



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT NYAMIRA

ELECTION PETITION NO. 3 OF 2017

**IN THE MATTER OF ELECTIONS ACT NO. 24 OF 2011 AND THE ELECTIONS (GENERAL) REGULATIONS 2017 AND
THE ELECTIONS (PARTY PRIMARIES AND PARTY LIST REGULATIONS 2017) PETITION RULES**

AND

**IN THE MATTER OF ELECTIONS/NOMINATIONS FOR THE COUNTY ASSEMBLY ELECTIONS/NOMINATIONS FOR
NYAMIRA COUNTY LEGAL NOTICE NO. 124 & 133 WITHIN NYAMIRA COUNTY GAZETTED ON THE 28TH AUGUST
2017**

AND 8TH SEPTEMBER 2017

BETWEEN

DAMARIS NYARANGI MOUNI.....PETITIONER

AND

1. WAFULA W. CHEBUKATI,

CHAIRMAN IEBC.....1ST RESPONDENT

2. THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....2ND RESPONDENT

3. IRENE NYAKERARIO MAYAKA.....3RD RESPONDENT

4. CLERK NYAMIRA COUNTY ASSEMBLY.....4TH RESPONDENT

JUDGEMENT

A. INTRODUCTION

The Petitioner filed a petition dated the 12th September, 2017. It was filed in court on the even date. The Petitioner simultaneously filed a notice of motion application and subsequently filed another application seeking orders inter-alia on the face of the two applications that pending the hearing and determination of the main petition dated the 12/9/2017 this court do issue orders of stay of the gazette volume No. 133 dated the 8th day of September, 2017. The court did issue the said orders, (supra).

Upon directions being taken the parties in the proceedings dispensed with all interlocutory applications, filed all requisite statements, affidavits and all other documents to be relied on during the hearing.

The parties agreed to canvass the petition by way of VIVA VOCE EVIDENCE. Issues of representation and filing of affidavits out of time were deliberated and the court made a determination which decision forms part of the court record.

In a nutshell, the affidavit of OGLA KARANI was not admitted.

B. BACKGROUND

This petition was filed by one DAMARIS NYARANGI MOUNI, who was nominated by the ODM party under gender top up during the 8th August, 2017 General Elections. In line with the mandate of IEBC as provided for under the law, they gazetted the petition on the 28th August, 2017 vide Kenya Gazette Volume No. 124 of the even date. Pursuant to the aforesaid gazette the Petitioner was scheduled for swearing in just like other nominated and elected members of the County Assembly of Nyamira County on the 7th day of September, 2017.

She was indeed sworn in on 7/9/2017 as a nominated Member of County Assembly of Nyamira representing gender top up under the provisions of Article 177 of the Constitution of Kenya 2010. There was no order challenging her nomination or questioning her credibility as a nominated Member of Nyamira County Assembly as at the date of gazette and swearing in.

Upon the Petitioner assuming a state office in line with the Constitution, the 1st Respondent, while discharging the duties in the 2nd Respondent's office, purported to revoke, and/or degazette the Petitioner through the Kenya gazette special issue Volume No. 133 of the 8th day of September, 2017 and gazette the 3rd Respondent. It was at this juncture that the Petitioner filed the present petition challenging the powers of the 1st & 2nd Respondents in discharging their mandates by over-riding the provisions of section 34 (10) of the Elections Act as read together with section 37 of the said Act.

It is worth noting that in filing the petition, the Petitioner equally filed two notices of motion application seeking orders of injunction and stay of the Kenya Gazette Notice dated the 8th day of September, 2017 affecting the interest of the Petitioner and the 3rd Respondent only. The orders were granted pending the hearing and determination of the main petition.

Upon hearing interlocutory applications and upon taking directions in court, the matter was stated for hearing and parties proceeded to tender viva voce evidence, relying on their affidavits and statements filed plus their documents duly filed in court.

The Petitioner opened her case for hearing. She testified and did call her two witnesses.

The 1st & 2nd Respondents called one witness by the name SALOME OYUGI, the legal officer with the 2nd Respondent.

The 3rd Respondent testified herself and did not call any other witness.

The 4th Respondent decided to rely on her affidavits and by consent of the parties, the 4th Respondent decided to rely on her affidavits and by consent of the parties, the 4th Respondent's learned counsel closed her client's case. The 4th Respondent has not filed submissions. However, the Petitioner's, 1st & 2nd Respondents' and 3rd Respondent's learned counsels filed their respective submissions.

The Petitioner's submissions are dated the 12/2/2018 plus a list of 6 authorities.

The 1st & 2nd Respondents' written submissions are dated the 20/2/2018. They supported their submissions with the law as laid down in various authorities. The 3rd Respondent's written submissions are dated the 20/2/2018, plus a list of 11 authorities.

1. A PRECISE OUTLINE OF THE PETITIONER'S EVIDENCE

It was the Petitioner's evidence that she relied on all the pleadings and the affidavits plus the annexures filed in court in favour of her petition.

During the hearing of the Petitioner's case, the Petitioner, one DAMARIS NYARANGI MOUNI hereinafter referred to as Pw-1, testified, inter-alia that she was a registered voter in the just concluded general elections and a life member of the ODM party. She said that she applied to her party for nomination in line with the party constitution. She produced before court the minutes of the County Executive ODM Committee meeting.

It was her further testimony that her name was forwarded to the National office for consideration and she was subsequently gazetted on the 28th day of August, 2017 and sworn in as a Member of Nyamira County Assembly on the 7th day of September, 2017.

The list of the order of swearing in, the certificate of oath of office and other documents in favour of the Petitioner did support the Petitioner's foregoing evidence.

It was Pw-1's further evidence that she was informed of another Kenya Gazette Notice issued on the 8th day of September, 2017 purportedly seeking to delete her gazette and nomination in lieu of the 3rd Respondent.

This development prompted her to move to court through an election petition in compliance with the law.

In her testimony in court and in the further affidavit filed by the Petitioner, she denied any fraudulent hand in her gazette. This line of evidence was by virtue of a purported court order filed in court by the 2nd & 3rd Respondents.

In her further evidence in chief, and her evidence under cross examination by the 1st & 2nd Respondents' and 3rd Respondent's counsels and also under re-examination by her learned counsel, the Petitioner was emphatic that, upon gazette, as a Member of the County Assembly for Nyamira, the 1st & 2nd Respondents had no jurisdiction in law to interfere with the Petitioner's mandate as a nominated Member of the County Assembly.

She further stated that her nomination was in line with the Constitution. In paragraph 15 of the petition, she pleaded that her nomination is in line with Article 177 (2) and (3) of the Constitution as read together with Article 90 of the Constitution of Kenya 2010.

In paragraph 16 of the petition which she supported with her oral evidence, the Petitioner pleaded that it is within the mandate of all the political parties to submit their preferred list of candidates to the 2nd Respondent within a given stipulated time and it is the mandate of the 1st & 2nd Respondents to receive and accord priority in terms of persons to be nominated based on the party ranking list.

In her evidence in court, and which evidence supported her pleading in paragraph 17 of the petition, the Petitioner stated that in the list of applicants for nominations in the Nyamira County Assembly under ODM party, she was listed as No. 5 and based on the requirements of Article 177 (1b and c) of the Constitution, her name was ranked as No. 3 in terms of qualifications for nominations and subsequently she was nominated as an MCA on the 28th day of August, 2017.

Pw-1, did testify that she did not present or submit the alleged fraudulent court order, Election Nomination Appeal No. 32 of 2017 vide; NYARANGI DAMARIS MOUNI =VRS= ORANGE DEMOCRATIC MOVEMENT (ODM) PARTY.

She also testified that she did not lodge a complaint to the IEBC Tribunal before filing of the petition before the court as required by the law.

The Petitioner did admit in her evidence that she had minutes and her application for Nomination but she did not present evidence that the same was received and stamped by the ODM party.

Pw-1, thus the Petitioner confirmed during cross examination that her name did not appear in the Sunday Nation Newspaper dated the 23rd July, 2017 in an advert by the 2nd Respondent showing those who had been nominated in the Gender top-up list for Member of County Assembly, Nyamira County.

She further admitted that she did not present her grievances to the IEBC Dispute Resolution Tribunal about the said list. Pw-1 also admitted that she was not aware of any other procedure the 2nd Respondent was supposed to use before gazetting the deletion of her name.

She did confirm to the court that the 2nd Respondent did its mandate. Pw-1 did testify that before the alleged fraudulent superior Court of Appeal Order, there is no other document bearing her name giving her priority in the party list ranking and/or order. This line of evidence is found at page 62 and 96 of the court's proceedings.

Pw-2, one ELIJAH SAMORA NYAMOI, testified. His evidence corroborated the Petitioner's evidence, to the effect that the Petitioner was a nominated MCA for Nyamira County Assembly and she was indeed sworn as such on the 7/9/2017.

Under cross examination, by the Respondents' counsels, he reiterated his evidence in chief, which evidence was contained in his affidavit dated the 12/9/2017, whose contents he adopted as his evidence in chief in this case. When cross examined by Mr. Kirenga, Advocate for the 1st & 2nd Respondents, Pw-2 told the court that he was invited by the Petitioner to attend the swearing in of the Nyamira County Assembly Members on 7/9/2017. He also told the court that he did not know if the Petitioner's Nomination was valid.

When cross examined by Mr. Nyaberi for the 3rd Respondent, Pw-2 told the court that he did not depone where the swearing in of the Petitioner took place. He did not also produce any document to show that he attended the swearing in ceremony of the Petitioner. He also stated that he did not sign any register to confirm attendance in the aforesaid swearing in ceremony of the Petitioner and other Members of the Nyamira County Assembly.

Pw-3, one KEFA MOKUA ONGERI, did adopt the contents of his affidavit dated the 12/9/2017 and duly sworn at Kisii before Sagwa Advocate. The gist of the said affidavit is that he witnessed the swearing in of the Petitioner as a Nominated Member of the Nyamira County Assembly on the 7/9/2017.

Under cross examination by the 1st & 2nd Respondents' counsel, Pw-3 told the court that he did not know the validity of the Petitioner's nomination, though he stated that the Petitioner was validly nominated, because her name was on the ODM party list and she was gazetted. He also corroborated the Petitioner's evidence to wit that he told the court that the Petitioner's name was in the ODM original party list, in the first Kenya Gazette. That the Petitioner's name was there as a Nominee.

It is worth noting that Pw-3 told the court that he did not indicate the time of the swearing in ceremony of the Members of the Nyamira County Assembly. He also did not sign any attendance register to confirm his presence in that particular ceremony. Be as it may, Pw-3, was emphatic in his evidence under cross examination by the Respondents' counsels, that the Petitioner was nominated as an MCA for the Nyamira County Assembly and she was thus sworn on the 7/9/2017 which ceremony he attended.

That is a very brief outline of the Petitioner's evidence. To buttress her evidence, the Petitioner's learned counsel filed written submissions dated the 12/2/2018 and supported the same with the law as laid down in 6 authorities.

The gist of the said submissions, is that, the 1st & 2nd Respondents cited outside their mandate and purported to revoke or degazette the Petitioner after gazettelement on the 28th day of August, 2017 which is deemed to be an election. That the petition presented before this court is therefore meritorious and ought to be allowed as prayed with costs to the Petitioner. To support this argument, the Petitioner's counsel relied on the Petitioner's evidence, the submissions and the law, he filed; which in a nutshell was that; the IEBC did not have the mandate to degazette or revoke and replace a Nominated Member of County Assembly after gazettelement on 28/8/2017.

His reason for this argument was that the mandate of the 1st & 2nd Respondents was to receive, supervise and declare the results from the names submitted by the political parties for nomination. That upon declaration of the aforesaid results through gazette for the case of nomination, they become *factus non official*. That under the provisions of the Constitution and the Elections Act, section 34 (10) of the said Act, prohibits the 1st & 2nd Respondents or any other party from interfering with the submitted list till the end of the term of Parliament.

Counsel further submitted that the 2nd Respondent was only responsible for the conduct and supervision of elections in the party list related to Nominated Members of Parliament, Senate and County Assemblies.

Counsel further submitted that the dispute as to who between the Petitioner and the 3rd Respondent ought to have been nominated by the ODM party could only be legitimately determined by IEBC before the 28/8/2017. That after that date the action of gazetting those nominated was deemed to be an election and the Petitioner was so for that matter duly elected to the County Assembly of Nyamira.

To support his submission that IEBC's mandate after declaration of election results, the Petitioner's counsel relied on the law as laid down in the case of *MOSES MUCIGI & 14 OTHERS =VRS= IEBC & 5 OTHERS (2016) eKLR* in which case, the Supreme Court considered the issue and stated thus: "(102) Article 90 (2) of the Constitution provides that IEBC shall be responsible for the conduct and supervision of elections in respect of seats provided for under clause (1). Seats in this category include the special seats provided for under Article 177 (1) (b) and (c) of the Constitution. And these seats, by Article 90 (3), shall be allocated to political parties in proportion to the total number of seats won by candidates of the political party at the general election (103) section 36 (4) of the Elections Act provides that "within thirty days after the declaration of the election results, the Commission shall designate, from each qualifying list, the party representatives on the basis of proportional representation".

(104) Section 36 (7) (8) and (9) of the Act, with regard to Nominations for County Assembly, thus provides

(7) for purposes of Article 177 (1) (b) of the Constitution, the Commission shall draw from the list under sub-section (1) (e), such number of special seats members in the order given by the party, necessary to ensure that no more than two thirds of the Membership of the Assembly of the same gender.

(i) (8) for the purposes of Article 177 (i) (c) of the Constitution the Commission shall draw from the list under sub-section (i) (f) four special seat members in the order given by the party

(9) the allocation of seats by the Commission under Article 177 (1) (b) and (c) of the Constitution shall be proportional to the number of seats won by the party under Article 177 (1) (a) of the Constitution.

(ii) (105) it is clear from the foregoing provision that the allocation of nomination seats by the IEBC is a time bound process that starts with the proportional determination of the number of seats due to each political party. On that basis, IEBC then designates or draws from the allocated list the number of nominees required to join the County Assembly. To designate or draw from entails the act of selecting from the list provided by the political party. It is clear to us that the Constitution and the electoral law envisage the entire process of nomination for the special seats, including the act of gazette of the nominees' names by the IEBC, as an integral part of the election process.

The court went on to state with regard to the legal position after gazetting those nominated;

(106) the gazette notice in this case, signifies the competition of the election through nomination and finalizes the process of constituting the Assembly in question. On the other hand an election by registered voters as held in the *JOHO* case, is in principle, completed by the issuance as to the validity of results from the IEBC to the election court.

(107) it is therefore clear that publication of the gazette notice marks the end of the mandate of IEBC regarding the nomination of party representatives, and shifts any consequential dispute to the election courts. The gazette notice also serves to notify the public of those who have been elected to serve as nominated Members of a County Assembly "(emphasis)"

The Petitioner's counsel, relying on the above stated law did submit that the Supreme Court made it clear that once IEBC gazettes names of the nominated members, it marks the end of its mandate and any other dispute thereafter is for election court. Counsel further submitted that upon gazetting names of those who had been nominated the entire nomination exercise becomes an election which can only be challenged via an election petition.

Therefore IEBC was barred by law from handling disputes relating to elections or disputes subsequent to an election. The issue in *MOSES MUCIGI*, case was also addressed by the Court of Appeal in the case of *ROSE WAIRIMU KAMAU and 3 OTHERS =VRS= IEBC C. A. NO. 169 OF 2013* and the decision in the above stated case was followed in the case of;

JALDESA TUKE DEBALO =VRS= IEBC and another (2015) eKLR, where the same issue was discussed and the court again stated; "We are cognizant of the principle that upon gazette of Members of the County Assembly, they are deemed to be elected Members of the County Assembly.

It is from the above analysis that the Petitioner's learned counsel submitted that once a member has been gazette as duly nominated that becomes an election result and anyone with that result can only challenge it as an election dispute in an election court.

That any challenge to the court that the ODM party was not enjoined to the proceedings and that this issue ought to have been filed before the tribunal and not before this court is a misplaced and ill-conceived submission because this is not the correct position in law.

The Petitioner's learned counsel did submit further that it is the 3rd Respondent who should have filed an election petition to, challenge the Petitioner's nomination after gazettelement on the 28th August, 2017.

Counsel went on in his written submissions to submit that in view of the above submissions, and the facts of this case and the applicable law IEBC acted outside its mandate and violated the Constitution and the Election Act.

That the 1st & 2nd Respondents had no jurisdiction to degazette the Petitioner and replace her through gazettelement, which gazettelement the Petitioner's Advocate has submitted that through an illegal gazettelement. He buttressed his argument that jurisdiction is everything with the law as held in the case of OWNERS OF MOTOR VESSEL "LILIAN'S" =VRS= CALTEX OIL KENYA LTD (1989) KLR 1.

All the above submissions were in respect of the Petitioner's issue no. 2, vide; whether IEBC have the mandate to degazette or revoke and replace a nominated Member of County Assembly after gazettelement on 28th of August, 2017.

On issue no. 3, vide; **whether the Petitioner was gazetted on the 28th of August, 2017 and sworn on the 7th September, 2017 as a Member of Nyamira County Assembly**; on this issue, the Petitioner's Advocate submitted inter-alia that it is not in dispute that on the 28/8/2017 through gazette volume no. 124 the 1st & 2nd Respondents Kenya gazette notice containing the names of the successful applicants who had been nominated by various political parties to occupy the positions in the respective County Assemblies. The Petitioner's name was among the successful applicants, who had been gazetted, the copy of this issue was filed in court and forms part of the Petitioner's exhibits.

There is ample evidence on record as tendered by the Petitioner that she was indeed sworn in on the 7/9/2017 and assumed office as an honourable Member of Nyamira County Assembly, certificates of affirmation of oath of office were produced before court. Counsel submitted that her gazettelement and subsequent swearing in amounted to a declaration of an election result.

On the 4th issue, as submitted by the Petitioner; vide; **whether this court has powers to declare and nullify the gazettelement of the 3rd Respondent through Kenya gazette volume no. 133 of 8th September 2017**. On this issue, the Petitioner's Advocate submitted inter-alia that this court has jurisdiction in its capacity as an election court to hear and determine the framed issues. He supported his argument with the law as laid down in the case of **RAHMA ISAAK IBRAHIM =VRS= IEBC & 2 OTHERS (2017) eKLR PETITION NO. 456 OF 2017 MILIMANI HIGH COURT** wherein, Judge ENOCK CHACHA MWITA; held that; in purporting to delete the Petitioner's name as duly nominated Member of Mandera County Assembly and substitute it with that of the 1st interested party, the IEBC acted outside its mandate. The Speaker of the County Assembly of Mandera could not lawfully swear in the 1st interested party consequent to the illegal gazette notice no. 8752 of September 6th, 2017.

On the Petitioner's 5th issue vide; **whether there was a petition or a cross petition against Damaris Nyarangi Mouni as a gazetted Member of Nyamira County Assembly**. On this issue, the Petitioner's counsel submitted that no other person has since filed a petition or a cross petition against the gazettelement of the Petitioner on the 28th August, 2017.

On the Petitioner's 6th issue vide; who should bear the costs of this petition, the Petitioner's learned counsel submitted that costs follow the event as this is the settled law. He however stated that an award of costs is a discretionary remedy exercised judiciously by the presiding judicial officer in such an election court at the determination of a dispute or judgement or ruling.

He did opine that the 1st & 2nd Respondents do pay the Petitioner the costs of this petition in the event the petition is in favour of the Petitioner.

On the issue as to whether the Chief Magistrate's Court has jurisdiction to hear and determine the present election petition, this was the Petitioner's first issue. On this issue, the Petitioner's Advocate submitted that, this Court has jurisdiction to hear and determine this matter. He supported his opinion with the provisions of section 74 (1) of the Elections Act, pursuant to Article 84 (4) (e) of the Constitution and the provisions of section 75 (1A) of the Election Act and the provisions of Article 169 (1) (a) as read with (2) of the Constitution of Kenya 2010; the said Article 169 (1) (a) as read with (2) of the Constitution of Kenya 2010 confers powers of appointing judicial officers to hear and determine matters of this nature by the Chief Justice.

A PRECISE OUTLINE OF THE 1ST AND THE 2ND RESPONDENTS' EVIDENCE

In opposing this petition, the 1st & 2nd Respondents filed their response to the petition dated the 29/9/2017 and the supporting affidavit sworn by SALOME OYUGI on the 26th day of September 2017, both documents were filed in court on the 3rd day of October, 2017.

The 1st & 2nd Respondents did rely on the contents of the afore-stated pleadings, plus the contents of annexures marked, "SO.1", "SO.2", "SO.3", "SO.4", "SO.5" and "SO.6" respectively, which are annexed on her supporting affidavit and the oral testimony of Madam SALOME OYUGI who testified in court on the 2/2/2018.

The 1st & 2nd Respondents do also rely on their written submissions and authorities filed herewith. Without recording the evidence of Madam Salome Oyugi one word after the other, this will point out that the summary of the said witness's evidence, was that; the contents of her supporting affidavit sworn on 26/9/2017, together with her oral testimony do form the evidence in chief of the 1st & 2nd Respondents. The said evidence was duly buttressed by the contents of all annexures "SO.1", "SO.2", "SO.3", "SO.4", "SO.5" and "SO.6" respectively which were annexed on Ms. Salome Oyugi's supporting affidavit dated the 26/9/2017 and duly filed in court on the 3/10/2017 as earlier herein above stated.

The said Salome Oyugi testified as Dw-2. It was her evidence that she was the Legal Officer at the IEBC and she is designated as the Manager Political Parties and Campaigns Financing. She testified for and on behalf of both the 1st & 2nd Respondents. She identified the 1st Respondent as the Chairman of the 2nd Respondent. It was her evidence that the ODM party qualified for three seats in gender top up position in Nyamira County and that three females were required to be picked on priority for the position.

She stated that the Commission received all final party lists on the 19/7/2017 being the deadline. She did further state that the Petitioner was not included in that list which meant that she could not be nominated to the Assembly. She testified that the final list was published in the Nation and Standard daily Newspapers of the 23/7/2017.

Dw-2 testified further that on the 10/8/2017, the Commission received another party list with the name of the Petitioner having been inserted. She also stated that due to strict timelines, the Petitioner's name was gazetted on the 28/8/2017, vide gazette notice volume 124. That her name was gazetted together with other candidates.

She however testified that after the Commission realized that the Petitioner's name was included in the party list on the basis of a fraudulent order, the Commission did a corrigenda correcting the mistake vide a gazette notice volume no. 133 of 8/9/2017 and issued the seat to the 3rd Respondent revoking the Petitioner's name.

Dw-2 told the court that the order in Election Petition Appeal No. 32 of 2017 was illegal in so far as that the Deputy Registrar of the Constitutional and Human Rights High Court at Nairobi denied the existence of such an order.

Dw-2 did clarify that those aggrieved with the party list were to lodge their grievances and/or disputes to either the Political Party Disciplinary Board, the Political Party Disputes Tribunal or the Commission for Nominations Disputes Committee of which the Petitioner did not lodge her dispute before any of the above stated bodies.

Dw-2 was emphatic that the 2nd Respondent acted within its mandate as required under the law, vide, as provided under Article 88 of the Constitution of Kenya 2010, which grants the Commission the mandate to inter-alia monitor compliance with the legislation on elections required by Article 82 (1) (b) regarding the nomination of candidates by political parties. So Dw-2 was categorical that the Commission and its chairperson derive authority from the Constitution of Kenya, the IEBC Act, 2011 and the Elections Act. She was emphatic in her evidence that Article 9 grants the Commission the sole mandate to allocate special seats on the basis of party lists in order to ensure that no more than two thirds of County Assembly Membership is of the same gender as provided under Article 177 (1) (b) of the Constitution and section 37 of the Elections Act. That the party list is a right given to the party under Article 90 (2) of the Constitution and section 34 (1) of the Elections Act and is created by the party as provided under section 34 (6A) and (b) of the Elections Act and Regulations 55 (3) of the Elections (General) Regulations, 2012.

However the Commission is tasked with the mandate to ensure that the party lists presented by the political parties adhere to the provisions of part X of the Elections (General) Regulations 2012. It is the 1st & 2nd Respondents evidence that pursuant to Regulation 54 (8) of the Elections (General) Regulations 2012, the Commission published the final party list as submitted by ODM in the Sunday Daily Nation, dated 23/7/2017 vide at page 4 of that Sunday daily Nation, as particularly stated by Dw-2.

The 2nd Respondent also published the final party list in the Standard Newspaper on 23/7/2017, and on 8th August, 2017, the Commission conducted the general election.

Dw-2 also testified that on the 19/7/2017, in line with section 34 (6) (a) and (b) of the Elections Act and Regulation 55 (8) of the Elections (General) Regulations 2012, the ODM party submitted their final party list to the Commission for the allocation of seats after the general election due to be held on 8/8/2017. This was exhibited by Dw-2's annexure SO.1 at page 0000009-000011 of the Commission's supporting affidavit, which is the letter by ODM to the Commission with the attached list.

Dw-2 testified further that on 10/8/2017, ODM submitted an amended party list to the Commission pursuant to an alleged court order dated the 27/7/2017 issued in Election Nomination Appeal No. 32 of 2017 in favour of the Petitioner herein, where ODM was ordered to include the Petitioner's name in the gender top up list. This is exhibited by annexure SO.2 at page 000012-000014 which is a copy of the amended party list as resubmitted by ODM party.

Dw-2 did state that vide a letter dated September 11, 2017, the Deputy Registrar of the Constitutional and Human Rights Division of the High Court of Kenya at Nairobi formally replied to the Commission by confirming that the Court Order in Election Nomination Appeal No. 32 of 2017 dated the 27/7/2017 was not authentic.

It is crucial to point out that Dw-2 did not dispute the fact that the Commission published gazette notice No. 124 dated the 28/8/2017, which included the Petitioner's name as a Member of Nyamira County Assembly in accordance with the gender top up list submitted by the ODM party.

Dw-2 did confirm to the court that the Commission thereafter did corrigenda vide gazette notice No. 133 of 2017 by deleting the Petitioner's name from the party list and subsequently replacing it with that of the 3rd Respondent herein.

Dw-2 also testified that as part of the process of Nomination under Article 88 (4) (e) of the Constitution, as read with section 74 of the Elections Act, 2011, the Commission has the mandate to settle electoral disputes, including disputes relating to or arising out of Nominations. Therefore Dw-2 said that as the Commission had received complaints as to the authenticity of the court order issued in Election Nomination Appeal No. 32 of 2017, which is a Nomination dispute, the Commission had the mandate to set out to investigate the veracity of the complaints.

That is a very brief outline of the 1st & 2nd Respondents' evidence. To buttress their evidence their learned counsel filed detailed written submissions dated the 20th day of February, 2018 and duly filed in court on the 21st day of February, 2018. Counsel also relied on the law as held in various authorities which has duly filed.

The gist of the 1st & 2nd Respondents' written submissions is that;

On the 1st issue of whether the Petitioner was validly nominated to the County Assembly. The 1st & 2nd Respondents learned counsels gave several reasons in his submissions to support his argument that the Petitioner was not validly nominated to the County Assembly. This court has read all those reasons as per the submissions. The court has considered the same.

On the 1st & 2nd Respondents' issue vide issue no. (ii) in their written submissions, which is to the effect that; that is whether the Petitioner is entitled to the reliefs sought in the petition.

In response to this issue, the 1st & 2nd Respondents learned counsel was particular that the Petitioner is not entitled to the reliefs sought in the petition as she has not discharged her burden of proving that she was validly nominated.

On the 3rd issue, thus issue no. (iii) vide; that who should bear the costs of the petition; the 1st & 2nd Respondents learned counsel submitted, inter-alia that costs follow the event and that the award of costs be made in favour of the 1st & 2nd Respondents.

In conclusion, counsel submitted in paragraph 46 of his submissions that this court do find that the petition is without merit, on the basis of all the grounds he offered in his written submissions dated the 20/2/2018.

2. A PRECISE OUTLINE OF THE 3RD RESPONDENT'S EVIDENCE

In her response to the petition, the 3rd Respondent filed her response, (under rule 11 of the Elections (Parliamentary and County Elections) Petition Rules 2017. It is dated the 19/10/2017 and filed in court on the 24/10/2018. She relied on the contents of this affidavit as her evidence in this case. She also relied on the contents of her bundles.

In paragraph 8 of the said response the 3rd Respondent pleaded in response to paragraphs 11 and 12 of the petition that the 1st & 2nd Respondents were legally mandated to publish the gazette in issue dated the 8th September, 2017 as the Petitioner's credentials were found wanting since she used unscrupulous and ingenious ways including forging of court orders to have her name gazetted when she was not qualified at all.

In answer to paragraph 13 of the petition, the 3rd Respondent averred in paragraph 9 of her response that she is the right person to occupy the nominee seat for gender top up Nyamira.

In paragraph 13 of her response the 3rd Respondent's answer to paragraph 18 of the petition was that it is not available to her to move the court in the manner and style that she has as the jurisdiction of the court is ousted.

She did plead in paragraph 16 of her response that this court does not have jurisdiction to grant the reliefs sought.

The 3rd Respondent testified in this case as Dw-1. She testified, among other things that her name is Irene Nyakerario Mayaka ID No. 22267150. She said that she participated in the General elections of 8/8/2017. She also said that she applied for a Nomination slot in Nyamira County and purposed to use the ODM party in which she is a Life Member.

She detailed to the court the process she followed in order to secure her Nomination. She did clarify the fact that her name IRENE NYAKERARIO MAYAKA was spelled wrongly as RENEE NYAKWARIRO MAYAKA in the published names on the party list for Nyamira County vide the extract from the Sunday Daily Nation dated the 23/7/2017 which Dw-1 identified before the court. The same was part of her documents.

It is clear from Dw-1's evidence under oath that her true name is IRENE NYAKERARIO MAYAKA and her ID No. is 22267150. This was her evidence in chief and under cross examination.

It is also important to note that the 3rd Respondent relied on her evidence as contained in her replying affidavit dated the 25/9/2017 and duly sworn at Nairobi before Kennedy O. Ochieng Advocate and Commissioner for Oaths. It was adopted as evidence in this case.

All her documents marked as annexures "INM-1", "INM-2" were adopted by this court as evidence in support of the 3rd Respondent's case. In her testimony in court, Dw-1 stated that she is a registered voter and a Life Member of the Orange Democratic Movement political party (ODM) and a player in the political movement in the Republic of Kenya. This evidence is in line with paragraph 4 of Dw-1's replying affidavit dated the 25/9/2017.

She did testify that she applied through her party for consideration to fill up the nominee slot for the party list in the gender top up category in the just concluded 8/8/2017 general elections.

It was her evidence that her name was appearing in annexure marked as INM-1 as no. 5 (under the gender top up category) but her name was erroneously written as RENEE NYAKWARIO MAYAKA.

That having had her name mis-pelt, she endeavoured to rectify the same for purposes of it to read officially and in accordance with how it appears in all her certificates and testimonials.

It was her evidence that she engaged her party (ODM) and the 2nd Respondent through correspondence and raised the issue with the manner and style that the Petitioner's name was found its way in the gazette notice when she did not have it published in the first instance. This averment was duly buttressed by the contents of the 3rd Respondent's annexure INM-2 which is a copy of her correspondence.

The 3rd Respondent was emphatic in her evidence that the Petitioner could not jump the priority queue and take up the nominee slots without following the laid down procedures and leave the deserving cases including the 3rd Respondent out of the race.

Dw-1 did state that the Petitioner stands disqualified as the County Assembly Representative for Nyamira County because her name was deleted following the gazette Notice Volume CXIX-NO.133 Gazette Notice No. 8879 of 8/9/2017 through a corrigenda.

Dw-1 did also state that the party that sponsored the Petitioner (which has not been made a party to these proceedings) revoked the nominee slot for the Petitioner, as herein-above stated.

Dw-1 did aver, that the Petitioner having not had her name published did not stand at a point of priority in the list with higher rights for consideration than the 3rd Respondent who was to automatically fill up the slot of the nominee in accordance with the Constitution and the Election Laws.

In paragraph 20 of her replying affidavit dated the 25/9/2017, the 3rd Respondent deponed inter-alia that

...the wording of the said Kenya gazette notice is very clear on the line after the corrigenda which states:-

“In Gazette Notice No. 8380 of 2017 Vol. CXIX-NO. 124 published on 28/8/2017, in the schedule irrespectively delete and insert as specified herein below....

And on the spread sheet where the Petitioner's name appears, it is written in very bold the word **“DELETE”** against the Petitioner's name and **“INSERT”** against the 3rd Respondent's name; which means that the Petitioner's nominee status is revoked by the deletion and the 3rd Respondent therefore takes her slot, meaning that the Petitioner is not a Member of the County Assembly for Nyamira County.

Dw-1 also testified that the deletion of the Petitioner's name was communicated to the 4th Respondent vide, the letter dated the 11/9/2017. That the letter is signed by the Executive Director of ODM and it was addressed to the 4th Respondent.

Dw-1 did also testify that she did not require a writ for any name to be inserted there because this was not an election dispute. She also said that she was not a candidate for a writ to be issued.

Dw-1 also told the court that she lodged her complaint to the EACC as regards the alleged fake, and illegally obtained court order and her matter is under investigation by the EACC and the Kenya Police. The upshot of the above-stated premises is that the 3rd Respondent (Dw-1 herein) confirmed the fact that she applied for the nomination slot in Nyamira County on the 5/6/2017 and lodged the same at the ODM party headquarters on the deadline day. This is as per her counsel's submissions dated the 20/2/2018. It was her evidence that she was successful in her application and her name was published by the 3rd Respondent in the Sunday Nation and the Sunday Standard Newspapers of the 23/7/2017.

She testified that she was no. 5 in the said list although her name was erroneously captured in the Newspaper advert on 23/7/2017 but her identification number was correct. She did confirm that the Petitioner's name was not in the said advert.

Dw-1 also testified that the name of the Petitioner was inserted illegally later in the party list by an IEBC employee by the name Dr. Gekara Mouni.

Dw-1 was specific in her evidence that the Petitioner's name only appeared on the subsequent party list because of an illegal and fraudulent court order. That is a very brief outline of the 3rd Respondent's evidence. To buttress her evidence her learned counsel filed detailed written submissions dated the 20/2/2018 plus a list of authorities, all duly filed in court on the 21st day of February, 2018.

He raised 3 issues in the said submissions. Issue no. ***(i) is whether the Chief Magistrate's Court has jurisdiction to hear and determine the Election Petition.*** Counsel's response to this issue was that the Petitioner ought to have filed her complaint with the Commission after the Gazette Notice No. 124. That it is clearly provided for by the provisions of section 74 of the Election Act. Court did relay on the law as laid down in the cases of: -

1. BEN NJOROGE & ANOTHER =VRS= IEBC & 2 OTHERS (2013) eKLR.

2. NATIONAL ASSEMBLY =VRS= JAMES NJENGA KARUME (1999) eKLR.

3. ISAIAH GICHU NDIRANGU & 2 OTHERS =VRS= IEBC & 4 OTHERS (2016) eKLR.

4. PETER OCHARA ANAM & 3 OTHERS =VRS= CONSTITUENCIES DEVELOPMENT FUND BOARD AND 4 OTHERS, KISII HIGH COURT PETITION NO. 3 OF 2010.

To support his argument that this court does not have jurisdiction to entertain this matter.

On issue no. **(ii) as to whether the 2nd Respondent had the mandate to degazette or revoke and replace the Petitioner as the nominated Member of County Assembly vide a Gazette Volume No. 133 of 8/9/2017 and if it had powers to do so.** In response to this, counsel, the 3rd Respondent's counsel submitted inter-alia that the 2nd Respondent acted within its mandate as required under the law, vide as provided under Article 88 of the Constitution. The 3rd Respondent's learned counsel invoked the law as provided under Article 88 (4) of the Constitution of Kenya, 2010.

Article 82 (i) (b) of the Constitution relating to nomination of candidates by parties,

Article 90 (2) of the Constitution of Kenya 2010.

Article 98 (1) of the Constitution of Kenya, 2010.

Article 90 of the Constitution which is given effect by the provisions of the Elections Act, 2011, Section 35, 36 and 37 provide a framework for the implementation of Article 90 of the Constitution.

Regulation 55 (2) of the General Regulations, and section 39 part (VI) of the Political Parties Act, 2011 to support his argument that the 2nd Respondent acted within its mandate as required by the above cited provisions of the law.

The 3rd Respondent's learned counsel did support his submissions that the Petitioner had an ONUS to exhaust the available resolution mechanisms before filing this petition, the law as laid down in the cases of: -

a) NATIONAL GENDER AND EQUALITY COMMISSION =VRS= IEBC & ANOTHER (2013) Eklr

b) BEN NJOROGE & ANOTHER =VRS= IEBC & 2 OTHERS (2013) eKLR.

c) LYDIA MATHIA =VRS= NAISULA LESUUDA & ANOTHER (2013) eKLR.

On the **(iii) issue on who should bear costs of the petition.** It was the 3rd Respondent's learned counsel opinion in his written submissions that costs follow the event. He supported this argument with the provisions of section 84 of the Election Act, Rule 30 of the Election Petition Rules 2017 and Rule 30 (2) of the said Rules (supra).

In his conclusion, the 3rd Respondent's counsel opined that this petition lacks merit and should be dismissed with costs to the 3rd Respondent. That the position held by several courts and it is the intention of the legislature when enacting the Election Act was that all internal dispute resolution mechanisms that have been provided by the law must be first exhausted before making the next step.

3. A BRIEF OUTLINE OF THE 4TH RESPONDENT'S CASE

It is worth noting that the 4th Respondent did not call any witness for viva voce evidence. She relied on the affidavits which she filed vide the affidavit of her witness. The 4th Respondent filed her response to the petition. It is dated the 18/10/2017 and was duly filed in court on the 23/10/2017.

The affidavit of DANIEL ORINA was deponed by the said Daniel Orin. Its contents supported all the contents of the 4th Respondent's response to the petition dated the 18/10/2017. The gist of the 4th Respondent's case is that the office of the Clerk of County Assembly held by the 4th Respondent is established by section 13 of the County Government's Act, 2012.

The 4th Respondent admitted paragraphs 1, 3, 4, 5 and 6 of the petition. The main crux of her response is that in accordance with the provisions of the Constitution of Kenya (Article 177 (i) (a) (b) & (c) the Respondent received Gazette Notice dated the 28th August 2017 with a list of Nominated Members to the County Assembly of Nyamira under Gender top up of which the Petitioner's name was included.

That in accordance with the provisions of the Constitution of Kenya (Article 177 (i) (a, b & c) and section 7 of the County Governments Amendment Act the Petitioner was sworn in on the 7th day of September 2017.

The 4th Respondent averred under paragraph 5 (g) of her response that at all times due process was followed and in turn the gazette notices dated 24/8/2017 and 8/9/2017. The 4th Respondent admitted paragraphs 7, 9, 10, 14 and 15 respectively of the petition.

In paragraph 8 of her response, the 4th Respondent avers that taking into account that the corrigenda, by the 1st & 2nd Respondents was published after the swearing in of the Petitioner, this Honourable court has jurisdiction to review the circumstances that led to the Petitioner's replacement by the 3rd Respondent and make appropriate orders guiding the Respondent.

That is a brief outline of the parties' evidence, plus their submissions and all the list of authorities relied on by the parties. This court has read all the above premises, and this court has keenly considered the parties evidence, each in its entirety as required by this court.

To determine this case, this court will raise issues from the reliefs sought by the Petitioner, the parties herein, the evidence on record and the law.

To begin with, this court will note that the Petitioner sought the following reliefs and/or prayers: -

- a) A declaration that she was validly nominated as a member of County Assembly Nyamira County under gender top up and gazetted on 28th August, 2017.
- b) A declaration that any challenge to her nomination after gazette and swearing in can only be by way of an election petition.
- c) A declaration that the gazette of the 3rd Respondent on the 8th September 2017 by the 1st & 2nd Respondent was irregular, null and void.
- d) An order of certiorari do issue quashing the gazette notice No. 133 dated 8th of September, 2017 in respect to nominations to Nyamira County Assembly.
- e) A permanent injunction restraining the 4th Respondent from swearing the 3rd Respondent as a nominated Member of Nyamira County Assembly.
- f) The 1st & 2nd Respondents be and is hereby directed to notify the Speaker of the County Assembly of Nyamira in writing of the valid nomination of the Petitioner to the office of Member of County Assembly under Gender top up.
- g) Costs of the petition be awarded to the Petitioner.

It is also important to note that the 3rd Respondent has raised a preliminary objection of law to the effect that the Chief Magistrate's Court does not have jurisdiction to hear and determine the Election Petition.

From the above stated premises this court will proceed to make a determination on the following issues, which have emanated from the issues raised by all the parties, the evidence on record and the law.

1. Whether the Petitioner was gazetted on the 28th day of August, 2017 and sworn in on the 7th day of September, 2017 as a Member of Nyamira County Assembly.
2. Whether IEBC has the mandate to degazette or revoke and replace a nominated Member of County Assembly after gazette on 28th day of August, 2017.
3. Whether there was a petition or cross petition against Damaris Nyarangi Mouni as a gazetted Member of Nyamira County Assembly.
4. Whether this court has the powers to declare and nullify the gazette of 3rd Respondent through Kenya Gazette Volume 133 of 8th September, 2017.
5. Whether the Chief Magistrate's Court has jurisdiction to hear and determine the present election petition.
6. Whether the Petitioner herein was validly nominated to the County Assembly.
7. Whether the Petitioner is entitled to the reliefs sought in the petition; and
8. Who bears the costs of this petition?

As regards issue no. 1 this court has considered the evidence on record, and it has found out that it is not in dispute that on the 28th day of August, 2017 through Gazette Volume No. 124 the 1st & 2nd Respondents published Kenya Gazette containing the names of successful applicants who had been nominated by various political parties to occupy the positions in respective County Assemblies.

The name of the Petitioner was among the successful applicants who had been gazetted, the copy of this issue was filed in court and forms part of the Petitioner's exhibits. It is also not in dispute that upon gazette the Petitioner was sworn in on the 7th day of September, 2017 and she assumed office as an Honourable Member of Nyamira County Assembly, Certificate of affirmation of each of office were produced before this court and forms part of the Petitioner's exhibits.

On the second issue, **vide whether IEBC has the mandate to degazette or revoke and replace a nominated Member of County Assembly after gazette on 28th day of August, 2017.**

The Court's answer to this issue is that, the IEBC has the mandate to degazette or revoke and replace a Nominated Member of County Assembly after gazettelement on 28/8/2017 as it did in this case because the Commission had received complaints as to the authenticity of the Court Order issued in Election Nomination Appeal No. 32 of 2017, which is a nomination dispute. So, the 2nd Respondent had the mandate to set out to investigate the veracity of the complaints. The Commission, having established that there had been a fraudulent act carried out, it published a corrigenda in order to safeguard its constitutional mandate.

The Petitioner failed to address the issue of the alleged Court Order which formed the basis of her Nomination. So, failure to account for her Nomination then the Petitioner failed to prove that she was validly nominated.

This answers issue no. 6 herein. It is worth noting that the 2nd Respondent acted within its mandate as provided, inter-alia under Article 88 of the Constitution of Kenya, 2010. That mandate prescribes that it has to comply with the Constitution and the National Legislation. In publishing its corrigenda, revoking the Nomination of the Petitioner, the 2nd Respondent acted to uphold the Laws of the Land which is mandated to adhere to.

As regards issue no. 3, vide ***whether there was a petition or a cross petition against Damaris Nyarangi Mouni, as a gazetted Member of Nyamira County Assembly***, the answer to this issue is that no other person has since filed a petition or a cross petition against the gazettelement of the Petitioner on the 28th August, 2017.

On issue no. 4 vide; ***whether this court has the powers to declare and nullify the gazettelement of the 3rd Respondent through Kenya Gazettelement Volume 133 of 8th September, 2017, this issue will be answered simultaneously with issue nos. 5, 6 and 7 as follows: -***

One, the Petitioner's prayer for certiorari for quashing of the Gazette Notice No. 133 of 8/9/2017 is not in the province of this court to determine. Issues to the staying or quashing certain limbs of the gazette is in the domain of the High Court.

It is also important to point out that the Petitioner was supposed to file her complaint with the Commission after the Gazette Notice No. 124. The Petitioner was to move either the Political Parties Disputes Tribunal or the Political Party Disciplinary Board and/or the Independent Electoral and Boundaries Commission Disputes Resolution Committee as her first port of the call to resolve the disputes relating to the party lists as per Law provided under the Constitution, the Election Act No. 24 of 2011, the Elections (Party Primaries and Party List Regulations 2017), Petition Rules, the IEBC Act 2011, the Elections (General) Regulations 2012 and the Political Parties Act, Article 87 (2), 88 (4), 90, 177 and 250 of the Constitution of Kenya, 2010 Section 34 and 35 of the Elections Act No. 24 of 2011 as revised in 2016, section 40 (2) 41 of the Political Parties Act No. 11 of 2011, Section 4 (e) of the IEBC Act of 2011.

So, failure to take her grievances to the above-stated institutions means that she skipped a fundamental process in law.

The Petitioner having failed to exhaust the legally provided for avenues as herein above stated, then this court will proceed to hold that, the Petitioner is not entitled to the reliefs sought in the petition. In arriving at this decision, this court is fortified by the Law as laid down in the decided cases of: -

1. NATIONAL ASSEMBLY =VRS= JAMES NJENGA KARUME (1999) eKLR.

2. BEN NJOROGE AND ANOTHER =VRS= IEBC & 2 OTHERS (2013) eKLR.

On the issue as ***to whether this Court has jurisdiction to hear and determine this petition***, it is this Court's answer and/or considered view, that this Court has jurisdiction to hear and determine this petition on the sole ground that where persons included in a party list have assumed the relevant office, as is alleged in the present case, their nomination can only be challenged by way of an election petition, see the Law as laid down in the case of ***NATIONAL GENDER AND EQUALITY COMMISSION =VRS= INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION AND ANOTHER (2013) eKLR.***

The Petitioner is also not entitled to the reliefs sought in the petition because she has not proved the fact that she was validly nominated to the County Assembly for Nyamira County. This premise is anchored on the grounds that issues of Nomination are not extinguished by virtue of Nomination as alleged by the Petitioner, but it is to be determined before the Election Court. That being the position, this Court has keenly considered the parties evidence, and exhibits herein and this court is of the considered finding that the Petitioner's name was not listed in the list that was provided to the Commission and published for Inspection in the Sunday Daily Nation and the Standard Newspapers dated the 23rd day of July, 2017.

It is worth noting that the party in which the Petitioner belongs to, that is the ODM party did not swear an affidavit or produce any document in this matter to support the Petitioner's position that she was correctly nominated.

It is also important to note that the minutes produced in evidence by the Petitioner as "DNM-001" were not certified and they do not in any way address why her name was not on the list submitted to the Commission on the 19th day of July, 2017 and only appeared later.

Coupled with the foregoing premises is the fact that the Petitioner did not address the issue of the alleged fake order. Failure to address the said fake Court Order has left this Court in a web of uncertainty as to whether the Petitioner was indeed validly nominated to the Nyamira County Assembly.

It is in the light of the foregoing premises that this court will proceed to hold that the Petitioner cannot pursue a legal remedy in the manner sought as it arises in connection with an illegal act and that no right of action can have its origin in fraud. In arriving at this conclusion (supra) this court is fortified by the law as held by the Court of Appeal in the case of ***MAPIS INVESTMENT (K) LTD =VRS= KENYA***

RAILWAYS CORPORATION (2005) 2 KLR 410, quoted with approval in the case of **PETER KIMORI MARANGA & ANOTHER =VRS= JOEL OMAGWA AND 2 OTHERS (2013) eKLR**.

It is in the light of the above stated premises that this court is of the considered finding that the Petitioner has not proved to the required legal standard held in the case of **RAILA AMOLO ODINGA & ANOTHER =VRS= IEBC & 2 OTHERS**, Presidential Petition No. 1 of 2017 that she was validly nominated as a Member of the County Assembly for Nyamira County.

The upshot of all the above stated premises is that this court is of the considered finding, that this petition is not meritorious and this court will proceed to dismiss it accordingly, in its entirety.

Taking into account the corrigenda by the 1st & 2nd Respondents which was published after the swearing in of the Petitioner this Honourable Court will proceed to uphold the contents and/or provisions contained in the Gazette Notice corrigenda vide Gazette Notice No. 8380 of 2017, Vo. CXIV No. 124 published on 28th August 2017 in which the Orange Democratic Movement Party Nominee is IRENE NYAKERARIO MAYAKA ID NO. 22267150 under the gender category.

The said Irene Nyakerario Mayaka, thus the 3rd Respondent did prove to the required legal standard, that she was validly nominated by the ODM party to the County Assembly for Nyamira County. This is as per her evidence on record and the contents of her exhibits herein.

Consequently, the 4th Respondent be and is hereby at liberty to swear in the 3rd Respondent as a Nominated Member of Nyamira County Assembly as appropriate.

As regards the issue on the costs, this Court shall take cognizance that costs follow the event. The Court shall also consider the Law regarding to this issue as provided by Section 84 of the Election Act, Rule 30 of the Election Petition Rules 2017, and Rule 30 (2) (1) (a) (b) of the said Rules supra. This Court shall appreciate the above cited provisions of the law. However, this court is of the considered view that the Petitioner had an unconditional right to file this petition, this Court shall proceed to make an order that each party herein do bear own costs.

In this matter, those shall be the orders of this court.

Orders accordingly.

M. O. WAMBANI – CM

28/02/2018

Judgement dated at Nyamira this 28th day of February, 2018. The parties have a right of Appeal.

M. O. WAMBANI – CM

28/02/2018

28th February, 2018 at 12.05 p.m.

Before Hon. Mrs. M. O. Wambani – CM

The Petitioner – Present

1st Respondent – Absent

2nd Respondent – Absent

3rd Respondent – Present

4th Respondent – Absent

C/C – Nyabonyi

Court – Interpretation/Language – English/Kiswahili/Ekegusii by C/c Nyabonyi.

Mr. Nyambati Advocate for the Petitioner

Mr. Nyaberi – I hold brief for Mr. Kirenga for the 1st & 2nd Respondents

Mr. Nyaberi Advocate for the 3rd Respondent - The 3rd Respondent is now present

Madam Michoma for the 4th Respondent

Court

Judgement duly signed, dated the 28th February, 2018 be and is hereby delivered in open court in the presence of C/c – Nyabonyi, the Petitioner, her Advocate, Mr. Nyambati, Mr. Nyaberi for Mr. Kirenga for the 1st & 2nd Respondents, the 3rd Respondent is now Present, her counsel Mr. Nyaberi and Madam Michoma for the 4th Respondent.

M. O. WAMBANI – CM

28/02/2018

Court

Judgement be and is hereby delivered accordingly.

Orders accordingly.

M. O. WAMBANI – CM

28/02/2018

Mr. Nyaberi for the 3rd Respondent

I apply for the certified copies of the judgement. I apply that the Executive Officer does extract the orders that have emanated from this Judgement to enable the 3rd Respondent to be sworn into office this afternoon today to enable her start transacting the house's business. We shall be following separately to surcharge the Petitioner on account of her earning unlawfully the emoluments from the office.

M. O. WAMBANI – CM

28/02/2018

Mr. Nyambati for the Petitioner

I apply for certified copies of the proceedings and judgement for the purposes of an Appeal. I apply for a stay of Appeal for 14 days since there is no Judge in Nyamira currently to grant us a stay pending an Appeal. The Petitioner has a right of Appeal.

M. O. WAMBANI – CM

28/02/2018

Madam Michoma for the 4th Respondent.

Nil.

M. O. WAMBANI – CM

28/02/2018

Mr. Nyaberi

Any litigant has a right of Appeal. That right can never be taken away because for the 3rd Respondent, we will be appealing against this court's judgement. Appeals of this nature are preferred within a period of 30 days from the date hereof. That in itself does not present a scenario to ask in a blanket manner stay of this court emanating from the judgement. The court has established that the platform that the Petitioner used to clinch the seat were not merited.

Having made that decision the Petitioner cannot purport to extend her tenure beyond today since her tenure in office is illegal. The non-availability of the High Court Judge cannot be a ground for the Petitioner to illegally continue occupying the office.

We do apply that the security for costs of Kshs. 100,000/= should not be refunded to the Petitioner because the 3rd Respondent is going to prefer an Appeal against the order on costs to replenish what she has spent.

It is far more than the Kshs. 100,000/=. The Petitioner said that she is sickly, so we would wish to have the security for costs of Kshs. 100,000/= do remain intact since we wish to lodge an Appeal in the High Court.

We may at least have something to lay our hands on as we pursue our Appeal on costs.

The 1st & 2nd Respondents have incurred a lot of costs that is apart from the 4th Respondent. The 3rd Respondent ought to have taken office yesterday.

There was acrimony when the court ordered that the Petitioner do stay in the office while this case was pending for trial.

M. O. WAMBANI – CM

28/02/2018

Mr. Nyambati for the Petitioner

Mr. Nyaberi has not demonstrated that in the event stay for 14 days is granted, they will suffer any loss or damage.

The purpose for the 14 days is to allow the Petitioner to file an Appeal before the nearest High Court.

The Court has made pronouncement on costs. The 3rd Respondent has a right to Appeal against that decision.

If stay is granted for 14 days, then the security for costs will remain intact for 14 days.

I do urge the Court to consider our prayer for stay for 14 days pending the filing of an Appeal and thus pending the hearing and determination of that Appeal. Our application is made in good faith and it will not cause any prejudice to the parties herein.

M. O. WAMBANI – CM

28/02/2018

Court

I have considered all submissions.

M. O. WAMBANI – CM

28/02/2018

ORDER

Following the Court's decision, today, this court will not grant a stay for 14 days as prayed by the Petitioner's learned counsel.

Secondly, the issue of the release of the security of costs shall be dealt with after the expiry of the Appeal period herein.

M. O. WAMBANI – CM

28/02/2018