



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT MILIMANI

**IN THE MATTER OF THE OF ELECTIONS ACT 2011 ELECTION AND PARLIAMENTARY AND COUNTY ELECTIONS
RULES**

ELECTION PETITION NO 21 OF 2017.

ALMAS MOHAMED.....PETITIONER

-VERSUS-

INDEPENDENT ELECTORAL BOUNDARIES

COMMISSION (IEBC).....1ST RESPONDENT

AMUL KER KASSIM.....2ND RESPONDENT

ZAMZAM ABDULLAHI ALL.....3RD RESPONDENT

ECONOMIC FREEDOM PARTY.....INTERESTED PARTY

JUDGMENT

The petitioner sought several prayer in the petition but among others sought .

- i. A declaration that the 1st respondent acts which were non compliant with the constitution and the written law affected the chances of the petitioner of being gazetted a member of the county assembly Mander county on priority of the 2nd 3rd and 4th respondents respectively.
- ii. Declaration that the 2nd ,3rd and 4th respondents were not validly elected , member of the county assembly Mander county and they could not be so elected on priority to the petitioner.
- iii. An order that the 1st respondent compelling the 1st respondent to degazette the names of the 2nd ,3rd and 4th respondent from the member of the county assembly Mander county under the gazette notice no vol CXXIX – NO 124 page 4997 and replace it with fresh gazette in compliance with the party lists as submitted to it by the interested party, the constitution and the written law.
- iv. An order directed at the 1st respondent compelling the 1st respondent to gazette the name of the petitioner as member of the county assembly Mander county on priority to the 2nd , 3rd and 4th respondent in the Gazette notice.
- v. Costs of the petition .

The Petitioner's case

The petitioner told court that she applied for nomination In Mander county as MCA. she applied with the Economic freedom party. she had the certificate annexure 1. The application was successful and she was gazetted and placed in the daily news paper at no 9. She was supposed to campaign for the party. she went and campaigned for the party at Garissa. The Economic party secured seats at Mander. The IEBC allocated 10 seats. Eight of the seats were considered on gender top up. she was no 9 in the general list. The list was changed after the elections. The list was changed and Noor was given the seat. she went to the tribunal of political parties and got the decision of the tribunal annexure 3. The list that was taken to the IEBC was dated 21/08/ 2017. The IEBC used the list dated 06/08/2017 she was not aware of this list. Page 37 of the interested party was the revised party list. The letter was written by the secretary general but it was not correct signature. The signature of the secretary appeared on the life membership certificate the same is on the forwarding letter. The same signature is on the pg 22 of the petition and forwarding the names. Then pg 16 of the interested party response. she knew the constitution of the party

said that the documents have to be signed by the secretary General article 14 -557. When the matter was gazette and she found that the list had been changed. There were people that had been gazetted and nominated no 11 Amran Adan and 15 Zamzam Ali and 18 Umul Kassim. The list that had been submitted she was still no 9. The 2nd respondent was no 17 on the list. The 3rd respondent was no 11. Their names were gazetted as nominated MCAS as no 4,5 and 7. she was aggrieved by the action of the interested party the respondents were behind me. she spoke to the advocate and informed him of the changes that were made at the political parties tribunal. She sought that the court grants prayer c-h of the petition.

On cross examination by the 1st respondent the petitioner said that she was a member of the EFP. She had participated in the activities of the party as planned. She had no role in the party lists. she made an application and participated in the activities of the party. she was not involved in the final lists. she had no say on the party lists. the officials had the final say. the list was before elections. The list she have attached was dated 21/08/2017 she was not the maker of the document. She was not copied by the letter. Once forwarded the 1st respondent was supposed to gazette the same. The IEBC was to check the qualification. The commissioner made appointment. The IEBC does not change the list. There was list that was changed on the 23/07/2017. The order by the PPT ordered that new list be published. she was not informed of the changes by the IEBC. She had no say on who made it to the list on gazette. She had not seen the list by the 1st respondent. she had no report to show that the signature was forged. It is possible to have more than one signature. she was no 9 on the list. The name on the list was Almas Issack Abdulahi id no 27807135. There was difference in the in the identity card. she had nothing to show that the names as they appear are one and the same. the name of the petitioner does not appear on the list. She was not called Abdullahi. Party list is before the elections. she was no 14 and was listed as Abdulahi but there was topographical error. The ID had one digit missing. the letter was in the letter head of the political party.

On cross examination by the advocate for the 2nd -4th respondent and interested party the petitioner said that she had deposited the cash to court as security. She applied to be county assembly she have not annexed the application to the respondent. There were other petitions. The signature does not belong to the secretary general. She was not forensic expert. The 2nd 3rd and 4th respondents were not officials in the EFP. They were members like petitioner. The member have no role on appointment. she was gazetted on the 23/07/2017. she was aware of the complaint no 523 of the PPT. the tribunal said that a new list had to be prepared. The respondent were no 5,6 & 10 they appeared before her. The interested party prepared a list. The lists are the same as per the list in the petition. She didn't know what article 88 states. 1st respondent abdicated it responsibility. There was decision of the supreme court and that carries weight. The party officials are the one to change the list. The IEBC and the respondent have no role to play. They did not follow the law.

On re examination the petitioner said that did not participate in the preparation of the list. There would be omissions on the entry. The address she used was no 679-00610 as given in the list. she would not be put in the list if she was not involved and participated in the activities of the party. she had applied to be member of county assembly, the application was to the party. the Party had the application for the petitioner. There was difference in signatures. She was not a document examiner but the signatures were different.

The 1st respondent case

The 1st respondent relied on its affidavit entirely. The 1st respondent case is that it was vested with the responsibility of supervising elections for the seats on the basis of propositional representation by the use by the party list under article 90 (2) of the constitution and sections 34,35, 36 and 37 of the elections act.

The interested party was ordered by the political parties tribunal in complaint no 528 of 2017 to prepare party list and submit the same to the 1st respondent. The 1st respondent received the party list the list and the respondents were appearing on the list no 17,6 and 10 on the list. The 1st respondent then submitted pursuant to section 35 of the elections act and that there was no time when the list that was submitted interfered with. The nomination therefore of the 2nd 3rd and 4th respondents was conducted in strict compliance of the law and the party list submitted.

The 2nd 3rd and 4th respondent case

The 2nd 3rd and 4th respondents in the affidavit submitted that they was Gazetted the by the 1st respondent as per the gazette notice no 8380 [vol CXIX NO124] on the 28th august 2017 as the nominated member of the county assembly Mandera. The nomination was done in accordance to law. the 2nd respondent denied the allegations in the petition no 7,8,9 & 10. A complaint had been filed against the 2nd respondent and interested party no 528 of 2017 on the 23/07/2017 and subsequently the party lists presented by the interested party to the 1st respondent as per the law required during the period designated for the party primaries were nullified as per the judgment of the TPDT case no 528 of 2017. The party moved to comply with the tribunal order and made changes to the list to reflect equality to all the clans of Mandera.

The 2nd 3rd and 4th respondents submitted that they were nominated on the basis of the list pursuant the order of the political parties disputes tribunal in complaint no **528 of 2017 Noordin ismail –vs- Economic freedom party and IEBC**. equality was the corner stone of the **Economic freedom party** the final list was submitted to the interested party on the 6th august 2017 which place the 2nd respondent no 17, the 3rd respondent as no 14 and the 4th respondent as no 10.

The respondents asserted that the nominees that were published in the Gazette of **28th august 2017 Vol CXIX NO 124** reflected the party list submitted by the interested party on the 6th august 2017 and that the same was approved without alteration variations and /or amendment. The respondents urged the court to dismiss the petition with costs.

The interested party case.

The interested party case was that the nomination of the county assembly of Mandera were done lawfully and in accordance with the constitution and the law. the nomination that was published Gazette of 28th august 2017 Vol CXIX NO 124 was applied without alteration variations and /or amendment. There was no breach of the legitimate expectation that was breached or violated since the petitioner belief that she would be nominated to the county assembly of mandera was based on the list that had no legal force. The petitioner petition was frivolous and the interested party urged the court to dismiss the petition with costs.

Parties submissions

The petitioner submissions submitted on three issues on whether the 1st respondent had jurisdiction to allow an permit the interested party to submit an altered list on the basis of the decision of the political parties tribunal? Section 43 of the elections Act obligates every political party to which nominates a candidate for election under article 177(1) (a) of the constitution to submit the party list in accordance with article 177(1) (b) and (c). in the event of nomination under (c), the party list is required to include certification in the manner prescribed by the commission. Under section 34(6A) the 1st respondent was required to review the list to ensure compliance with the prescribed or required the party to amend the party list to ensure such compliance failing which the commission shall reject the list. A party list submitted and approved cannot be amended under section 34(10) of the elections act during the term under which the county assembly for which the candidates are elected. The party listed is submitted at least 45 days before the date of general election. The petitioner submitted that the interested party complied when it first submitted the first party list. Any party dissatisfied with the decision had the right to file a petition with the 1st respondent after the list was published and before the election were held as provided for under section 74 of the elections act. The issue relied on by the respondent and interested party was **PPDT no 528 of 2017 Noordin Sheik –vs- the Economic Freedom party & IEBC** the same was null and void as the petitioner was not a party and no orders could be granted affecting her political and constitutional rights which had already vested.

The petitioner relied on the case of **Matiba –vs- the AG [1995-1998] 1EA 192** it was held that where there was fundamental breach of the rule of law no man shall be condemned unless he is given fair opportunity to be heard which is cardinal principle of natural justice, any order that flowed from such fundamental breach, any order that flowed from such breach cannot be sustained. The petitioner relied on the case of **Tononoka stell ltd –vs- Eastern and southern Africa development bank Ca n o 255 of 1998**. The right to access to courts can only be taken away by clear and unambiguous word of parliament. The petitioner urged the court to find that the tribunal that purported to take away the right of that had accrued to the nominees submitted and to the 1st respondent is null and void and cannot be sustained.

On the second issue the decision of the tribunal, the basis upon which the impugned nomination list was submitted, is decision that which rendered by a tribunal which lacked jurisdiction. Section 74 of the elections act vests the 1st respondent with the jurisdiction to settle electoral disputes, including disputes that arise from nomination but excluding the petitions and disputes subsequent to the declarations of elections. The petitioner relied on the case of **Jubilee party of Kenya –vs- Catherine Jeptoo Nrb Nomination appeal no 17 of 2017** and the case of **Jubilee party –vs- Mohammed Abdikadir NA no 22 of 2017**. It was held that the political parties dispute tribunal had no jurisdiction over the dispute relating to the contents of a party list that has already been submitted. The petitioner relied on section 88(4) of the constitution and section 74(1) of the elections act.

The 1st respondent erred in implementing decision that that was plainly erroneous and incapable of being complied with under the constitution the petitioner relied on the case of **Re Hebatulla properties ltd [1979]** it was held that tribunal can only do those things that which the statute has empowered it to do since its powers are express and not implied. The article 2(4) invalidates any law that is inconsistent with the constitution. The petitioner submitted that court should find that the only list that was published by the 1st respondent on the 23rd July 2017 was certified and vetted and published in accordance with the elections act.

On the 3rd issue whether the 2nd, 3rd and 4th respondents were duly elected as members of the mandera county assembly in accordance with constitution and legislation. The respondent were no registered voters. The petitioner relied on article 87 of the constitution and 75(3) and urged the court to find that the 2nd, 3rd and 4th respondent were not duly elected as member of the county assembly of mandera county assembly as the only valid list was the party list of 23rd July 2017. The 1st respondent erred and violated the constitution in failing to nominate and gazette the petitioner in accordance with the list as submitted to 1st respondent and published on the on the 23rd July 2017. There was a topographical error on the name of the petitioner and in the list that was subsequently submitted by the 1st respondent there was deliberate inadvertent misspelling. There was flawed and irregular decision of the political parties tribunal. The petitioner urged the court to allow the petitioner in terms of prayers (c), (d), (e), (f) (g) (h) and (i) of the petition.

The 1st respondent submitted that the petitioner was bound by contents of the petition and cannot proceed to submit on matters not specifically pleaded in the petition. The 1st respondent relied on the case of **Raila odinga & anor –vs- IEBC & 2 others [2017] eKlr**. the 1st respondent submitted that the standard of proof in the election petition lay with the petitioner and it is higher than the balance of probabilities and the court should be guided. The 1st respondent relied on the case **Kalembe Ndile –vs- Patrcik Musimba & 2 others [2013] eKlr** and petition no 5 of 2013 **Raila odinga & anor –vs- IEBC & 3 others**.

There was no alteration that was done by the 1st respondent. There was no evidence that was adduced by the respondent to show that the 1st respondent did the alteration.

On the issue that the 1st respondent failed to nominate the petitioner on priority to the respondents in line with the list submitted on the 21st august 2017. The petitioner was not the author of the said letter nor was the same addressed to her. The interested party has confirmed that there was no other list. The 1st respondent relied on the list that was submitted to it and the claim cannot therefore stand.

The 1st respondent did not abdicate in its duties of failing to nominate the petitioner. the 1st respondent relied on the case of **Justus Kariuki –vs- Martin Nyaga Wambora [2014] eKlr** it was held that party knowing of an order which was null should apply to the court that it

might be discharged. The order by the tribunal was never discharged 1st respondent was under obligation to obey the same. the order was still in place and valid. The 1st respondent relied on the case of **Mogesi Agnes & 8 others –vs- IEBC & 13 others** and submitted that it cannot interfere with the decision of the political parties tribunal and the same still stood. The petitioner complaint therefore did not hold any water. The 1st respondent was not the author of the list. The 1st respondent urged the court to find that the petition fails and the same should be dismissed with costs to the 1st respondent.

The 2nd 3rd and 4th respondent submitted that they were gazette by the 1st respondent as per the gazette notice no **8380 (vol .CXIX no 124)** on the **28th august 2017** as nominated members of interested party at the county assembly Mandera. This was lawfully done in accordance to the law article 90 (1) (2) (3) and 177 (1) of the constitution sections 34,35,36 of the election act 2011.

The complaint case no 528 of 2017 **Noordin Ismail -vs- Economic freedom party & IEBC** challenging the nomination party list published by the 1st respondent dated 23rd july 2017 and the same was subsequently presented by the interested party to the 1st respondent as per law required during the period designated for the party primaries were nullified as per the judgment in the complaint no 528 of 2017.

The 2nd 3rd and 4th respondent submitted that nullification of the EFP party list by the political parties tribunal the party moved to comply with the tribunal order therein and made the changes to the party list to reflect the quality of all the clans of mandera.

The interested party then submitted the list in compliance with the law. the law did not allow the amendment of the party list once it is submitted to the 1st respondent. The list then that was submitted was applied without alteration variations changes and/or amendments. There was no manipulation of the said list in any way the 2nd 3rd and 4th respondents denied these allegations. The petitioner failed to prove the same.

The 2nd 3rd and 4th respondents submitted that there was no breach of any legitimate expectation by the petitioner belief that she was nominated by the mandera county assembly was based on the notice that had no legal force. The 2nd 3rd and 4th respondent submitted that the petitioner had failed to prove her case and the same should be dismissed.

The 2nd 3rd and 4th respondent relied on section 107 of the evidence act and the case of **Raila odinga & 2 others –vs IEBC & 3 others [2013] eKlr** where it was held that party who was alleging non conformity with the electoral laws, the petitioner must not only prove that there has been non compliance with the law but such failure of compliance did affect the validity of the elections.

The 2nd 3rd and 4th respondent relied on article 90(2) of the constitution and the role was conferred on the 1st respondent and section 34(6) of the elections act, section 7(2) of the county government act that requires that the community parties nominating persons to the county assembly to ensure that the community and cultural diversity of the county is reflected in the county assembly and that there was adequate representation to protect the minorities within the county in accordance with article 197 of the constitution.

The political parties prepare party lists and submit the party nomination to the 1st respondent retains the oversight role over the parties in the preparation of the party list to ensure that there is compliance with the law and the party rules Regulation 55 of the election general rules 2012. Any challenge to the to its compliance with the law lies with the IEBC.

The list prepared by the 1st respondent complied with the law and then it was subsequently gazette the role of the 1st respondent was enunciated in the case of **SC case of Moses Mwigigi & 14 others –vs- IEBC & 5 others [2016] eKlr** it was held that party list comply with the relevant provision of the law. there was no where that the law granted the IEBC to adjudicate the upon the nomination process. The 2nd 3rd and 4th respondents were therefore nominated according to the law.

As to whether the acts of omission on the party of the 1st respondent affected the chances of the petitioner being gazette as member of the county assembly of mandera on priority to the 2nd 3rd and 4th respondents, the 2nd 3rd and 4th respondents submitted that after the nullification of the party list by the PPDT, the interested party moved to comply with the tribunal order therein and made the changes to the party list to reflect equity. The interested party then submitted the revised list to the 1st respondent on the in compliance with the judgment. The 1st respondent upon receipt of the list dated 6th august 2017 subjected the same to the scrutiny and that the list was in compliance with article 90, 177(1)(c) and sections 34,35,36 and 37 of the elections act. The 1st respondent then gazetted the names on the 28th august 2017. The publication then marks the end of the mandate of IEBC regarding the nomination of the party representatives and shifts any dispute to elections court.

The 2nd 3rd and 4th respondent submitted that that the dispute by the petitioner could have been settled by the IEBC or the PPDT and not the election court. the court therefore lacked the jurisdiction to adjudicate on the matter. the 2nd 3rd and 4th respondent relied on the case of **Isaiah Ndirangu & 2 others –vs- IEBC & 4 others [2016] eKlr** it was held that the commission shall be responsible for settling disputes relating and arising from nominations. The petitioner was no blaming the IEBC save for publishing in Kenya gazette a list of nominees forwarded by the interested party. The 2nd 3rd and 4th respondents relied on the case no **2 & 5 of 2017 Mandera**.

As to whether the 2nd 3rd and 4th respondents were validly nominated? The 2nd 3rd and 4th respondents submitted that they followed the due process of being nominated to the county assembly. The interested party that prepared the list and forwarded it to 1st respondent for publication. The 2nd 3rd and 4th respondents had no role in the list. The petitioner had failed to demonstrate that she had applied to the interested party to be nominated to the to the Madera county assembly. The 2nd 3rd and 4th respondents indeed annexed evidence of the applications. The membership certificate by the petitioner was incomplete and the name as it was appearing was different all together.

The list as submitted by the independent party was never challenged reviewed and/or set aside by any court or competent jurisdiction. The

party list cannot be amended the 2nd 3rd and 4th respondents relied on section 34 (10) of the election act. The petitioner sought to amend the said list a position that untenable in law. the if there was an amendment it would be conducted before the publication of the gazette notice. The 2nd 3rd and 4th respondents relied on the case of **Narc Kenya party & anor –vs- IEBC & anor** .

The 2nd 3rd and 4th respondents urged the court to find that the petition lacked merit and the same should be dismissed with costs to the 2nd 3rd and 4th respondents and the interested party.

Analysis and Determination

I have considered the submissions by all the parties and I am required to determine whether the petitioner has made out a case to warrant the grant of the orders that are sought I note that there are three issues that have presented themselves that need to be determined :-

- i. Whether the 1st respondent had jurisdiction to allow an permit the interested party to submit an altered list on the basis of the decision of the political parties tribunal?
- ii. On whether the decision of the tribunal , the basis upon which the impugned nomination list was submitted was regular.
- iii. 3rd issue whether the 2nd 3rd and 4th respondents were duly elected as members of the Mandera county assembly in accordance with constitution and legislation?
- iv. As to whether the petitioner was the person that was listed in the list that was submitted for gazetement?

The matter of nomination of members of the county assembly from party lists to represent special groups has its basis in the Constitution. The relevant provisions are Articles 90 and 177. The starting point is Article 177 which provides as follows –

‘(1) A county assembly consists of–

- v. *(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;*
- vi. *(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;*
- vii. *(c) the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and*
- viii. *(d) the Speaker, who is an ex office member.*
- ix. *(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.’*
- x. 5. Article 90 provides that –
- xi. *‘(1) Elections ... for the members of the county assemblies under 177(1) (b) and (c), shall be on the basis of proportional representation by use of party lists.*
- xii. *(2) The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervisions of elections for seats provided for under clause (1) and shall ensure that –*
- xiii. *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;*
- xiv. *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 priority in which they are listed; and*
- xv. *c) except in the case of county assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya.’*

And the laws under the elections act 34(1) *The election of members of the National Assembly, Senate and county assemblies for party list seats specified in Articles 97(1)(c) and 98(1)(b)(c and Article 177 (1)(b) and (c) of the Constitution shall be on the basis of proportional representation and in accordance with Article 90 of the Constitution.*

(2). ...

(3). ...

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

35(1) A political party shall submit its party list to the Commission on the same day as the day designated for submission to the Commission by political parties of nominations of candidates for an election before the nomination of candidates under Article 97(1)(a) and (b), 98(1)(a) and 177 (a) of the Constitution.'

On the 1st issue the courts have held in several cases that Election Act give the IEBC jurisdiction to settle election disputes including disputes relating to or arising from nomination but excluding election petitions and disputes subsequent to the declaration of election results. I rely on the case of **Election Nomination Appeal No. 22 of 2017** in which the Learned Judge held that:

"Article 88(4)(e) and Section 74(1) Election Act give the IEBC jurisdiction to settle election disputes including disputes relating to or arising from nomination but excluding election petitions and disputes subsequent to the declaration of election results. It therefore follows that once IEBC accepted the party list under Regulation No. 26 any dispute arising there from should have been referred to the IEBC Dispute Resolution Committee and not the Political Parties Disputes Tribunal. I therefore find and hold that the PPDT did not have jurisdiction to entertain the dispute herein as it could only exercise jurisdiction on an election dispute that falls within its exclusive jurisdiction..."

Accordingly, when it comes to the compilation of Party Lists, the role of IEBC is not that of "conducting" that process, but is limited to a supervisory role. Indeed, **Section 34(6A)** of the **Elections Act** recognizes that:

"Upon receipt of the party list from a political party under subsection (1), the Commission shall review the list to ensure compliance with the prescribed regulations and--

(a) issue the political party with a certificate of compliance; or

(b) require the political party to amend the party list to ensure such compliance failing which the Commission shall reject the list."

The case of **Jubilee Party of Kenya v Farah Mohamed Manzoor [2017] eKLR** it was held that impugned Judgment of the tribunal was declared null and void for want of jurisdiction. I rely on the case of **Mauray Asewe Ouko & another v Orange Democratic Movement & another [2017] eKLR** it was held that A party unhappy with the contents of a party list in the hands of the Interested Party has a right of recourse only to the internal disputes mechanisms of the Interested Party, in accordance with Article 88(4) of the Constitution and section 74 of the Election Act. The PPDT has no jurisdiction whatsoever over such lists. The judge went further and held that it is my conclusion that the PPDT had no jurisdiction to handle the dispute which culminated in the decision the subject of this appeal. If there was no jurisdiction to pronounce the judgment the subject of this appeal, then it follows that the appeal before me cannot be competent. Having held that the appeal before me is not competent. I rely on the case of **Owners of Motor Vessel Lillian S vs. Caltex Oil (Kenya) Ltd [1989] KLR 1, Nyarangi**. "Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Guided by this case, I find that the political parties disputes tribunal had no jurisdiction to entertain the dispute that involved the party list their decision was therefore illegal null and void.

On the 2nd issue guided by the holding in the **Owners of Motor Vessel Lillian S vs. Caltex Oil (Kenya) Ltd [1989] KLR 1** the **political parties dispute tribunal** having lacked there was no basis for relying of that decision by the 1st respondent. The 1st respondent erred in implementing decision that that was plainly erroneous and incapable of being complied with under the constitution the I have relied on the case of **Re Hebatulla properties ltd [1979]** cited by the petitioner it was held that tribunal can only do those things that which the statute has empowered it to do since its powers are express and not implied. The article 2(4) invalidates any law that is inconsistent with the constitution. I find that the only list that was published by the 1st respondent on the 23rd July 2017 was certified and vetted and published in accordance with the elections act.

As to whether the 2nd 3rd and 4th respondents were duly elected as members of the Mandera county assembly in accordance with constitution and legislation? Court finds that the 1st respondent erred and violated the constitution in failing to nominate and gazette the petitioner in accordance with the list as submitted to 1st respondent and published on the on the 23rd July 2017. The finding therefore of the court is that the 2nd 3rd and 4th respondents were not validly nominated in accordance to the law.

On the 4th issue that the petitioner was not one and the same person as the name was different from the one that was in the party list, the petitioner explained that there was a topographical error in typing the party lists. I did not find any contrary evidence to disprove that offered by the petitioner. The 2nd 3rd and 4th respondents and the interested parties relied on their affidavits. The issue was settled on cross examination of the petitioner. the petitioner was the one and the same person. the other final issue was whether the petitioner applied to be an MCA with county assembly Mandera, the application were made to the interested party and all the application were under the custody of the interested party and therefore was supposed to have given list to demonstrate that the petitioner was not an applicant this was not done and I find and hold that the petitioner was one of the applicants.

I therefore find that the petitioner proved her petition and I allow the same with costs I make the following orders :-

- i. A declaration that the 1st respondent acts which were non compliant with the constitution and the written law affected the chances of the petitioner of being gazette a member of the county assembly Mandera county on priority to the 2nd 3rd and 4th respondents respectively.

ii. Declaration that the 2nd, 3rd and 4th respondents were not validly elected member of the county assembly Mander county and they could not be so elected on priority to the petitioner.

iii. An order that the 1st respondent compelling the 1st respondent to degazette the names of the 2nd, 3rd and 4th respondent from the member of the county assembly Mander county under the gazette notice no vol CXXIX – NO 124 page 4997 and replace it with fresh gazette in compliance with the party lists as submitted to it by the interested party, the constitution and the written law.

iv. An order directed at the 1st respondent compelling the 1st respondent to gazette the name of the petitioner as member of the county assembly Mander county on priority to the 2nd, 3rd and 4th respondent in the Gazette notice.

v. Costs of the petition capped at ksh 500,000/=.

Orege K. I. – S.R.M 23/02/18

Delivered dated and signed at Milimani court this 23rd day of February 2018.

.....in the absence/ presence for the petitioner.

.....-in the absence / presence for the 1st respondents.

...in the absence / presence for the 2nd, 3rd, 4th respondents.

.....in the absence / presence for the interested party

Orege K. I. – S.R.M 23 /02/18