



REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATES COURT AT MAKUENI

ELECTION PETITION NO. 2 OF 2017

LUCAS MULINGE WAMBUA.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL

& BOUNDARIES COMMISSION (I.E.B.C).....1ST RESPONDENT

THE COUNTY ASSEMBLY OF MAKUENI.....2ND RESPONDENT

JUSTUS MUTUA MASESI.....3RD RESPONDENT

AND

WIPER DEMOCRATIC MOVEMENT-KENYA.....INTERESTED PARTY

JUDGMENT

INTRODUCTION

LUCAS MULINGE WAMBUA, the petitioner is a member of WIPER DEMOCRATIC MOVEMENT-KENYA, the interested party herein. The 1st respondent, the Independent Electoral Boundaries Commission, hereinafter referred to as IEBC is given the mandate to among others conduct or supervise elections to any elective body or office established by the Constitution.

JUSTUS MUTUAMASESI, the 3rd respondent is a nominated member of the county assembly (MCA) of Makueni. He was nominated by the interested party herein and his name was duly gazetted by the 1st respondent and subsequently sworn in as a member of the County Assembly.

Afterwards, the Petitioner, not being satisfied with the process done by the 1st Respondent in nominating the 3rd Respondent, filed this petition.

PETITIONER'S CASE

The Petitioner pleaded that his name and that of the 3rd respondent were in the original list submitted to the IEBC by their party. That his name ranked first to that of the 3rd respondent. He said their party made changes to that list upon realization that the name of one of the nominees Lynett Mbula Mutula appeared under both the marginalized group and gender top up categories.

That following a case and judgment from the Political Parties Dispute Tribunal [PPDT] being complaint No. 512 of 2017 their party submitted a final list of marginalized category in which both his name and that of the 3rd respondent appeared with that of the 3rd respondent ranking first and in the youth category. Hewas listed in the marginalized clan category.

He says that list was irregular, unlawful and hence void for it violated both the Constitution and electoral laws as it prioritized the youth over other marginalized groups. He said that by placing three persons from the youth group, the other marginalized groups were unfairly disadvantaged and that was in violation of Section 34(3) of the Elections Act which provides that such party list shall prioritize a person with disability, the youth and any other candidate representing a marginalized group.

The petitioner said since the list was drawn on 24th August 2017 after the election had been announced, the Party knew by applying the formula provided for under Regulation 569(2) of the Elections (General) Regulations 2012 the special seats to be allocated to it were three and therefore it was unlawful and irregular for it to prioritize those three seats which were the only ones available under the youth category.

In his submissions, the petitioner said if the list was aligned to the law in terms of prioritization, it would mean the name of Gideon Muinde Mwangi (person with disability) would be the first one, followed by Urbanus Kyalo Wambua (youth), then Sophia Mutio Mutua (marginalized women) under the marginalized groups and given that Gideon Muinde Mwangi and Sophia Mutio Mutua did not file suit or complain, then the petitioner would be the next in line in order of priority.

It was for the above reasons the Petitioner sought the following orders from this court:

a) A declaration that the election and nomination of Justus Mutua Masesi (3rd Respondent) as a Member of County Assembly of Makueni is unconstitutional, unlawful and hence invalid and order for nullification of the said nomination/election.

b) A declaration that the petitioner Lucas Mulinge Wambua is the duly nominated and/or elected member of the County Assembly of Makueni pursuant to the list of Wiper Democratic Movement-Kenya representing marginalized groups under the category of marginalized clan.

c) Costs of the suit.

1st RESPONDENTS CASE

The 1st respondent said it adhered to the Laws governing elections including publishing in the dailies a list of nominees submitted to it by the interested party. That even after the initial list was challenged at the Political Parties Dispute Tribunal it satisfied itself that the re-submitted list by the interested party as per the Tribunals orders met the criteria as by law provided before adopting the list.

In its submissions, it said its role was only to adopt the list as submitted upon satisfying itself the list meet constitutional and statutory criteria. That the law does not grant it powers to adjudicate upon the nomination process of a political party which has been left entirely to the political parties and that further any party member aggrieved by the process of a party may have recourse to among others the Political Parties Dispute Tribunal and the court.

It submitted that under Article 90(b) of the Constitution, the list only needed to comprise appropriate number of qualified candidates and alternated between male and female in the priority in which they are listed. That the Marginalized group list took precedent over the Gender top up list with the latter list being supplemental to the former.

Finally the 1st respondent took issues with the petitioner for raising his concerns in court and late for that matter. That any legal challenges to a party list should ideally be raised before the publication of the nominated persons in the Gazette Notice and their assumption to the relevant office.

3rd RESPONDENT AND INTERESTED PARTY'S CASE

Summarized, both the parties case is that the function of determining the prioritization of nominees is the responsibility of the individual party (Interested Party) and not the 1st respondent. That the 1st respondent never violated the Constitution or any law by allocating to the 3rd respondent a seat in the county assembly. In their joint submissions, they said if the petitioner was to exercise his right to dispute the party list and prioritization, then such challenge can only be made against the entire list and cannot be limited to the 3rd respondent's position on the list unless it was the petitioner's claim that the 3rd respondent was not qualified for nomination. They submitted that by doing so, the petitioner invited the court to make declarations with regard to the party list which declaration would adversely affect persons who are not parties to the suit. That even if the court was to make such a finding, that would not translate into nomination of the petitioner as a member of the county assembly of Makueni as the provisions of section 37 of the Elections Act regarding re-allocation of special seats would apply. Further, they argued that the court cannot be called upon to adjudicate on the legality, validity and/or constitutionality of the party list as that is a matter within the purview of the internal party mechanisms, the Political Parties Disputes Tribunal and the IEBC dispute resolution committee.

They submitted that petitioner's contention that the people of Makueni have been denied their right to proportional representation is not true.

DETERMINATION OF ISSUES

During the pre-trial conference of this petition, counsels for the respective parties agreed the following were the issues for determination.

- a) Whether the nomination and gazettelement of the 3rd respondent, JUSTUS MUTUA MASESI as a member of the County Assembly of Makueni was lawful, legal and valid, and whether the same was undertaken in accordance with the Constitution and Election laws.**
- b) What is the legal effect of the decision dated 1st August 2017 in Complaint No. 512 of 2017 at the Political Parties Dispute Tribunal and whether the same was complied with?**
- c) Whether the Petitioner's name was lawfully forwarded to the 1st respondent as being part of the party list of the interested party, Wiper Democratic Movement-Kenya**
- d) Whether the petitioner, Lucas Mulinge Wambua is entitled to be gazetted as a duly nominated member of the County Assembly of Makueni**
- e) What orders should be made as to costs.**

I will address the issue of burden and standard of proof first. It is now accepted that in an Election Petition, the burden of proving the allegations made in the petition lies with the Petitioner. The presumption is that the Petitioner is required by law to adduce sufficient facts to support his/her claim; secondly, when that is done, the court will have to consider whether it is satisfied that the Petitioner adduced sufficient evidence to support the facts but it must also bear in mind that the elections laws can be infringed, especially through incompetence, malpractices or fraud attributable to the responsible electoral body. However it rests on the person who alleges, to adduce and produce the necessary evidence. The burden of proof was well explained by our Supreme Court in **Raila Odinga and others Vs Independent Electoral and Boundaries Commission & Others [2013] e KLR** as follows; *"Where a party alleges non-conformity with the electoral law, the Petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the Elections. It is on that basis that the respondents bear the burden of proving the contrary. So the Petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law."*

In the Tanzanian case of **MBOWE vs. ELIUFOO (1967) EA 240**, Georges CJ, held that, “*There has been much argument at the meaning of the term “proved” to the satisfaction of the court. In my view it is clear that the burden of proof must be on the Petitioner rather than the Respondents because it is he, the Petitioner who seeks to have this election declared void*”. In the Nigerian case of **Abubakar v. Yar’Adua [2009] All FWLR (Pt. 457) 1 S.C.**, the court held that, “*the burden is on the Petitioner, to prove non-compliance with electoral law, and to show that the non-compliance affected the results of the election*”.

Thus the statutory and evidential burden of proof in this petition rests with the Petitioner. The Petitioner alleges that there has been breach of law by the 1st Respondent and the Interested Party and must therefore lay evidence before the Court to support the allegations.

This Court will now address the issues that emerged for determination during the hearing of this petition having considered the pleadings, evidence and submissions.

I wish to start with the 2nd and 3rd issues respectively as drafted by the parties.

ISSUE NO.1 What is the legal effect of the decision dated 1st August 2017 in Complaint No. 512 of 2017 at the Political Parties Dispute Tribunal and whether the same was complied with?.

The 1st respondent in its submissions said the judgment in the above stated complaint only addressed the Marginalized group list .That that was clearly indicated in paragraph one of its introduction. In that paragraph, the following sentence appears, “His application for nomination on the list of marginalized group was approved and accepted”

If that was the only sentence to consider, then I would agree with the 1strespondent. However it would appear that was not the only list submitted to the tribunal by the parties in that complaint .It’s apparent the list referred to by the tribunal contained both the Marginalized and Gender top up nominees to the County Assembly of Makueni as submitted by the parties to the complaint to the tribunal for consideration.

At page 3 of the said judgment at paragraph 10,the tribunal states;

“....., we have scrutinized the documents on record including the respondent’s party list as published by the Independent Electoral and Boundaries Commission. While the respondent was under obligation to ensure that its party list represents the ethnic diversity of the people of MakueniCounty, it did not fulfill this obligation while compiling the party list. The list of marginalized persons is exclusively composed of party members identified as belonging to the Akamba majority. The gender top-up list is similarly almostexclusivelycomposed of the Akamba majority with a single slot going to the Somali minority....”

It is evident the tribunal did address its mind to both the marginalized and gender top up list and that was the understanding of the interested party herein and who was the respondent in the tribunal case and that explains whyit resubmitted two lists on both groups.

DW3 Jared Maaka Siso, the interested party’s executive director in his evidence in court said their understanding of the judgment was that both the gender top list and the marginalized list were null and void and that is the reason why the party prepared and re-submitted a list on the two groups.

It would follow then that the effect of the tribunals decision was that it nullified the interested party list of nominees on both the Marginalized and Gender Top categories and that would explain why the Interested Party did in compliance with the tribunal orders re-submittedanother list on both categories.

ISSUE NUMBER 2. Whether the Petitioner’s name was lawfully forwarded to the 1st respondent as being part of the party list of the interested party, Wiper Democratic Movement-Kenya.

The petitioners name was forwarded to the 1st respondent not on its own but as one of the names in the

list of nominees by the interested party, That list was never rejected, annulled or contested hence the list and by extension the petitioner's name was lawfully forwarded as such.

ISSUE NUMBER 3. Whether the nomination and gazettelement of the 3rd respondent, JUSTUS MUTUA MASESI as a member of County Assembly of Makueni was lawful, legal and valid, and whether the same was undertaken in accordance with the Constitution and Election laws.

It is the Petitioner's contention that the re-submitted list by the interested party to the 1st respondent following the tribunal's ruling was irregular, unlawful and hence null and void for it violated both the constitution and the electoral laws.

He pointed out that the list does not prioritize persons with disability and other marginalized groups contrary to section 34(3) of the Election Act. He said that placing the names of three persons from one category, of the youth, in priority over other nominees from other marginalized groups, the other groups including the marginalized clan under which he was listed were prejudiced and that was in violation of the law. He said the Interested Party was aware that the special seats to be allocated to the interested party were three and therefore it was not only unlawful but irregular for it to have prioritized the only three available seats to the youth. That, he said was fraudulent and an attempt to circumvent the law. The list complained of was as follows;

NO.	NAME	OF	NOMINEE	CATEGORY	OF
MARGINALIZED			GENDER		
1.	Urbanus Kyalo Wambua			Youth	
	Male				
2.		Lynnet	Mbula	Mutula	
	Youth		Female		
3.	Justus Mutua Masesi (3 rd Respondent)			Youth	
	Male				
4.		Sophia	Mutio	Mutula	Marginalized
	Woman		Female		
5.	Gideon Muinde	Mwango			Person with
	Disability		Male		
6.	Agnes	Mutuku	Musembi		Person with
	Disability		Female		
7.	Lucas	Mulinge	Wambua	(Petitioner)	Marginalized
	Clan		Male		
8.	Ahmed	Mohamed		Ibrahim	Ethnic
	Minority		Male		

He said the above list is clearly in breach of the Constitution and Election Laws as it never took into account the principle and values of equity, social justice, accountability, transparency, non-discrimination, human rights and protection of the marginalized (Under Article 10 of the Constitution) and violated Article 177(1) (C) which provide for consideration and inclusivity of members of marginalized groups including person with disability and other groups.

He said Parliament was under Article 100 of the Constitution mandated to enact laws in order to promote representation of Marginalized groups. That it did enact section 34(3) of the Elections Act which is specific and particular about the manner in which the list under marginalized group is to prioritize

different categories of the marginalized persons.

In the premises he said the answer to the above issue is that the election of the 3rd respondent was in violation of the Constitution and Electoral Laws.

The 1st respondent said it never breached neither violated any laws in dealing with the above list. That it allocated 3 seats to the interested party in order of priority as per the list. That it has not denied the people of Makueni County their Constitutional right to equal and proportional representation at the County Assembly.

In its submissions, the 1st respondent drafted for itself what it called issues for determination very different from the ones agreed by the parties herein. In answering one such issue titled “Whether the list published on 23rd July 2017 adhered to the Law”, the 1st respondent said it was satisfied with the re-submitted list and proceeded to publish it. That it is the mandate of the political parties to nominate members to the county Assembly and that in doing so they must among other things ensure and safeguard the representation from the marginalized groups, more specifically person’s with disability and the youth. It concluded by submitting that the list was according to law and that the petitioner has not challenged the nomination process of the 3rd respondent.

The 3rd respondent and the interested party advanced more or less same arguments as those of the 1st respondent with the 3rd respondent emphasizing that the seat allocation formula was fair and in accordance with the constitution and election laws.

In their joint submissions, they said the re-submitted list once approved by the IEBC became final and incapable of amendments pursuant to provisions of section 3 of the Elections Act. I believe they intended to quote section 34(7) which provides that the list shall be valid for the term of the Assembly.

They argued further that even if the court was to find the list was improper, such a finding cannot translate into nomination of the petitioner as a member of the county assembly of Makueni as section 37 of the Elections Act regarding re-allocation of special seats would apply. That the court should not make a declaration on the party list as sought by the petitioner as such a declaration would adversely affect persons not parties to this petition. To do so, they submitted would offend the rules of natural justice and would amount to condemning the said persons nominated from the list without hearing them.

The importance of marginalized party list cannot be over emphasized. The parties herein appeared to know its importance and especially the interested party and the 1st respondent who are the main players in that regard. Both parties through their witnesses, DW1 Salome OYUGI who handles political parties issues with the IEBC and DW3 Jared MAAKA who is the executive director of Wiper Democratic Movement-Kenya said that list is held in priority over the gender top list. That the list must have youth, persons with disability and other marginalized groups.

DW1 said because it was the prerogative of the parties to compile their lists, then it mattered not the manner in which the groups in that category are prioritized so long as the list contains all the categories within the marginalized group. She said the interested party was only entitled to three slots and that it prioritized the youth to occupy those three slots. That IEBC picked the three youth as prioritized as it was the parties’ prerogative to prioritize the list. To her, the IEBC is to only rubber stamp what is presented to it by the parties whether it finds any anomaly in prioritization or not.

I don’t think so. In the case *Lydia Mathia v Naisula Lesuuda & another* [2013] eKLR, the court had the following to say about the role of the IEBC on party list for special seats;

‘.....by holding that the 2nd Respondent (IEBC) could not designate as it did in this case, this Court would be limiting the 2nd Respondent from doing what it was required to do under the Constitution thus, defending the Constitution as required under Article 3 (1) of the Constitution. Political Parties are guided by the Elections Act on how to nominate their members by considering

the regional and ethnic diversity and in doing so, comply with the provisions of Article 10 on national values and governance. If a political party fails to do so then it is only appropriate for IEBC, which has the mandate to conduct, supervise and regulate elections, to step in and ensure compliance in accordance with the provisions of the Constitution and election laws. I agree with the 2nd Respondents submissions, that the Petitioner is now estopped from asserting or claiming that the 2nd Respondent lacks that same mandate to ensure ethnic and regional diversity.”

In the same case and quoting other cases the court reiterated;

“The legal framework for the nomination of candidates to the Senate, National Assembly and County Assembly was intended to inject equity, rationality, objectivity and inclusivity into the nomination process.....As concerns nomination of members of the National Assembly, Senate and County Assembly the exercise of discretion by political parties was required to promote gender equity and also regional diversity in accordance with the provisions of Article 90 of the Constitution of Kenya. The requirement for the lists to reflect the regional and ethnic diversity of the people of Kenya meant that to ensure that no ethnic group or region of the country dominates the list provided by the parties, IEBC is obliged in accepting the party lists to ensure compliance with the provisions of Regulation 55 (2) of the General Regulation which empowers IEBC to ensure that the party lists comply with the requirements of the Constitution, the Elections Act 2011 and the regulations.”

DW3 while admitting there is no superior category in marginalized group said its party prioritized the youth as others would follow in line in case of death or resignation of the nominees.

While it's the prerogative of parties to draw their list of nominees and in what order of priority they will appear, the law dictates that fairness, equity and non-discrimination and non-prejudice must be observed. For gender top up list that is achieved by listing the appropriate number of qualified candidates and alternating between male and female candidates in the priority in which they are listed. For marginalized list other than applying the zebra format similar alternate formula is required among the categories in the list and the picking of the nominees by IEBC must employ such alternate formula for candidates who qualify.

In the case—Vs- **Lydia Nyaguthii Githendu –vs- The IEBC & 7 Others [2015] eKLR**

The court stated that such a list”*is expected to contain a total of eight (8) names whose arrangement is to pay heed to the gender equality rule, and alternating of male and female and then indicate whether the proposed nominee had been proposed as a person with disability , a marginalized person or as a youth”*

Article 100 of the constitution underscores the need for promotion of marginalized groups especially women, persons with disability, youths, ethnic and other minority categories. Whenever these lists are made, the alternate formula must be applied. For example section 36(2) of the Elections Act stipulates inter alia,

“A party list submitted.....shall contain alternatives between male and female candidates in the priority in which they are listed”

From perusal of the list in question, it's abundantly clear that both the interested party and the 1st respondent did not act in line with the constitution in submitting the list and nomination of the candidates respectively. The interested party failed and/or refused to adhere to the marginalized rule that is listing alternates among the youth, persons with disability and other marginalized categories. The court notes that the interested party's list never paid attention to the category of its nominees but was biased in favor of the youth and against the other categories. The interested party had an obligation to ensure that no category that either dominated or was unfairly prioritized over the others. The IEBC failed in either rejecting the list as submitted and directing or advice the interested party to re-submit another list employing the alternate formula.

The purpose of the alternate formula in the party list is to avoid instances of bias, favoritism, prejudice and other improper motives and influences.

The Political Parties themselves, just as any other person or state organ, are bound to observe all provisions of the constitution including those that require that the rights of the minorities, youth and persons with disabilities be promoted and protected. Article 90(2) bestows on them the responsibility of ensuring that the party list meet certain criteria set out in the Constitution and legislation.

Both the interested party and the IEBC committed illegalities in the manner in which they handled the list. Courts of law will and should always frown upon acts of illegalities and these acts should not be allowed to either be perpetuated or to pass. It is good policy that courts enforce the law and avoid perpetrations of acts of illegality as allowing such acts to stand is in effect perpetuation of the illegality. Public policy dictates that courts should not aid in the perpetuation of illegalities.

So, what is the fate of the list in question?

The list as submitted was not a nullity to the extent that it provided for different categories in the marginalized groups. It was only an irregularity to the extent that it never alternated among the categories in the groups.

In the case of Suleiman Said Shabhal –Vs- IEBC & 3 others [2014] eKLR while quoting the decision in Mac Foy –Vs- United Africa Co. Limited[1961] 3 ALL ER 1169 the court said,

“Lord Denning distinguished between an act that is a mere irregularity and one that is a nullity. A mere irregularity is not void but voidable. An act that is voidable is valid until it is made or declared void. It ceases to have effect if it is declared void; It is not void ab-initio; what has been done or accomplished pursuant to that act is not affected by the declaration. On the other hand a nullity is really something that is void, anything right from the beginning”

From the list in question as submitted by the interested party and going by the nominations done by the IEBC, only one name that can stand the test as laid above earlier. That is the name of the nominee that appears first in the list irrespective of whatever category in the marginalized group.

That is the name of one URBANUS KYALO WAMBUA nominated in the youth category.

In view that there were other more than one categories in the marginalized group and that the interested party was only entitled to only three seats in that group, then any other nominee in the youth category would not and was not supposed to be picked by the IEBC unless it was demonstrated that some or all of the other nominees were not qualified to make it to the list.

And so the answer to the above issue for determination is that the 3rd respondent, JUSTUS MUTUA MASESI nomination/election as a member of the County Assembly of Makueni was unlawful, illegal and invalid, and the same was not undertaken in accordance with the Constitution and Election laws.

For the above reasons, the court grants prayer one in the petition and issues a declaration that the election and nomination of Justus Mutua Masesi (3rd Respondent) as a Member of County Assembly of Makueni is unconstitutional, unlawful and hence invalid and order for nullification of the said nomination/election be and is hereby issued.

Other than the 2nd respondent and one Urbanus Kyalo Wambua whose nomination/election to the County Assembly of Makueni stands, there was Lynnet Mbula Mutula who was nominated to the Assembly under the youth category in the list in question. In their joint submissions the interested party and the 3rd respondent said no orders should be made against anyone who is not a party to this petition as that would be condemning such a party unheard. I don't think so. The said nominee's name was forwarded to the IEBC by the interested party as the second nominee in order of priority and still in the youth category.

Her fate would therefore had she been a party to this petition been tied to that of the 3rd respondent. The interested party participated in this petition defending the manner in which it handled the list in which was her name and that of the 3rd respondent were. The IEBC acted in concert with the interested party in its response to the petition. Her interest was well taken care of and was heard through the interested party and the IEBC. In their joint submissions, and rightly so, the 3rd respondent and interested party had argued that if the petitioner was to exercise his right to dispute the party list and prioritization, then such challenge can only be made against the entire list and cannot be limited to the 3rd respondent's position on the list unless it was the petitioner's claim that the 3rd respondent was not qualified for nomination. Their argument fortifies the correct position that the 3rd respondent and Lynnet Mutula's fate were co-joined.

Her nomination/election as a member of the County Assembly of Makueni was unlawful, illegal and invalid, and the same was not undertaken in accordance with the Constitution and Election laws.

For the above reasons, the court issues a declaration that the election and nomination of Lynett Mbula Mutula as a Member of County Assembly of Makueni is unconstitutional, unlawful and hence invalid and order for nullification of the said nomination/election be and is hereby issued.

ISSUE No. 4 Whether the petitioner, Lucas Mulinge Wambua is entitled to be gazetted as a duly nominated member of the County Assembly of Makueni.

In his submissions, as earlier pointed hereinabove, the petitioner said if the list was aligned to the law in terms of prioritization, it would mean the name of Gideon Muinde Mwangi (person with disability) would be the first one, followed by Urbanus Kyalo Wambua (youth), then Sophia Mutio Mutua (marginalized women) under the marginalized groups and given that Gideon Muinde Mwangi and Sophia Mutio Mutua did not file suit or complain, then the petitioner would be the next in line in order of priority.

The 3rd respondent argued that even if the court was to make such a finding as it has done, that would not translate into nomination of the petitioner as a member of the County Assembly of Makueni as the provisions of section 37 of the Elections Act regarding re-allocation of special seats would apply.

Whether the petitioner, Lucas Mulinge Wambua is entitled to be gazetted as a duly nominated member of the County Assembly of Makueni depends at what position his name was placed in the list and the qualification of the nominees in the list and especially those placed ahead of him.

As pointed hereinabove, the law dictates that fairness, equity and non-discrimination and non-prejudice must be observed. For gender top up list that is achieved by listing the appropriate number of qualified candidates and alternating between male and female candidates in the priority in which they are listed. For marginalized list other than applying the zebra format similar alternate formula is required among the categories in the list and the picking of the nominees by IEBC must employ such alternate formula for candidates who qualify.

Going by the list in question, the court has already made a finding that the first nominee in the list, Urbanus Kyalo Wambua remains unaffected by the finding and declaration of the court. He is a male appearing in the youth category. The court has already pronounced itself on the other two nominees in the youth category.

The other category in the group is marginalized women. Only one name appeared in that category. That is the name of one Sophia Mutio Mutua.

Her name is the next in line in order of priority.

The next category in the list is that of persons with disability. Two names were forwarded. The first in the order of priority is one Gideon Muinde Mwangi, a male. His name is the next and the last in order of

priority in view that the interested party was entitled to only three seats in the category of special seats under the marginalized group list.

And so the answer to issue No. 4 for determination is that the petitioner, Lucas Mulinge Wambua is not entitled to be gazetted as a duly nominated member of the County Assembly of Makueni.

WHO PAYS THE COSTS.

Costs usually follow event. Pursuant to Rule 34(1) (a) of The Elections (Parliamentary and County Elections) Petition Rules 2012, this court is granted power to specify the total amount of costs that shall be paid in a petition. This court recognizes the participation, in terms of time, research, preparation of pleadings and the time spent in court during the actual hearing of the case and submissions. This court also recognizes that the Petitioner came to court as a member of interested party's party and who have a duty to support his party. The interested party and the IEBC owed it to the petitioner to act in fairness in the manner in which they handled the list in question. They didn't but instead committed illegalities. The Petitioner has partially succeeded in this Petition. The 1st Respondent and the interested party failed to exercise their mandate bestowed upon them by the Constitution of Kenya and Election laws. With this in mind in exercising my discretion, I find that the petition is entitled to costs of the petition. The cost shall be payable to him by the IEBC and the Interested party jointly and severally. The ceiling of the cost is set at Ksh-200,000/=, meaning he will not earn more than that sum. In most cases the courts don't order costs for or against an interested party but in this petition it's substantially because of its conduct that brought about this petition. In that regard, the sum that was deposited in court by the petitioner shall be refunded to him forthwith.

In the end, the court makes the following final orders;

- 1. The legal effect of the decision dated 1st August 2017 in Complaint No. 512 of 2017 at the Political Parties Dispute Tribunal was that it nullified the interested party list of nominees on both the Marginalized and Gender Top categories and it was substantially complied with by the Interested Party who re-submitted another list on both categories.**
- 2. Petitioner's name was lawfully forwarded to the 1st respondent as being part of the party list of the interested party, Wiper Democratic Movement-Kenya.**
- 3. The election and nomination of Justus Mutua Masesi (3rd Respondent) and Lynett Mbula Mutula as Members of County Assembly of Makueni was unconstitutional, unlawful and hence invalid and order for nullification of the said nominations/elections be and is hereby issued.**
- 4. That going by the list submitted SOPHIA MUTIO MUTUA and Gideon MUIINDE MWANGO are entitled to be gazetted as duly nominated/elected members of the County Assembly of Makueni.**
- 5. Certificates under section 86(1) of the Elections Act to issue in terms of orders 3 and 4 above and be served on the IEBC and the Clerk to the County Assembly of Makueni.**
- 6. The IEBC upon service of the Certificates to comply with order 4 above.**
- 7. The petitioner, Lucas Mulinge Wambua is not entitled to be gazetted as a duly nominated member of the County Assembly of Makueni.**
- 8. Cost to the petitioner payable to by the IEBC and the interested party jointly and severally. The ceiling of the cost is set at Ksh-200,000/=.**

Orders accordingly.

I wish to thank Counsels and the parties for their preparations, arguments and submissions and in particular the petitioner for having the courage to institute this petition.

Dated, signed and delivered in Court this 14th day of February 2018

JAMES N. MWANIKI

Senior Principal Magistrate

In the presence of:-

.....for the Petitioner

.....for the 1st Respondent

.....for the 3rd respondent

.....for the interested party

Mr Mwengi.....Court Clerk