



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATES COURT AT NANYUKI

ELECTION PETITION NO. 3 OF 2017

IN THE MATTER OF ELECTIONS ACT 2011 AND ELECTIONS (PARLIAMENTARY AND COUNTY ELECTION) PETITION RULES, 2017

BETWEEN

DENNIS KANIARU MATHENGE.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST RESPONDENT

WAFULA CHEBUKATI.....2ND RESPONDENT

JUBILEE PARTY.....3RD RESPONDENT

ZAMZAM SALAMA HUSSEIN.....4TH RESPONDENT

PETER LEMERIA MATUNGE.....5TH RESPONDENT

MARY SAMKEN.....6TH RESPONDENT

CHISTOPHER MARK MWANGI.....7TH RESPONDENT

CATHERENE NYOKABI KIBUE.....8TH RESPONDENT

JUDGEMENT

This petition filed by Dennis Kaniaru Mathenge contests the nomination of the 4th -8th Respondents as nominated members of the Laikipia County Assembly. The gravamen of the petition dated 25th September 2017, is that the 4th-8th respondents nomination was irregular and unconstitutional. He stated that the respondents were nominated under the minority category yet they are from the Kikuyu community which is the majority community in Laikipia County. He decried the fact that persons with disabilities have no representation in the Laikipia county assembly contrary to the constitutional requirements. He further stated that much as party lists were completed, the same did not fully adhere to regulation 54 of the Elections (General) Regulations Act. The petitioner's grievance against the 1st and 2nd is their failure to comply with the provisions of Articles 81 and 100 of the constitution of Kenya, 2010 and particularly ensuring that persons with disability are adequately represented in the Laikipia County

Assembly. He concluded that the 4th -8th respondents nomination was unconstitutional and as thus should be nullified and the 3rd Respondent should be compelled to compile a another list in which the petitioner must be included.

The 1st and 2nd respondents filed their response to petition on 8th November, 2017. In the response, the 2nd respondent states that in so far as election into county assemblies is concerned, the 2nd respondent cannot be sued, either in his personal or official capacity and as thus, the claim against him is bad in law and should be dismissed. He denied the petitioner's averments in the petition and stated that the 4th – 8th Respondents nomination was conducted on the basis of proportional representation by use of party lists as required by Article 90 of the constitution and that the formulae for election under Article 90 required each party to list to comprise the appropriate number of qualified candidates alternated between male and female candidates in priority in which they are listed by the prospective party. They concluded that the petition was misconceived and bad in law and urged the court to dismiss it with costs.

The 4th, 5th and 7th respondents filed a joint response dated 7th November, 2017. In their response, they averred that they applied for nomination to the 3rd respondent as required by law as marginalised and that they were in the list of marginalised group nominees. They stated that they are residents of Laikipia County nominated to represent the minority tribes in Laikipia County Assembly. The 4th respondent averred that she is from the Borana community, 5th from Yiaku community- a minority community found among the Maa and the 7th from the Burji community which is equally a minority in the Laikipia County. They said that they had refuted the petitioner's allegation that they were from the Kikuyu community and prayed that the petition be dismissed with costs.

The 6th respondent filed her response on 16th October, 2017 in which she stated that her election was conducted on the basis of proportional representation by use of party lists as required by Article 90 of the constitution.

She said that the 3rd respondent was allocated 9 positions for its nominees to the Laikipai County Assembly. She denied the petitioner's allegation that she was from the Kikuyu community and stated that she was from the Mumonyot community of the Maa tribe who are indigenous inhabitants of Liakipia County. She denied being Mary Anne Wanjiru Nyaga as appearing on the IEBC verification portal and stated that the petitioner had been included in the marginalized list but that his appointment was subject to availability of seats to be allocated to the party, the doctrine of priority in which the candidates were listed and the position of the petitioner on the list viz a viz the available seats. She stated that she was duly nominated and elected and that the petitioner's allegation that at least 2 people should have been nominated to represent the disabled was not supported by any law. She further stated candidate of a higher rank were considered and found fit for elections filling the available slots to the exclusion of the petition who was ranking lower in the nomination list. She concluded that her nomination and election were done in consonance with the constitution and that it accords her an opportunity to represent her marginalized community and as thus, her nomination and election did not deviate from any established law nominated process, procedure or formulae. She prayed that the petition be dismissed with costs.

The 8th respondent filed her response on 15th October, 2017 in which she stated that she was duly nominated and elected as a member of the Laikipia County Assembly vide Gazette Notice No. 8380 pursuant to Article 177(1) (b) which aims at ensuring that no more than two-thirds of the membership of the assembly were of the same sex. She said that her nomination was under the gender top-up list and not on the marginalised category. She denied the petitioner's allegation that she was from Nakuru County and stated that she hails from Laikipia County but registered as a voter in Nakuru County. The 8th respondent said that there is no law prohibiting one from being nominated/ elected in a county assembly in which she is not a voter.

During the hearing, the petitioner testified that he is a businessman at Nanyuki and a member of the CDF committee. He stated that after the August 2017 elections, the 3rd respondent had 9 slots for nomination into the Laikipia County Assembly divided into two categories that is the gender top-up and the

marginalised which includes people with disabilities and the youth. He said that from the gazette notice, he thought that they were Kikuyus. Those he thought were Kikuyus were Zamzam Salana the 4th respondent, Peter Lemeria, the 5th respondent, Mary Samkem The 6th respondent and Christopher Mwangi, the 7th respondent. He said that his name together with that of Faith Ngithi appeared on the gazette notice in the category of People with Disability. He impugned the 4th -8th respondent's nomination on grounds that none of them was a Person with Disability. He said that during nomination, the 3rd respondent should have picked ZamZam from the female category, appearing alongside him on the category of PWDs. He impugned the 8th respondent's nomination on grounds that she hails from Nakuru County.

In cross examination by the 1st and 2nd respondent, the petitioner stated that marginalized groups have been disadvantaged in the society including exclusion from leadership. He said that Laikipia has many marginalized groups including women and youth, He said that the Boranas and Kikuyus should not be termed as marginalised. The petitioner stated that the gazette notice did not reflect the respondent's tribe and acknowledged that recommendation form people with disability is not an express acceptance as a nominee. He stated that the nomination list was to wait for elections for consideration for nominations into the various categories.

In cross examination by Mr. Ombasa for the 3rd respondent, the petitioner stated that the 3rd respondent had initially considered People with Disability. He said that he would not have any problem with the respondents if indeed they were Burjis and Boranas and stated that he relied on the list as appearing on the daily nation to determine the tribe of the residents. He acknowledged that the 4th and 7th respondents were properly nominated. He said that both the Kenya Gazette and the nation newspaper contained the respondent's relevant information and that he couldn't tell which of the lists was authentic. He said that he was initially comfortable with the list of nominations but realised that there was breach of law when his name was left out on the nominations into the County Assembly. He maintained that 3rd respondent did not break any law.

In cross examination by the 4th, 5th and 7th respondents, the petitioner stated that he is a businessman. He acknowledged having indicated in his application for nominations that he was a teacher and stated that he indeed was a part time teacher. He denied personally knowing whether the 4th, 5th and 7th respondents and states that though he had named them as Kikuyus, they denied so and that he didn't doubt them.

On cross examination by Mr. Kariuki for the 6th defendant, the petitioner stated that he attended the University of Nairobi between 2014-2015 taking certificate studies in adult educations. He said that a marginalised person is disadvantaged due to various reasons. He confirmed being satisfied with the list appearing on the daily nation on 23rd July, 2017 and stated that there was another person with disability on the list and that the list was all inclusive as it had representation from the marginalised, minority, youth and persons with disabilities. He confirmed not complaining against the list and that his name was number 8 on the nominations list. He stated that nominations was carried out on priority basis and that as thus, number 2 on the list could not be considered before number one on the list. He also said that if jubilee party had 9 nomination slots, he could have been nominated. He stated that although he had indicated in his petition that Mary Anne and Zamzam were Kikuyus and that Zamzam had in her response to the petition denied that she was Kikuyu stating that she was a Maasai. He said that he knew that she was from Laikipia and a Maasai.

He further stated that he represents people with disability at the CDF committee but would better represent PWDs if he were nominated into the county assembly.

In cross examination by Mr. Muhoho for the 8th respondent, the petitioner stated that 15 people were elected into the Laikipia county assembly and that there were 9 slots for nominations. He said that there were nomination slots for the marginalized and gender top-up and the 6th respondent is a gender top-up representing women. He denied knowing where she comes from and said that he was informed that she

comes from Ngobit ward. He said that PWDs cannot affect gender top-up. He said that the 8th respondent doesn't come from Laikipia as her ID and voter's details indicate that she hails from Nakuru but that he doesn't know where she was born. He prayed that the 8th respondent's nomination be replaced with another qualified person.

In Re- examination, the petitioner the petitioner stated that Article 90 relates to national assembly while county assemblies deal with groups of people. He said that he had no problem with the list appearing on the daily nation as it included PWDs and youth but that the list appearing on the Kenya Gazette excluded PWDs. He acknowledged being a member of the CDF committee and stated that he was keener on being a nominated MCA. He urged the court to discard the list of nominated members of Laikipia county assembly and direct the 3rd respondent to come up with a fresh one.

The 4th respondent testified that she is a nominated MCA. She relied on her reply and supporting affidavit. She urged the court to dismiss this petition. She confirmed that she had been listed as a Kikuyu in the nomination list appearing on the Daily Nation but stated that she was a Borana. She said that she applied for nomination to the 3rd respondent and succeeded and that the petitioner never lodged any complaint against her. In cross examination, the 4th respondent stated that she is a Muslim of Borana origin. She said that her nomination was under the marginalised category. She clarified that after the initial list indicated that she was a Kikuyu, she wrote to the 3rd respondent and sked for her details to be corrected from Kikuyu to Borana.

The 5th respondent testified that He is from the Yaku community and not Kikuyu as alleged by the petitioner. He stated that he applied for nomination to the 3rd respondent and that his application was successful. He stated that the petitioner never challenged his application and as thus, he was validly elected. He urged the court to dismiss this petition. In cross examination, the 4th respondent stated that he knew Mary Samkem as the only Maasai in the Laikipia County assembly and that she also represents the interest of the youth. He also confirmed that the 8th respondent was elected on the gender top-up. He said that he doesn't know whether PWDs are in the category of marginalised group. He said that elections through nominations was pegged on the available slots.

The 6th respondent testified that she was nominated under the marginalised. She stated that the 3rd respondent had capture a wrong ID number. He wrote to the 3rd respondent requesting then to correct her details but could not tell whether it was corrected. She stated that she was not kikuyu as alleged by the petitioner but a member of the Momonyot community- a minority group in Laikipia County. She said that the nominations were legal and wondered why the petitioner never challenged them at the Political parties' Disputes Tribunal. She also said that the petitioner's prayer that a new list be prepared does not hold water as he was on the nominations list but could not be reached. She urged the court to dismiss the petition.

The 7th respondent relied on his response and supporting affidavit. He testified that the petitioner gave his name as Christopher Mark Mwangi which is not is name. He said that he applied for nomination into the Laikipia County Assembly and succeeded. He urged the court to dismiss this suit as the petitioner testified that never challenged his nominations at the Political Parties' Disputes tribunal. He stated that if the court allowed the petitioner's petition as prayed, it will affect other nominated MCAs who will stand condemned unheard. He said that he represents the Burji community at the County Assembly. He stated that the 3rd respondent applied the order of priority and that the petitioner missed out on the nomination as his name fell way after the 4 available slots. He confirmed that there was a Christopher Mwangi on the nomination list but that his ID number had been placed against Christopher's name.

On her part, the 8th respondent testified that she was nominated into the Laikipia County Assembly in the gender top-up category. She denied the petitioner's assertion that she hails from Nakuru County and stated that she is married and lives in Ngobit area in Sirma ward in Laikipia County. She said that should the petitioner's petition succeed, it shouldn't affect her as she was not nominated under the special

interest category and that no lady had filed a petition against her nomination. She stated that the 4th, 5th and 7th respondents were nominated under minority category and were not Kikuyus and that there were 4 other nominated members of the county assembly who weren't parties to this petition. She said that if the court grants the petitioner the orders sought, the other nominated MCA's will be condemned unheard. She concluded that people with disability do not affect nominations under the gender top up category.

The parties filed their written submission which they later highlighted in Court. The petitioner's submissions were filed on 12th February, 2016, 1st and 2nd respondents on 16th February, 2018, 3rd, 4th, 5th, 6th, and 7th respondents filed their respective submissions on 19th February, 2018 while the 8th respondent filed hers on respondent on 19th February, 2018, 4th, 5th and 7th respondents on 19th February, 2018, 6th respondent on 19th February and the 8th respondent filed on 15th February, 2018. The submissions were highlighted in court.

Mr. Abubakar Learned counsel for the petitioner submitted that the petitioner's petition is dated 25th September, 2017. He relied on the Petitioner's submissions, documents filed and list of authorities dated 12th February, 2018. He submitted that the constitution of Kenya provides for and protects the rights of people with disabilities and provides that they should be treated with respect and dignity. He said that Article 54 (2) of the constitution of Kenya provides that the state should ensure that at least 5% of elective posts are held by PWDs. Counsel submitted that it had been proved that PWDs are not represented in Laikipia County and that although the 6th respondent had stated that she had seen someone in walking clutches being sworn in as an MCA, her testimony had not been corroborated by any other witness. He said that Mr. Kagundu; MCA referred to by the 6th respondent was elected to represent Thingithu Ward. He stated that the petitioner had been certified as a person living with Disability by the Council of people with disability and that at least one PWD should have been nominated to represent their interests in the assembly. He said that under the Regulations 54-55 of the Elections (General) Regulation rules, the 1st respondent should not have accepted the 3rd respondent's party lists as it offended the provisions of the law. He stated that the existing list contravenes Article 92(c) of the constitution. Counsel submitted that when the 2nd respondent published the lists, there was no equity and equality because all the 4 persons nominated were from the same tribe. He said that Article 177 provides that the persons nominated to the county assemblies shall consist of marginalised groups including the youth and PWDs. Counsel further stated that he was misinformed as he thought that the 1st respondent would pick nominees from each category alternating male and female. He further relied on Section 36 of the Elections Act which provided party lists should give priority to persons with disability and stated that PWDs should have been given the 1st priority.

Counsel further submitted that the 4th -7th respondents' nomination was unconstitutional and unlawful. He disputed the 8th respondent's nomination and stated that she was not a registered voter in Laikipia County nor is she born in Laikipia County. He said that although she testified that she was married in Ngobit area, she never gave anything to prove the same. He relied on section 36(1) of the Elections Act and Article 177 of the Constitution and stated that County Assembly nominees and particularly gender top-up should hail from a particular ward in the county. He submitted that the 8th respondent is from Nakuru County and therefore represents the people of Nakuru and not Laikipia County and submitted that the gender top -up list was not in line with the constitutional provisions.

On the 5th and 6th respondents, counsel submitted that they alleged that they were Maasai's and that there was evidence that there were other Maasia's in the Assembly hence the Maa is not a marginalized community in the assembly. He reiterated that the 5th and 6th Respondents were Kikuyus and stated that ethnicity is not a consideration when it comes to Nominations. He relied in the case of **Moses Mwicigi & 14 Others v IEBC & 5 Others** (2016) Eklr

Counsel further submitted that PWDs were discriminated against in the whole nominations process as the nomination lists only consisted of the minority group. He urged the court to vitiate the election of the 4th and 8th respondent as per the provision of Section 83 of the Elections Act. He urged the court to allow the

petition and direct the 3rd respondent to come up with a fresh nomination list including the petitioner and other qualified persons. He also prayed for any other reliefs that the court may deem fit to award.

Mr. Mohama for the 1st and 2nd respondent relied on their filed submissions and stated that the petitioner bears the burden of proof to prove his petition beyond reasonable doubt. He relied on the case of **Joho v Nyange & Another (2008)** 3 KLR (EP) 500 where the court held that petitions should not be lightly taken and generalised but should be proved by credible and consistent evidence and stated that the petitioner had not provided the required proof. On the issue of gazetement, counsel submitted that the 1st respondent published and gazetted the names of the 4th -8th respondents together with the petitioner based on party and party lists. He said that although this is one of the 1st respondent's duties, its main duty is to conduct and supervise elections. Counsel stated that the names were submitted by the 3rd respondent and that the petitioner's name was on the final list as submitted by the 1st respondent. He said that the gazetement was to allow for any aggrieved party to file a complaint with either the 3rd respondent or the Political Parties' Disputes Tribunal and that one Abdi Salat filed a complaint at the PPDT which was declared null by the High Court on appeal. It was on the basis of the High Court's orders that the 1st and 3rd respondents used the gazetted list; the list that the petitioner seeks to set aside. He said that the petitioner's nomination formulae was his own and not based on any legislation.

Counsel stated that the 3rd respondent was entitled to nominate 4 members into the Laikipia County Assembly and that the petitioner was number 8 on the list thus he could not be reached as the 3rd respondent picked the 1st 4 people on the list. He relied on the case of **Ben Njoroge & another v Independent Electoral Boundaries Commission (I.E.B.C) & 2 others**[2013]eKLR and stated that party lists should be considered in order of priority. He submitted that in any event, the petitioner had confirmed during the hearing that he represents the interest of PWDs in another capacity at the CDF committee and that the petitioner was using the court to advance his private interests. He urged the court to dismiss the petition with costs.

On his part, Mr. Mbaabu holding brief for Mr. Ombasa for the 3rd respondent stated that Mr. Ombasa wished to rely on his filed submissions.

Submitting for the 4th, 5th and 7th respondents, Mr. Mbaabu stated that he relied on his written submissions filed on 19th February, 2018. He submitted that the petitioner had testified that he had no problem with nominees who were not Kikuyu and that the 4th, 5th and 7th respondents testified under oath that they were not Kikuyus. He said that the 3rd respondent complied with the legal and constitutional requirements while submitting its list of nominees to the 1st respondent and that the 3rd respondent picked the 1st 4 names as per the order of priority and prayed that the petition be dismissed with costs. He stated that the petitioner was trying to ask the court to interpret the constitution on which group of marginalised should have priority yet interpretation of the constitution is a preserve of the High Court. He said that the 5th Respondent was from the Yiaku Community and submitted that a person's identity card does not indicate their ethnicity and that the petitioner never disputed the respondent's averments in their respective affidavits.

Mr. Kariuki for the 6th respondent relied on the reply to petition, supporting affidavit and submissions filed. He said that the petitioner bore the burden of proving each of the allegation levelled against the 6th respondent. He stated that the 6th respondent had given evidence on oath rebutting the petitioner's allegations that she is from the Kikuyu community stating that she is a member of the Momonyot community in Laikipia County and that the 3rd, 4th, 6th and 8th respondents had testified that they knew her as a Maasai. He stated that no independent witness had led evidence proving that she was a Kikuyu. Counsel stated that the 4th respondent was Borana, 5th a Yiaku and 7th a Burji, evidence which the petitioner was unable to rebut. He also submitted that the 4th-7th respondents were marginalised group in Laikipia County. He wondered why the petitioner had sued the 6th respondent giving her names as "Maryanne Wanjiru Nyaga, only to later state that he conducted a search which made him believe the 6th

respondent was the said Maryanne and no independent investigations revealed that MaryAnne was Kikuyu.

He said that Article 77 of the constitution had nothing to do with the nomination of MCAs. Relying on **Public Corruption Ethics and Governance Watch V Minister for Transport & 4 others[2013]eKLR** counsel stated that the several Articles relied on by the petitioner were irrelevant to this petition and said that it is not merely enough to cite sections of law on breach without proving the breach. He submitted that the party list as prepared by the 3rd respondent did not violate the constitution.

On party lists, counsel submitted that the petitioner's name was on the nominations list and so was that of a Faith Ngithi representing PWDs. He (the petitioner) testified that he was okay with the list as it was and he never challenged it. He said that the list as gazetted never violated any provision of the constitution. Who then are the marginalised? Counsel relied on the case of **Commission for the Implementation of the Constitution –vs- The Attorney General and Another, Nairobi Civil Appeal No. 351 of 2012**, and stated that the court in that case had held that the constitution does not define the marginalised but that they include those whose interests have not been taken care of by election process. The court listed the marginalised as ethnic minority, youth, blind, deaf, physically disabled, religious and cultural minorities and racial minority. Counsel then stated that Article 177 (1) (c) the marginalised groups as including the people with disability and youth as prescribed by the act of parliament. He stated that there is a wide definition of marginalised and that PWDs should not be seen to stand a higher pedestal than other persons who suffer marginalization.

He relied on **Ben Njoroge case** and submitted that all groups falling under the marginalised stand in equal footing.

Counsel stated that Section 36(8) of the Election Act requires that IEBC to draw the names of the special sit members according to the order given by the party and therefore it cannot be said that the 1st respondent breached any law or the constitution. He relied on the case of **Moses Mwicigi (supra)** where the court had held that IEBC had no jurisdiction to direct political parties in the manner on how to prepare the party lists. He said that the list of 23rd July, 2017 contained names of 2 PWDs hence the petitioner's claim that the list was unconstitutional is unsubstantiated. He said that the **Commission for Implementation of the Constitution (supra)** the court held that the list should include regional and ethnic balancing to ensure there is no domination of one community in the assembly.

On the 8th respondent, counsel submitted that she was born in Nakuru but married in Ngobit which is in Laikipia County. He said that the petitioner was unable to explain the law that bars a resident from participating in governance matters. He urged the court to find that this petition has no merit and dismiss it with costs.

Mr. Muhoho for the 8th respondent relied on the 8th respondent's filed submissions. He said that petitioner bore the burden of proving his claim against the 8th respondent stating that the allegation that the 8th respondent was from Nakuru is based on the information on IEBC's portal. He stated that being registered in a county does not necessarily imply that the said person hails from that county. Counsel submitted that the 8th respondent had submitted that she comes from Ngobit area of Laikipia County. He stated that the petitioner ought to have told the court which of the MCAs nominated under gender top-up does not represent the correct representation as per wards. He said that the petitioner had in cross examination stated that he didn't know where the 8th respondent resides and as such, he did not prove that the 8th respondent was not from Laikipia County and that the place of voter registration does not determine where a person comes from. He said that the petitioner did not have any legal backing for his claim against the 8th respondent. He urged the court to find that the petition against the 8th respondent unmerited and dismiss it with costs.

In reply, Mr. Abubakar for the petitioner relied on the case of **AG of Tanzania V. Christopher Mutikera [2010]** where the court had held that a court cannot disregard the words of the constitution. He

said that the constitution was a driver of equality, inclusivity and happiness. He impugned the 6th respondent's submissions and stated that this petition was in compliance with the petition rules. He said that the 1st respondent ought to have ensured fair representation on the list before gazetting it. He stated that although Mr. Mbaabu had submitted that the petitioner did not include the 5th Respondent in his prayers his nomination too was disputed.

He relied on the case of the **National Gender and Equality Commission v Independent Electoral and Boundaries Commission & another [2013] eKLR**, and stated that groups falling under marginalised cannot be deprived since new special interests keep gapping up. He said that Section 36(3) of the Elections Act provides that party lists for County assemblies shall prioritise PWDs. He said that there was no person with disability in Laikipia County. On the 8th respondent, he stated that she did not provide any documentary evidence to prove that she was married in Ngobit. He impugned the respondents' assertion that the petitioner was representing PWDs in the CDF committee and stated that the committee only met 6 times a year hence he was not in permanent employment. On the 1st respondent, the petitioner submitted that it had a role to play in either accepting or declining the party lists. He said that giving slots to one category of marginalised is illegal. He said that Jubilee party failed in preparing party lists and that the 4th-8th respondents as nominated did not qualify to hold the position they hold and if allowed to continue holding their position, they will continue to perpetuate an anullity. He prayed for the orders sought.

I have considered the pleadings; the evidence; the parties' respective written submissions as well as the authorities provided and relied on by the parties herein. The main issues narrowed down to, and for determination are;

- i. Whether the 1st and 2nd respondents breached any legal or constitutional requirements on nominations leading to the disputed election of the 4th -8th respondents.
- ii. Whether the 4th- 8th respondents were validly nominated and elected into the Laikipia County assembly.

On the 1st issue, the relevant constitutional provisions are Articles 90 and 177 of the constitution of Kenya, 2010 which provides for membership into the county assembly. Article 90 provides for allocation of seats. It reads;

“(1) Elections for the seats in Parliament provided for under Articles 97(1)(c) and 98(1)(b), (c) and (d), and for the members of county assemblies under article 177(1)(b) and (c), shall be on the basis of proportional representation by use of party lists.

(2) The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) and shall ensure that—

(a) each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided for under clause (1), within the time prescribed by national legislation;

(b) except in the case of the seats provided for under Article 98(1) (b), each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed; and

(c)

Article 177 further provides that

“ (1) A county assembly consists of—

(a)

(b) the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender;

(c) the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and

(d)

(2) The members contemplated in clause (1)(b) and (c) shall, in each case, be nominated by political parties in proportion to the seats received in that election in that county by each political party under paragraph (a) in accordance with Article 90.

From the constitutional provisions above, the 1st respondent’s role as far as nominations into the county assemblies is the responsibility to conduct and supervise the elections. In this regard, the law provides that political parties come up with the lists and forward them to the 1st respondent who confirms that same comply with the legal requirements before gazetting the names.

The petitioner herein testified that he was number 8 on the 3rd respondents’ party list published on 23rd July, 2017 and was okay with it. He also confirmed that the said list contained two names of PWDs that is Faith Ngithi and himself. It also contained names of other persons who qualified to be elected under the various categories. The petitioner further testified that he did not challenge the list because he thought that he will be given priority over the nominees appearing before him. What the petitioner is simply telling this court is that he was ignorant of the order of priority in party list.

The doctrine of *ignorantia legis neminem excusat* or simply put, *Ignorance of the law is no defence* aptly applies here. The petitioner cannot fault the 1st and 2nd respondent for the acts or omissions of the 3rd respondent which he didn’t think that were wrong but only came to realise later that they were not right. Besides, the 1st respondent followed the list in order of priority. Further, the court in the case of **National Gender and Equality Commission case (supra)** [2013] eKLR, the held that,

“the IEBC does not have jurisdiction over resolution of disputes related to the process of political parties preparing their party list for nominations to Parliament and the County Assembly. The jurisdiction is vested in the Political Parties Dispute Tribunal”

I therefore find that the decision as to who gets on the political party lists rests entirely with the political party and its members and it is not a function of IEBC. I therefore vindicate the 1st and 2nd respondents from any perceived act or omission that could have caused the petitioner herein to lose out on the nominations to the Laikipia County assembly. I find that the petitioner has not proved his case against the 1st and 2nd respondents and hereby dismiss it.

What about the 3rd respondent? The 3rd respondents received applications from the petitioner and many others who sought to be nominated into the Laikipia County Assembly. The petitioner, just like the 4th - 8th respondents succeeded in their applications. The petitioner was number 8 in the party lists representing persons with disability. He testified that he was okay with his position and that he never challenged the same at the political Parties’ Dispute Tribunal. He therefore cannot turn back after losing out on the election and accuse the 3rd respondent of having no regard and discriminating against him and / or PWDs. If the petitioner had an issue with the party lists, Equity aids the vigilant. Equity therefore bars the petitioner herein from seeking to challenge the 3rd respondent’s decisions after the period for doing so has lapsed. I find that the petitioner has not proved his claim against the 3rd respondent and dismiss the same.

On the 2nd issue of whether the 4th- 8th respondent's nomination was irregularly and illegally elected, the petitioner alleged that the 4th -7th respondents on grounds that they were nominated under the minority category yet they come from the kikuyu community who are the majority inhabitants in Laikipia County. The 4th respondent in her evidence and submissions stated that she was a Muslim of Borana and that she was representing the interests of the Borana; who are a minority group in the Laikipia County Assembly. The 5th respondent testified under oath that he was not Kikuyu but a member of the Yiaku community which is a marginalised group in laikipia. The 7th Respondent testified that he was a member of the Burji community which is also a marginalised community in Laikipia County. The 6th respondent on her part testified that she was a member of the Momonyot community in Laikipia. All these respondents' nomination was impugned on grounds of their being members of the Kikuyu community yet they were the majority in Laikipia County. The petitioner did not challenge any of the petitioner's assertion that they were not members of the Kikuyu Community. I therefore find that the 4th-7th respondents have proved that they were not members of the Kikuyu community but that they represented their respective minority groups in the assembly, their groups well confirmed as such via a document marked as PLM2 from the National Gender and Equality Commission addressed to the chairman IEBC.

Besides their ethnical background, the petitioner impugned the 4th -7th respondent's nomination on ground that he should have been given priority in nomination given that he was a person with disability. He relied on Section 36 of the Elections Act which provided party lists should give priority to persons with disability and stated that PWDs should have been given that 1st priority. His business in the county assembly will then be taking care of the interest of person's with disability in the County Assembly. The 6th respondent in her testimony testified that the interest of PWD's was represented in the house by a Mr. Kagondu; an elected MCA for Thingithu Ward. Given that Mr. Kagondu was already in the assembly, Section 36 (2) (7) of the Elections Act provides

“For purposes of Article 177(1)(b) of the Constitution, the Commission shall draw from the list under subsection (1)(e), such number of special seat members in the order given by the party, necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender”

The petitioner herein was number 8 in the party lists. Elections on party lists are based one on the number of slots available and two on the priority on the party lists. In cross examination, the petitioner confirmed that if the 3rd respondent had only one slot for nominations, he could not have qualified to be nominated. He also confirmed severally that he was okay with his position in the party list.

Nominations are meant to cater for the interests of people who are not represented either by election or nomination in particular assembly. Having a male person with disability in the Assembly therefore contributed to the higher number of males in the assembly than females. Perhaps the situation could have been different if the member for Thingithu Ward wasn't in the assembly then the petitioner could have been considered but still it is well said that marginalised are marginalised hence equal in that status. I therefore find that the interests of people with disabilities were adequately taken care of by Mr. Kagondu.

I therefore find that the petitioner has failed to prove that the 4th -7th respondents were from the Kikuyu community who are the majority and that the rights of PWDs are well taken care of by Mr. Kagondu in the county assembly. Consequently, the petition against the 4th -7th respondents fails.

Finally the petitioner disputed the election of the 8th respondent on grounds that she was a resident and voter in Nakuru County. The 8th respondent on her part testified and submitted that she is married and lives in Ngobit area in Sirma ward in Laikipia County. She stated that the fact that she is not a registered voter in Laikipia does not bar her from being nominated to Laikipia given that she is married and lives within Laikipia County. Relying on the provisions of Section 109 of the Evidence Act, which provides that;

“The burden of proof as to any particular fact lies on the person who wishes the court to

believe in its existence”

The 8th respondent challenged the petitioner to prove that she is not married in or does not stay in Ngobit. The petitioner in his submissions simply maintained that the 8th respondent was a voter and resident of Nakuru County and as thus, she represented the interests of Nakuru County in Laikipia County assembly.

He never gave any evidence to prove that the petitioner was not a resident of Ngobit. Voter registration in a different county on its own does not make an individual a resident of the area in which they are registered in. Besides, by dint of Article 38(3) of the constitution, the 8th respondent has a right to be registered as a voter. This right is not limited to any county or constituency.

The 8th respondent further submitted that she was nominated under the gender top-up category. Even if he were to be nominated, the petitioner is male. He was to represent the rights of PWDs in the assembly. Clearly, both the petitioner and the 8th respondent represent different interests. They were nominated under different categories. There are other MCAs in the county assembly who were nominated for gender top –up. Nullifying the 8th respondent’s nomination would amount to discrimination since there are others, nominated under the same category whose nomination has not been challenged. I therefore find that the petitioner has not made up his petition against the 8th respondent and dismiss the same.

Having said that, I would like to say that nominations are meant to cater for the interests of various marginalised categories, categories of people who are not represented in an assembly via elections. There are various categories viz gender, youth, ethnic minorities, religious minority etc. The petitioner herein impugns the nomination of the 4th 8th respondents and states that he ought to have been given priority given that he suffers disability.

Ougo J. in Ben Njoroge & another v Independent Electoral Boundaries Commission (I.E.B.C) & 2 others [2013]eKLR holds that that;

“.....Article 13,2, of the African Charter on Human and Peoples Rights, Article 23 of the Women’s Protocol in ensuring protection of women with disabilities and ensuring that the rights of women with disabilities are free from violence and are treated with dignity. I appreciate the highlighted instruments but this court has to read them in line with the Constitution of Kenya and in light of the claim of the petitioners.I note that no disability is superior to another neither no disability is vulnerable to another.”

I therefore find that the petitioner’s rights are subject to the rights of others including the rights of the respondents herein. In judge Ougo’s words, disability is not superior to another neither no disability is vulnerable to another.”

The totality of my findings I have made is that the petitioner has failed to prove his case against the respondents. The petition is therefore dismissed.

On costs, **Section 84** of the **Act** provides that,

“An election court shall award the costs of and incidental to a petition and such costs shall follow the cause.”

Such costs are to follow the event and the Court has broad jurisdiction to determine costs **Rule 30 (1)** of the **Rules** provide as follows:

36 (1) The Court shall, at the conclusion of an election petition, make an order specifying –

- a) the total amount of costs payable; and*
- b) the person by and to whom the costs shall be paid.*

In *Kalembe Ndile and Another v Patrick Musimba and Others* Machakos HC EP No. 1 and 7 of 2013 [2013] eKLR Majanja J. held that,

Costs awarded should be fairly adequate to compensate for work done but at the same time should not be exorbitant as to unjustly enrich the parties or cause unwarranted dent on the public purse or injure the body politic by undermining the principle of access to justice enshrined in Article 48 of the Constitution.”

This petition was not complex and the issues were fairly straight forward as manifested by the pleadings and submissions tendered, the number of witnesses and the nature of their evidence on record. In reaching the cap, I have taken into account the time spent on research, preparation of pleadings, applications and submissions, preparation of witnesses and in court during the actual hearing of the case and the parties' proposals. I also note that the 3rd respondent neither filed pleadings nor called any witness to testify.

Considering all facts, I find that the instructions fees for each party shall be capped as follows; **Kshs. 300,000/00** each for the 1st, 2nd, 4th 5th 6th, 7th, and 8th respondents. The 3rd respondent's costs shall be capped at Kshs. **150,000/00**.

The final orders are therefore as follows;

- (a) The petition be and is hereby dismissed with costs.
- (b) The respondents are awarded costs on the following terms:
 - (i) 1st, 2nd, 4th 5th 6th, 7th, and 8th respondent are capped at :
Kshs. 300,000/00.each
 - (ii) Instruction fees for the 3rd respondent is capped at **Kshs. 150,000/00**.
 - (iii) The costs shall be taxed and the total costs certified by the courts EO.

DATED and DELIVERED at Nanyuki this 6TH day of March 2018.

L. K. Mutai

Chief Magistrate