS VS ATTORNEY GENERAL & 2 OTHERS NAIROBI PETITION NO. 268 & 293 OF [2012] eKLR.**

The 3<sup>rd</sup> respondent made reference to several other international articles which gave definition and meaning of elderly persons as special group.

It was the 3<sup>rd</sup> respondent's submissions that the petition before Migori Resident magistrate's Court was not similar to our case.

The 4<sup>th</sup> -12<sup>th</sup> respondent submitted that the petitioned case had no merits and should be dismissed.

They urged the court to consider four issues:-

1. *Whether the unpleaded issues warranted this court's determination*
2. *Whether the nominations process of the members of the County Assembly of Baringo was conducted in accordance with the Law.*
3. *Whether the orders sought for in the petition were capable of being granted especially the nullification of Kenya gazette notice Vol. CXIX-NO.124.*
4. *Costs.*

On issue number one they urged the court not to consider any issues that were not pleaded and the allegations by the petitioners that there were typographical issues should not be entertained and they urged the court to deal with pleaded issues only.

They cited the case of **MAHAMUD MUHUMED SIRAT VS ALI HASAN ABDI RALUMA & 2 OTHERS NAI. 15 OF 2008[2010]**

The said respondents submitted further that the petitioners did not discharge their duty on burden of prove in all the allegations in the pleadings.

They cited cases in support of the said issue:-

**(1) JEET MOHINDER SING VS HARMINDER SINGH JASSI CIVIL APPEAL NO. 154 OF 1999.**

**(2) PETITION 13 OF 2013 LYDIA MATHIA VS NAISULA LESUUDA & ANOTHER**

**(3) RAILA ODINGA & OTHERS VS INDEPENDENT ELECTORAL AND BOUNDARY COMMISSION AND OTHERS 2013[EKLR.]**

**(4) ABUBAKAR VS ADUA 2009 ALL FWLR.**

It was the said 4<sup>th</sup> -12<sup>th</sup> respondents submissions further that Article 90 (2) c exempted the County Governments from the issue of Ethnic -diversity prescriptions for party lists and thus the said issue was irrelevant.

It was their submissions further that the 3<sup>rd</sup> respondent had demonstrated that all the six constituencies of Baringo was represented in the nominations and thus the issue was adequately achieved.

On the issue of disability it was the said respondents submission that the alleged person with disability one EDWIN KIPSEREM did not disclose that he had disability and that he had applied under gender top up and he cannot be heard to say that he was not considered under the disability category.

It was the 4<sup>th</sup> -12<sup>th</sup> respondents submissions that they were Lawfully nominated as the Political Parties and IEBC had all complied with their respective relevant Laws that Article 88,82,90,97,98, and 177 of the constitution and section 35, 36, and 37 of the Elections Act as they discharged their duties in the nomination exercise.

The respondents urged the court to find that the petitioners did not prove that the respondent had violated any Laws to warrant the nullification of the gazette notice since there was no evidence that there was any person that applied under the disability category since they were not themselves nor were they from the marginalized groups as per their evidence.

The 4<sup>th</sup> -12<sup>th</sup> respondents urged the court to dismiss the petition with costs.

Upon hearing the evidence tendered and reading of the pleadings together with the submissions filed the issues for determination were :-

1. Jurisdiction

2. Whether the 3<sup>rd</sup> - 12<sup>th</sup> respondents had a role to play toward any irregularities that may have arisen out of the nomination that were conducted by the 2<sup>nd</sup> and 13 respondents.

3. Whether the 2<sup>nd</sup> and 13<sup>th</sup> respondents had played their roles as required under the laws and regulations that are applicable.

4. Whether the 1<sup>st</sup> respondent had played its role as so prescribed by the laws that govern it and the management of elections and the constitution.

5. Whether the petitioners discharged their duties to prove their case as required above balance of probability but not beyond reasonable doubt as required in the election petitions.

6. Whether the nullification or non-nullification will offend the relevant law and the constitution.

7. Whether the nullification orders will be enforceable based on the party lists that were submitted to the IEBC 1<sup>st</sup> respondent by the 2<sup>nd</sup> and 13 respondent based on the laws governing nomination issues.

8. Whether costs are payable and by who.

## **1. JURISDICTION**

The respondents raise an issue that the petitioners were required to appeal from the political parties tribunals orders if they were aggrieved to the High Court and not to file a fresh petition.

As per the provisions of section 75(1A) of the Elections Act it is provided that, "a question of the validity of the election of a member of a county Assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice.

The issue to be addressed is when does that jurisdiction arise?

The same has been humbly dealt with the very recent case in the High Court at Kabarnet constitutional petition NO. 9 of 2017 SUSAN WACHUKA VS IEBC AND THE ATTORNEY GENERAL.

The learned Presiding Judge in the said case cited several authorities which demonstrated that "The legal position emerging from the case of **RAHMA ISSAK IBRAHIM –VS – INDEPENDENT ELECTORAL AND BOUNDARY COMMISSION AND 2 OTHERS [2017]eKLR** was that once a member has been gazetted as duly nominated that becomes an election result and anyone unhappy with that result can only challenge it as an election dispute in an election court.

The said High Court case the Presiding Judge held that the Resident Magistrate court has the jurisdiction to hear and determine an election petition in regard to County Assemblies members.

I thus find that the respondent's submission that the court lacked jurisdiction to hear and determine the petition is lacking basis and the same is dismissed.

**2. WHETHER THE 3-12<sup>TH</sup> RESPONDENTS HAD A ROLE TO PLAY TOWARDS ANY IRREGULARITIES THAT MAY HAVE ARISEN** if any out of the nomination that were conducted by the political parties R2 AND R13 herein and confirmed by IEBC in the gazette Notice No. CXIX NO.124 OF 28.8.17.

As per the evidence of pw1, pw2 and pw3 they had seen adverts for nomination positions that were put in daily papers by the Jubilee party 2<sup>nd</sup> respondent and KANU party the 13<sup>th</sup> respondents and pw1 stated further that she had applied online after obtaining all the required documents.

She stated further that all the Jubilee members had applied the same way which I believe included the respondents herein.

Pw2 confirmed too that she had applied online for a nomination with Jubilee party just like the others. That was also the position and evidence of pw3 that she had applied online.

That was the position with respondent number 3 who confirmed that indeed he had also applied for nomination through Jubilee Party and he went as far as attaching all the documents that he submitted together with his application for the nomination exercise.

That was also the position for CAROLINE CHEBICHI KESSEI the 10<sup>th</sup> respondent in the petition who confirmed that she had applied online for the nomination.

That was a clear confirmation that for anyone who was interested to be nominated as a member of Baringo County Assembly he or she was to APPLY.

The petitioners informed the court that some respondents were put on the 2<sup>nd</sup> list without applying and or being in the first list. That was their words against the alleged respondents.

The petitioner's were required to prove the said allegations by way of documentary evidence which they did not. It was thus clear that the petitioner's had failed to discharge that allegation as required.

The 3<sup>rd</sup> respondent went a step to prove beyond reasonable doubt that indeed he had applied for nominations he had all the required documentation that were required and he had attached them to his affidavit. Though that was not his duty to prove his innocence on the allegation laid by the petitioner as a prudent man he proved them wrong.

**ALL the other respondent had no duty at all to prove that they had applied as it was the petitioners duty to prove that they did not apply as required.**

Nominations are guided by several provisions of Law, **but I will rely specifically on SECTION 25 (1) WHICH specifies the qualifications for nomination as a member of County Assembly and states:-**

(1) unless disqualified under section (2) a person qualifies for nomination as a member of a County Assembly if the person:-

(a) Is registered as a voter.

(b) Satisfies any educational moral and ethical requirements prescribed, the constitution and the said act.

(c) is either

(i) Nominated by political party

(ii) an independent candidate supported by at least five hundred registered voters in the ward concerned.

There was no evidence from the petitioners that any of the nominated member's respondents herein was short of the above requirement.

Section 25 clause 2 of the Elections Act lists 7 ground under which a person can be disqualified for nominations.

The petitioners did not adduce any evidence that any of the respondents had fallen victim for any of the said grounds.

As per the evidence of the petitioners and respondents, after application were sent to the political parties a list was generated for the successful applicants which was then sent to the IEBC who in return evaluated the list and made recommendations to the political parties if there was need on compliance.

In this case petitioners stated that they had applied but their names were not put on the lists and they had challenged the nominations before the political parties tribunal and they were successful.

Sadly it was not clear from the evidence as to what the petitioners appealed against to the tribunal ; was it against their none appearance on the list, was it against the respondents or was it against the non-inclusion of the disabled and marginalized groups.

**The advocate for the 1<sup>st</sup> respondent submitted that they had returned the list to Jubilee Party upon receipt of the 1<sup>st</sup> list and they had asked them to deal with two issues (1) on members who were not registered voters and (2) on members who were not registered as members of the said party.**

I cannot tell whether that was out of the tribunal's direction/orders or out of its/party role in the nomination exercise.

**The 1<sup>st</sup> respondent thus submitted that all the respondents herein number 3-12 were properly and lawfully nominated as required by the Law.**

With no evidence to the contrary that the respondent had breached any of the provisions of the constitution and any other laws as persons I find that they were properly nominated by their political parties and cleared by the IEBC and thus they are not to blame for any other un-procedural activities omissions and or commission that the petitioners alleged in this petition.

The provisions of section 25 thus clear all the allegations raised by the petitioners that some respondents were from different counties and that other respondents had been nominated twice and that other respondents were officials of a political party before nominations.

**Article 90(2) (a) of the constitution mandated the 1<sup>st</sup> respondent the responsibility of conducting and supervising the election for special seats be ensuring that the party list contains names of persons who are eligible for nomination as so submitted by the 1<sup>st</sup> respondents advocate and since there is no evidence that IEBC did not do that I find that the 3<sup>rd</sup> -12<sup>th</sup> respondent were lawfully nominated.**

**3. WHETHER THE 2<sup>ND</sup> AND 13<sup>TH</sup> RESPONDENTS HAD PLAYED THEIR ROLES AS REQUIRED IN THE**

## **NOMINATION OF MEMBERS OF BARINGO COUNTY ASSEMBLY.**

**As per the provision of Article 177 (2) political parties were required to nominate County Assembly members in proportion to the seats received in an election.**

The petitioners stated that indeed the two political parties herein Jubilee and KANU had advertised vacancies for County Assemblies and they had applied.

That meant that indeed the two parties had taken the 1<sup>st</sup> step towards nominations.

Section 34 of the Election Act stipulates the steps that political parties are required to take in the process of the nomination.

The 2<sup>nd</sup> respondent submitted that it had followed all the process of nomination and they had sent a party list to the IEBC and IEBC had conducted its work as per the provision of **section 34 (4) of the Election Act and they had the names gazetted.**

The 2<sup>nd</sup> respondent submitted further that rule 41.1(d) of the Jubilee party constitution provided that the submission of application was one of the requirements which assisted in the procedure for identifying the persons eligible for nomination and they had followed the said procedure and IEBC had received its party list which they returned for some clarification or rectification on the issues that I have stated herein above.

**Sadly the petitioners did not find it necessary to provide the court with the party lists that the political parties had submitted to IEBC to see whether they had complied with all the legal requirements or not and thus I cannot wrong what I have not seen;**

### **4. WHETHER THE 1<sup>ST</sup> RESPONDENT HAD DISCHARGED ITS DUTIES AS REQUIRED.**

As per the evidence and submissions it was clear that the 1<sup>st</sup> respondent had received party lists from the 2<sup>nd</sup> and 13<sup>th</sup> respondents and it had evaluated the lists as required of it and the only issues that they found requiring clarification were raised to the political parties and when the lists were resubmitted the IEBC was satisfied and the names were gazetted on priority basis as presented.

### **THE MAIN POINT OF CONTATION HEREIN WAS**

Whether the petitioners had proved the case as required to prove that the marginalized, special interest groups and persons with disability had been left out, the nomination to the Baringo County Assembly and as gazetted under gazette notice No. CXIX NO. 124 OF 28.8.17.

All the parties submitted on the said issue at length and there was no dispute on the provisions governing the same but the interpretations and application on whether there was any category that had preference over the other was the only issue that I am to address and make a finding whether there was a wrong committed by either parties and whether the petitioners and other interested groups had performed their part of bargain.

Section 177 (1) (c) of the constitution provides that the County Assembly shall consist of the number of marginalized groups, including persons with disabilities and the youth.

Section 36 (1) f of the elections Act states further that Article 177 (1) (c) of the constitution shall include eight candidates at least two whom shall be persons with disability, two of whom shall be the youth and two of whom shall be persons representing marginalized group.

The above are the provisions that the respondents had allegedly offended hence this petition.

I wish to state hereunder before I address the issue whether the above was violated.

(1) For the above provision to apply a political party must have a chance to nominate based on its party strength in the elected members.

In this case the evidence was that Jubilee, 2<sup>nd</sup> respondent had 8 slots and KANU 13<sup>th</sup> respondent had 4 slots to fill.

Once the above is guaranteed a party will commence its nomination process as per their rules or constitution.

In this case the petitioner's had stated that the parties had advertised for vacancies.

Upon advertisement members of the public who felt that they were qualified as the party's conditions and requirement were required to offer themselves for nomination by applying and in this case the petitioners stated that they had applied online.

After the application period is over the political parties have the mandate to select the persons that are successful and prepare a party **list on priority basis** as per the provisions of Article 177 and Section 36 of the Elections Act.

The list is forwarded to the commission which is mandated to review the list to ensure compliance with the prescribed regulations.

It was the petitioner's evidence that they had all applied online under the gender top up category.

The petitioners stated that all interested persons were required to state as to under which category they had applied and they listed the categories as marginalized /minority , disability , youth and gender top up.

All the respondents herein had applied under gender top up.

Some respondent had applied under gender top up, youth and minority or marginalized.

As per the records filed in court and the evidence tendered in court there was NO PERSON who claimed to have applied under the disability category.

There were allegations, that three persons that is one EDWIN KIPSEREM KANDIE of KANU party , RODGES KIPKURUI and REGINA SARICH of Jubilee parties had applied under the disabled category but the said persons did not appear in court as petitioners or witnesses nor did the petitioners adduce any evidence to that effect.

As is it, the court has no knowledge whether there was any person that had applied under the disability category and denied a chance.

If indeed there were no persons that had applied under the said category the 2<sup>nd</sup> and 13<sup>th</sup> respondent could have not been able to comply fully with the requirement of section 36 of the Elections Act.

#### **Now on interpretation of the provisions of section 36 of the Elections Act.**

The political parties are required to nominate two persons from the disability group, two from the youth and two from the marginalized group.

To my understanding it is not a must that the nominated person shall be automatically be gazetted as members of the County Assembly.

Those are to me minimums for selection which will be listed **on priority**.

KANU had 4 slots but it was required that they had to send a minimum of 6 person as prescribed and as per the evidence they sent 30 and the allocation was to be **on priority basis** and thus it could have chanced that any of the group could have missed depending on the number they were placed on **priority listing** .

I have considered the submission made by the respondents and I agree with them that all the categories were to be equal and sadly the final list was to be picked on priority basis as listed by the political parties with no alterations.

Sadly as per the gazette notice the 3<sup>rd</sup> respondent was the only one who was nominated under marginalized category. There was no evidence that there was any other person who applied under the same category and proved that he was more marginalized than the 3<sup>rd</sup> respondent.

Marginalized and or minority is very broad. I agree with him that the elderly are special group and that Kerio valley is a hardship area of Baringo County and there was no contrary opinion that it was not true.

The 3<sup>rd</sup> petitioner did not state that he applied as a minority **as of tribe but** as of special group and the region of Baringo where he comes from.

He was thus rightful nominated based on the constitutional requirements.

**On regional balance:** the constitution exempts County Governments/assemblies from the requirement but even if it was not so, the petitioners were not able to state categorically as from which area all the nominated members of the County Assembly of Baringo originated from.

The 3<sup>rd</sup> respondent had come to their aid and stated that the nominated members of the Assembly of Baringo were picked from all the six constituencies. **On the issue that there was no representative nominated from the marginalized category.** The petitioners stated that 3<sup>rd</sup> respondent was nominated under the said category but he did not qualify.

The 3<sup>rd</sup> respondent gave evidence that he had applied under the said category and he was over 70 years and was a resident of Kerio Valley an area he considered to be under hardship and he was considered.

**ON THE ISSUE OF NULLIFICATION OF THE GAZETTE NOTICE NO. 124** :Section 34 (10) of the Elections Act States that the party list submitted shall not be amended during the term of the County Assembly and the 1<sup>st</sup> respondent submitted that the said provisions commenced at the gazettelement.

It has been held that it is the responsibility of political parties, rather than the courts or the IEBC to determine which of their members should be included in a party list, in which category and in what order of priority [MOSES MWICIGI & 14 OTHERS -VS IEBC AND FIVE OTHERS , SUPPREME COURT PETITION NO. 1 OF 2015 , PENINAH NANDAKO KILISWA VS IEBC AND 2 OTHERS.

It was the responsibility of IEBC to ensure that candidates nominated by way of party list meet suitability and eligibility requirements set out in the constitution and Elections Act 2011 as held in the case of **MOSES MWICIGI AND 14 OTHERS –VS IEBC AND 5 OTHERS** and in this case IEBC submitted that indeed they were satisfied with the party lists presented by the two political parties herein and they had used the said party lists to gazette the nominees on priority basis as presented.

This court had no mandate to nullify the said gazette notice as it had no chance to see the lists presented to IEBC nor does it process any powers by law to do so without prove that indeed the gazetted members were not the ones that were presented for nomination.

This case can be distinguished with Migori County case since in the Migori case the gazetted members were not part of the names that were so approved and or directed for approval by the political parties tribunal.

The petitioners herein may have not been satisfied that their names were left out of the lists and final gazettment but it **MUST** be understood that the slots were few and the majority of the persons who were nominated were picked from the gender top up category under which the two petitioners had applied.

As per the Laws that guide the nomination exercise specifically section 34 of the elections Act it is clear that the political parties and IEBC have the sole mandate to nominate and gazette members to the County assemblies. That has to be done through party list which will be listed on **PRIORITY** : priority herein is the sole mandate of the political parties.

All that I can add is to urge the political parties to be considerate and share the few nomination slots equitably between all the intended groups without biasness on **PRIORITY** to avoid a situation where Kenyans will think that the provisions of article 177 of the constitution which gave **hope** to the disabled, marginalized/minorities and other special groups was a mockery as the said **HOPE** was deposited with the political class inform of political parties by section 34 of the Elections Act, whereby the said political class is not willing to release the said **hope** to the so intended groups while hiding under priority listing.

#### **ON COSTS**

It is always argued that costs follows the event that is very true but there are always exceptions to the known norms.

The petitioners herein were challenging the manner in which the political parties that is the 2<sup>nd</sup> and 13<sup>th</sup> respondents picked their priotized members in the nominations of the 3<sup>rd</sup> -12<sup>th</sup> respondents.

Though the discretion and mandate to select the nominees rested on the 2<sup>nd</sup> and 13<sup>th</sup> respondent it can be said that their priority listing may have been in a manner that was designed to deny the disabled and other groups a chance if at all there were any who had applied. The IEBC 1<sup>st</sup> respondent though it had no powers to change the priority listing presented by the 2<sup>nd</sup> and 13<sup>th</sup> respondent, it had powers to return it before gazettment and request that the priority listing to at least have the disabled and other groups if at all they had applied an issue that was not proved by the petitioner herein.

Constitutionally the political parties and IEBC have the mandate to conduct civil education and sensitize the members of the public that they have right and they should go for them by making application for nominations.

In this case the 1<sup>st</sup>, 2<sup>nd</sup> and 13<sup>th</sup> respondents did not demonstrate that indeed they had either conducted civil education to inform the said categories that they were required to apply or that they had placed them strategically on the party lists if at all they had applied.

For that reason, I will not award any costs to the 1, 2 and 13<sup>th</sup> respondents. The 3<sup>rd</sup> -12<sup>th</sup> will have cost as they had no role to play in the nomination exercise and they will share Kshs.100,000/- deposited in court in equal proportions.

#### **CONCLUSION**

The petition herein is thus dismissed with costs to the 3-12<sup>th</sup> respondent as the petitioners were unable to prove as required that indeed there were disable persons that had applied and denied a chance by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents under the disability category.

The amount deposited in court to serve as final costs assessed for the 3<sup>rd</sup> - 12<sup>th</sup> respondent which amount will be distributed equally at Kshs. 10,000/= per a person/respondent.

#### **S.O. TEMU [PM]**

Delivered in the open court in the presence of the parties and their advocates.

Nyagaka for 4<sup>th</sup> – 12<sup>th</sup> respondents, Mwaita for 3<sup>rd</sup> respondent and holding brief for 1<sup>st</sup> respondents advocate, Kipkulei holding brief for the petitioner's advocate.

**S.O. TEMU [PM]**

**23.2.18**

Nyagaka- we appreciate the patience of the court.

We pray that original receipt for cost be deposited in court and supply of proceedings.

Kipkulei- I pray for 30 days stay on cost.

Court- parties to be supplied with proceedings herein and judgment at a fee as required.

30 days stay granted on costs.

**S.O. TEMU [PM]**

**23.2.18**