REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Mutunga; CJ & P, Ibrahim, Ojwang, Wanjala & Njoki, SCJJ)

PETITION NO. 1 OF 2015

—BETWEEN—

1.	**MOSES MWICIGI**..	**APPELLANTS**
2.	**JOYCE NYAMBURA NGANGA**......................................	
3.	**DAVID MWANGI NDIRANGU**......................................	
4.	**ANN WAITHIRA KIONERO**..	
5.	**MARGARET WAMUYU**...	
6.	**MONICA WAMUYU**...	
7.	**REBECCAH NYANGATI**..	
8.	**NANCY WAMBUI**..	
9.	**BETH WAHITO**...	
10.	**DORCAS NYAMBURA**...	
11.	**PATRICIA WANJUGU**..	
12.	**TIZIANA WANJIRU**...	
13.	**JANE MUTHONI**..	
14.	**RAHAB WANJEHIAH**..	
15.	**MIRIAM WAHURA**...	

—AND—

1.	**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION..............................**	
2.	**THE NATIONAL ALLIANCE PARTY.............................**	
3.	**LYDIAH NYAGUTHII GITHENDU................................**	**RESPONDENTS**
4.	**THE SPEAKER, NYANDARUA COUNTY ASSEMBLY...**	
5.	**ESTHER NJOGU..**	
6.	**DAVID NDUNG'U NDEGWA..**	

(Being an Appeal from the Judgment/Orders of the Court of Appeal at Nairobi (Nambuye, Warsame & Murgor, JJA) delivered at Nairobi on 23rd January, 2015 in Nairobi Civil Appeal No. 224 of 2013 consolidated for purposes of Judgment with Civil Appeal No. 238 of 2013)

JUDGMENT

A. INTRODUCTION

[1] This is an appeal from the Judgment of the Court of Appeal sitting in Nairobi, dated 23rd January 2015 in Civil Appeal No. 224 of 2013 (as consolidated with Civil Appeal No. 238 of 2013), revoking the applicants' gazettement as Members of the Nyandarua County Assembly.

[2] The petition is premised upon twelve summarized grounds, as follows:

(a) the Court of Appeal wrongly interpreted the Constitution and particularly the provision in relation to settlement of electoral disputes as provided in Article 87 of the Constitution, requiring timely settling of electoral disputes, and petitions to be filed within twenty eight days after the declaration of election results by gazettement on the 12th July 2013 by Independent Electoral and Boundaries Commission;

(b) the Court of Appeal erred in declaring the offices of the members of the County Assembly vacant and ordering that the 2nd respondent prepares a fresh list within seven days, thus contravening Article 194 of the Constitution which provides for the circumstances when the office of a member of County Assembly can become vacant;

(c) the Court of Appeal departed from the law and precedents on the determination of appeals in respect of electoral disputes set out under Section 85A of the Elections Act, which prescribes a limit of six months from the time of filing the petition;

(d) the Court of Appeal wrongly interpreted Article 90(2) a, b, and c of the Constitution insofar as it relates to County Assembly seats, where the issue of regional and ethnic diversity is expressly exempted as regards party lists for County Assembly seats;

(e) the Court of Appeal decision delved into matters of fact, and failed to take into account Section 85A of the Elections Act, which limits appeals to matters of law only;

(f) *the Court of Appeal wrongly interpreted the Constitution when it declared the appellants' seats vacant, and ordered their replacement within seven days, failing to appreciate that it was obligated to invoke Section 86(1) of the Elections Act which requires the Court to send a certified copy to IEBC which then notifies the Speaker of the County Assembly of Nyandarua, who would then give the necessary directions; and further, the decision overlooked the fact that they had only fourteen days to exercise their right of appeal under Articles 163(4) of the Constitution;*

(g) *the Court of Appeal exceeded the scope of its jurisdiction by entertaining an electoral dispute that had not been filed by way of an electoral petition, which jurisdiction by the terms of Article 87(1) of the Constitution and Section 85A of the Elections Act, is limited to matters of law; the Appellate Court made various conclusions of fact, where there had been no proper trial, and hence no definitive findings of fact existed;*

(h) *the Court of Appeal acted in patent breach of the petitioners' right to a fair hearing, as enshrined in Articles 50(1) and 25(c) of the Constitution—to have a dispute that can be resolved by the application of law decided in a fair hearing;*

(i) *the Court of Appeal was in breach of the provision of Article 163(7) of the Constitution, by deviating from the established principles regarding the incidence of burden and standard of proof, in election petitions;*

(j) the Court of Appeal failed to consider relevant provisions of the Constitution, the Elections Act and the Regulations thereunder, when it applied the provisions of Article 10 of the Constitution (on national principles and values in governance);

(k) the Court of Appeal erred by allowing the 3rd, 5th and 6th respondents to derive benefit from proceedings that were a nullity, as the High Court petition had been entertained contrary to the provisions of the Constitution and Elections Act, that require any person contesting election results to file a petition within twenty-eight days from the date of declaration of the results; and

(l) the Court of Appeal wrongly interpreted the law regulating electoral disputes, when it nullified the decision of the IEBC Nominations Dispute Tribunal of 7th June, 2013 and the Kenya Gazette Notice of 17th July, 2013 in disregard of the provisions of Section 83 of the Elections Act.

B. BACKGROUND

(a) Preliminary Issues

[3] The appellants are all nominated and serving Members of the County Assembly (MCAs) of Nyandarua, having been proposed by The National Alliance of Kenya Party (TNA) for the special seats for youth, people with disability, and female gender.

[4] The 3rd, 5th and 6th respondents filed a number of complaints against the appellants before the Independent Electoral and Boundaries Commission (IEBC) Nomination Dispute Resolution Committee.

[5] The IEBC Nomination Dispute Resolution Committee on 4th May, 2013 dismissed the complaints on the grounds that there was in sufficient evidence; that the complaints lacked merit; and that the names placed on the party list was a matter between the nominating political party and its members—and any dissatisfied persons should file formal suits for the recovery of their money, or move the Political Parties Dispute Tribunal (PPDT) as appropriate.

[6] Aggrieved by the first decision of the IEBC Dispute Tribunal, and pursuant to the High Court Order delivered on 15th March, 2013 in ***National Gender and Equality Commission v. IEBC and the Attorney General Nairobi Constitutional*** Petition No. 147 of 2013 which ordered IEBC to publish the party list in respect of the special seats for the county assemblies, and to put in place mechanisms to resolve any disputes concerning the lists, in accordance with Article (88)(4)(e) of the Constitution as read together with Section 74 of the Elections Act, 2011, the 3rd, 5th and 6th respondents filed a second set of complaints before the Tribunal.

[7] On 7th June, 2013 the Tribunal dismissed the matter on the ground that the dispute was *res judicata,* as it had been previously adjudicated upon.

[8] Further aggrieved by the 2nd decision of the Tribunal, the 3rd respondent on 21st June, 2013 moved the High Court, in ***Republic v. the Independent Electoral Boundaries Commission & 17 Others Ex-parte Lydia Nyaguthi Githendu,*** Nairobi High Court Miscellaneous Civil Application (Judicial Review) No. 218 of 2013. The 5th and 6th respondents, on 9th May, 2013 also filed ***Esther Njogu & Another v. Independent Electoral Commission,*** Nairobi Constitutional Petition No. 238 of 2013.

(b) Proceedings in the High Court

[9] In Nairobi High Court Miscellaneous Civil Application (Judicial Review) No. 218 of 2013, the applicants therein sought an order of *certiorari* to quash the decision of the IEBC nomination tribunal made on 7th June, 2013; and in its place they sought orders as follows:

(i) the 2nd respondent (TNA) be ordered to submit to the 1st respondent (IEBC) two distinct valid and proper party lists of nominees under Section 36(1)e and (f) of the Elections Act pursuant to Articles 90(2)b and 177(1)(b) and (c) of the Constitution;

(ii) the 1st respondent be ordered to qualify/pick qualified persons from the submitted party lists, to be validly nominated to membership of the Nyandarua County Assembly.

[10] On 12th July 2014 the High Court (*Mumbi, Majanja & Korir, JJ*) dismissed the Judicial Review proceedings, after taking into account the decision of the IEBC tribunal of 7th June, 2013 that *the matter relates to party lists submitted by TNA and as such, was internal to the party.*

[11] In Nairobi Constitutional Petition No. 238 of 2013, the 5th and 6th respondents (together with one Hellen Wambui Annan, who did not file an appeal) invoked the provisions of Bill of Rights, and sought a declaration that the list of nominees to the Nyandarua County Assembly published in the IEBC website violated Articles 90, 98, 174 and 177 of the Constitution, by purporting to exclude, and to discriminate against Ndaragwa, Ol' Kalau and Ol'Jororok Constituencies.

[12] The High Court, on 12th July, 2014 dismissed the petition, with no Orders as to costs, holding that the mode of distribution of the nomination slots *was a party matter. The Court held that the question whether the party list reflected a*

proportionate distribution of available nomination slots among the constituencies of Nyandarua County, was not the primary factor signalling diversity within the County; and that there was no basis for impugning the committee's decision.

(c) Proceedings in the Court of Appeal

[13] Aggrieved by the High Court's Judgment, the 3rd 5th and 6th respondents appealed to the Court of Appeal (Appeal No. 224 of 2013: ***Lydia Nyaguthii Githendu v. the Independent Electoral Boundaries Commission & Others,*** and Civil Appeal No. 238 of 2013: ***Esther Njogu & Another v. the Independent Electoral Boundaries Commission & Others)***.

[14] The two appeals were lodged on the basis that the High Court had fallen into error—

(a) by holding that there was no breach of the petitioners' fundamental rights and freedoms;

(b) by failing to hold that failure to consider the diversity of Nyandarua County in the determination of the party list of TNA offends Article 10 and 90 of the Constitution;

(c) by failing to hold that the party-list nomination slots were not absolute, but subject to statutory and constitutional compliance; and

(d) by failing to hold the party list of TNA nominees to the Nyandarua County Assembly unconstitutional, to the extent that it purports to discriminate against Ndaragwa, Ol' Kalau, and Ol'jororok Constituencies.

[15] In Civil appeal No. 224 of 2013 the appellant sought—

> (a) *to revoke the portion of **Kenya Gazette** No. 9794 Vol. No. 105 dated 17th July 2013, listing the 4th to 18th respondents as the valid nominees to Nyandarua County Assembly;*
>
> (b) *an Order of **certiorari,** to quash the decision of the IEBC dispute resolution committee made on 7th June 2013;*
>
> (c) *an Order compelling the 1st respondent to submit two valid party lists, in accordance with Section 36(1) (e) and (f) of the Elections Act, and pursuant to Article 90(2) (b) and 177(1)(b) and (c) of the Constitution.*

[16] In Civil Appeal No. 238 of 2013 the appellants sought—

> (a) *a declaration that the TNA party list of nominees to Nyandarua County Assembly, violates Article 90, 98 174 and 177 of the Constitution;*
>
> (b) *a declaration that the lists of nominees to Nyandarua County Assembly as published by IEBC in its website, is unconstitutional to the extent that it discriminates against Ndaragwa, Ol' kalau and Ol' jororok Constituencies;*
>
> (c) *a declaration that the list of nominees to Nyandarua County Assembly confirmed by TNA (vide its letter dated 16th March 2013) and supported by all elected leaders, is the proper list of nominees to the Nyandarua County Assembly; and*

> (d) *a mandatory injunction to issue compelling IEBC to adhere to the listing of nominees of members of Nyandarua County Assembly.*

[17] The Court of Appeal heard the two appeals together, as matters founded upon the same set of facts, as well as a common legal position—namely the constitutionality, legality and regularity of the two Nyandarua County Assembly TNA party lists, published by the IEBC on the 15th and 16th May 2013.

[18] At the Court of Appeal, the appellants urged that the IEBC Dispute Resolution Committee erred, in failing to uphold their complaint, that the nomination should have adhered to the requirement of regional balancing, as enshrined in Article 90(1)(c) of the Constitution; the committee had ruled that the County Assemblies were exempt from this requirement. It was also submitted that the Committee had erred in failing to observe that the party was required to furnish two party lists: one list containing eight nominee-names in the categories of youth and people with disabilities; the other list containing 50 nominee-names (male and female), corresponding to the 25 Nyandarua county wards. The appellants contended that the main list submitted had contained only 47 names, mixed up, or repeated.

[19] The respondents, by contrast, urged that the 14 of them had already been duly gazetted as members of Nyandurua County Assembly, and that by virtue of the gazettement, they were deemed to have been elected; and hence, this election could only be contested by means of an election petition, filed within 28 days of election (the gazettement), in terms of Article 82(2) of the Constitution and Section 76(1)(a) of the Elections Act. The respondents submitted that the High Court had rightly declined jurisdiction, as the appeal related to questions of merit, rather than the processes of the Dispute Resolution Committee; and as the gazettement of the respondents was not an issue before the other two fora. The

2nd respondent urged that only the Political Parties Dispute Resolution Tribunal, established under Section 39 of the Political Parties Act, has the mandate to resolve disputes between a member and a political party.

[20] The Court of Appeal had proceeded by considering two questions, namely:

> *(a) whether the Court of Appeal was properly seized of the matter; and*
> *(b) whether the High Court had jurisdiction to entertain the matter in issue.*

[21] The Court held that it did have jurisdiction, observing *that there is a constitutional mandate donated to the Court, to hear all appeals emanating from the High Court*. It then held that *the matters which had come before the High Court, touched on the constitutionality and the legality of the nomination list submitted to the Commission, pursuant to the relevant provisions of the Constitution and the Elections Act, by TNA as a party, and with respect to Nyandarua County Assembly*. The Appellate Court held that *the High Court had the mandate to hear the matters, but had erroneously declined jurisdiction.*

[22] Upon arriving at the foregoing conclusion, the Appellate Court went further to determine the questions set out by the applicant in Civil Appeal No. 238 of 2013, namely:

> *(a) whether the list of TNA nominees to the Nyandarua County Assembly as published by the respondent offends the provisions of Article 10 and 90 of the Constitution;*

(b) whether the list of TNA nominees to the Nyandarua County Assembly as published by the respondent should be nullified for being unconstitutional;

(c) whether the respondent should be compelled to publish a fresh list in conformity with the list confirmed by TNA on 16th March 2013.

[23] In its decision of 23rd January, 2015 the Court of Appeal allowed the two appeals, and set aside the Orders of the High Court, substituting them with new ones as follows:

(i) Civil appeal No. 224 of 2013:

(a) An Order of certiorari to issue to quash the decision of the IEBC's Nominations Dispute Resolutions Committee made on 7th June 2013 and revoking the two TNA nominee party lists published on 15th and 16th May, 2013 of Nyandarua County Assembly and in its place substitute an Order that the 2nd respondent TNA be ordered and directed to submit within 7 days two distinct and valid lists of nominees to the IEBC (pursuant to Section 36(1)(e) and (f) of the Elections Act and Articles 90(1)(e) and 177(1)(b) and (c) of the Constitution).

(b) An Order that IEBC be directed to qualify and select qualified persons from their submitted compliant party list to be validly nominated to Nyandarua County Assembly.

(c) An Order revoking that portion of the Kenya Gazette Notice No. 9794 volume XCV 105 dated 17th July, 2013 listing the 4th through to the 18th

respondents (both inclusive) as valid nominees to Nyandarua County Assembly.

(ii) Civil Appeal No 238 of 2013—additional to Orders (b) and (c) above:

(a) A declaration that the 1st respondent Commission's list of nominees to the Nyandarua County Assembly published in their website violates the provisions of Article 90, 98, 174, and 177 of the Constitution.

(b) A declaration that the 1st respondent Commission's list of nominees to the Nyandarua County Assembly published in their website is unconstitutional to the extent that it purports to discriminate against Ndaragwa, Ol' Kalau and Ol'jororok constituencies.

[24] The respondents were aggrieved by the determinations of the Court of Appeal, and moved to the Supreme Court.

(d) Supreme Court Proceedings

[25] Hence the application of 28th January, 2015, under certificate of urgency, seeking conservatory Orders to stop the implementation of the Court of Appeal decision. The applicants were apprehensive that the Appellate Court's Order would have the effect of ending their five-year tenure as TNA-nominated MCAs for Nyandarua County Assembly. The urgency flowed from the fact that TNA was required to submit a fresh party-list of nominees within seven days—and this would have terminated the applicants' nomination to the County Assembly.

[26] On 30th January, 2015, the Supreme Court (*Ojwang, SCJ*) certified the matter as urgent, and granted interim Orders staying the execution of the Court of Appeal Judgment of 23 January, 2015.

[27] On 26th February 2015, the parties appeared before the Court and consented to extension of the interim Orders, in order to expedite the hearing of the appeal. The full Bench of the Court recorded the consent and ordered that the matter be placed before the Deputy Registrar for compliance, and date-assignment for a hearing. On the same day the applicants filed the petition of appeal.

C. PARTIES' SUBMISSIONS

(a) Appellants

[28] Mr. Kihara, learned counsel for the appellants, submitted that the decision of the Court of Appeal is inconsistent with Article 164 (7) of the Constitution; Rule 30 of the Supreme Court Rules; and Rule 34(2) of the Court of Appeal Rules.

[29] Counsel contended that the Court of Appeal had no jurisdiction to act contrary to statutory provisions which required that the names of the nominated persons be drawn from a list already prepared and lodged by the relevant political party, prior to the conduct of elections, and not after the elections. Counsel submitted that at all material times of the hearing before the High Court and Court of Appeal, the appellants had been duly nominated, gazetted, and sworn-in as serving members of the County Assembly of Nyandarua.

[30] Learned counsel urged that the Appellate Court decision ordering the preparation of a fresh list was contrary to the TNA's party nomination rules, and

that no such prayer had been made before the Court of Appeal or the High Court. Counsel submitted that the Court of Appeal should not have taken up such a matter for the first time, as it was not a subject of appeal. Counsel submitted that the Court of Appeal decision stood in contradiction to the provisions of Section 34(10) and 37(1)2 of the Elections Act.

[31] On the question whether the Court of Appeal decision was contrary to Articles 90 (2)(b), 177(1)(b) and (c) of the Constitution, and whether it violated the rights attached to County Assembly seats, counsel submitted that the constitutional provisions do not require County Assembly political party lists to reflect the regional or ethnic diversity of the people of Kenya. He submitted that the Appellate Court went contrary to the Constitution, when it determined that the IEBC's lists of nominees for Nyandarua County Assembly, as published, violated Articles 90, 98, and 177.

[32] Counsel urged that the Appellate Court's finding, which faulted the TNA Nyandarua MCA nomination on the basis of discrimination so as to favour Kinangop Constituency, entailed an error of law; it lacked a constitutional foundation; it was a misdirection in law; and it was erroneous, as the Appellate Court lacked evidence to support its decision.

[33] On the issue whether the contested decision violates the appellants' right to a fair and public hearing, in which the dispute on nominations would be resolved by application of the law, or appropriate electoral-dispute resolution process, counsel contended that the matter should not have proceeded by way of judicial review or constitutional petition. He submitted that by Article 88(4)(e) of the Constitution, and the Section 75 of the Elections Act, any dispute arising from nominations, where the nominee is already serving as a member of County Assembly, is to proceed by way of petition.

[34] Learned counsel submitted that a constitutional motion cannot oust constitutional and statutory provisions, citing as pertinent precedents: ***Mwihia & Another v. Ayah & Another*** [2008] 1 KLR (EP) 450; and the Trinidad and Tobago Court of Appeal decision in ***Peters and Another v. Attorney-General and Another*** [2002] 3 LRC 32-162. He urged that it was an abuse of the Court process to resort to a constitutional motion, where there was an availability of alternative means of redress, invoking the Privy Council decision in ***Thakur Persad Jaroo v. AG*** [2002] 5 LRC 258.

[35] It was submitted that the Appellate Court's decision was contrary to Article 175 of the Constitution, because it declared vacancies in all fifteen of the TNA gender MCA seats, in mid-term, thus distorting the County Assembly's composition to the prejudice of the guaranteed gender quota.

[36] Counsel urged that the Court of Appeal Order which revoked the two TNA nominee party-lists, by ordering TNA to submit within seven days, two distinct and valid proper lists in accordance with Section 36(1)(e) and (f) of the Elections Act, could not be implemented, as the lists could not be validly prepared within seven days. He submitted that the timelines for furnishing fresh lists were inconsistent with the timelines specified under Articles 90(2)(b), 177 (1) (b) and (c) of the Constitution, and the 30 days provided for in Section 36(4) of the Elections Act.

[37] Learned counsel urged that the High Court (*Mumbi, Majanja and Korir, JJ.*) had rightly held that the matter was one to be determined by the Political Party Dispute Tribunal (PPDT), as it had been raised prior to the gazetting of the nominee-list, and thus came within the jurisdiction of that tribunal, as provided in Section 40 of the Political Parties Act, 2011.

[38] Counsel urged the Court to set aside the Judgment of 23rd January, 2015 and to award costs to the appellants jointly and severally against the respondents.

(b) 1st Respondent

[39] Learned counsel, Mr. Obondi appearing together with Ms. Kerry, submitted that the Appellate Court had no jurisdiction to make Orders annulling the election of the appellants, as the appeal before that Court was a nomination dispute arising out of the conduct of the 1st and 2nd respondents and not an election dispute. Counsel urged that the judicial proceeding determining the validity of an election result is first to be lodged in an election Court, clothed with special jurisdiction as conferred by the Constitution, the Election Act, and the applicable Regulations. Counsel invoked in this regard, the case of ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others***, Sup Ct. Pt No. 10 of 2013 in which this Court stated that Form 38 declares the winner of an election, terminating the mandate of the returning officer, which in turn shifts the jurisdiction as regards the election outcome to the Election Court.

[40] Counsel urged the Court to find that the Appellate Court had, through craft and innovation, conferred upon itself the jurisdiction of the election Court, in disregard of the terms of Articles 87(2) and 159(2) of the Constitution; and Sections 75, 76(1) of the Election Act, and the applicable Regulations.

[41] Counsel urged that since the High Court decision had not been the subject of stay Orders, the 1st respondent had declared the results well in accordance with its constitutional mandate; and thus, the results so declared were valid, unless declared otherwise by an election Court. Counsel called in aid the Supreme Court of India case, ***Jeet Mohinder Singh v. Harminder Singh Jassi*** civil Appeal No. 154 of 1999, which holds that the success of a candidate who has won an

election should not be lightly interfered with. To the same effect, counsel cited ***Evans Kidero & 4 Others v. Ferdinand Ndungu Waitituti & 4 Others*** (2014) eKLR; and ***Fredrick Otieno Outa v. Jared Odoyo Okello & 4 Others,*** Sup. Ct. Pet. No. 10 of 2014.

[42] Counsel urged the Court to find that the Court of Appeal acted without jurisdiction in nullifying the elections of the appellants, and that the appellants were validly elected as members of the Nyandarua County Assembly.

(c) *2nd Respondent*

[43] Mr. Omuganda learned counsel for the 2nd respondent, submitted that the Appellate Court had erred in giving an unreasonable and impracticable timeline for party-list nominations. He stated that the proper procedure is set out in the Nomination Rules, and requires announcement or call for applications in at least one newspaper of wide circulation, with a deadline of no more than seven days following such notice. This is followed by the shortlisting of candidates for interview, within seven days of the deadline for receiving applications. Interviews are then conducted after a three-day notice is given.

[44] Counsel submitted that Article 90(2)(c) of the Constitution exempts County Assembly seats from ethnic-diversity prescriptions for party-lists, on the factual basis that counties usually have concentrations of particular ethnic identities, and thus, regional diversity ceases to be a relevant consideration. Counsel submitted that the Nyandarua County party-list, as published by the 1st respondent, did indeed reflect the diverse face of Nyandarua County.

[45] Counsel submitted that the 3rd, 5th and 6th respondents' complaint had been overtaken by events, with the appellants having been gazetted, and deemed

elected. Counsel urged that in the circumstances, by virtue of Article 82(2) of the Constitution, and Section 76(1)(a) of the Election Act, any contest to the election must be by way of an election petition, filed within 28 days.

[46] Counsel urged the Court to find that the appellants were already midway through their term of office and, in view of the terms of Article 194 of the Constitution, the Appellate Court was not in a position to create a vacancy in the said offices.

(d) 3rd Respondent

[47] Learned counsel Mr. Kihiko, for the 3rd respondent, contested the appeal, and urged that both the High Court and the Court of Appeal had jurisdiction to hear and determine the matter. He submitted that the judicial review application had been filed on the 12th July, 2013, prior to the nomination of the appellants which was gazetted later, on the 17th July, 2013: and that in the circumstances, the Court had jurisdiction to hear the matter.

[48] Counsel submitted that TNA together with IEBC had breached the provisions of Article 177(1) (b) and (c) of the Constitution, and Sections 34, 35, 36 and 37 of the Elections Act together with Regulations 54 and 55 of Elections (General) Regulations, 2012. It was counsel's submission that the decision of IEBC's Nomination Dispute Resolution Committee could properly be contested before the High Court, the Court of Appeal and the Supreme Court. He urged that the said committee was not a *sui generis* tribunal, with any finality clauses shielding its decisions from the supervisory jurisdiction of the Courts.

[49] Counsel submitted that a distinction should be drawn between an election petition, on the one hand, and a contest to political party nomination list for County Assembly under Article 177(1)(b) and (c) of the Constitution.

[50] Counsel urged this Court to disregard the High Court's finding in ***National Gender and Equality Commission v. IEBC,*** High Court Petition No. 147 of 2013—that the nominees to the Senate and National Assembly and County Assembly were to be deemed elected, once they were gazette, and that in that case, their positions could only be challenged through an election petition.

[51] On the basis of Articles 1, 10 and 90(2) (c) of the Constitution, counsel urged the Court to determine whether IEBC is obliged to ensure the party list in respect of nominations to respective County Assemblies, complies with regional-balance requirements, within the County itself.

[52] Learned counsel submitted that the decisions of IEBC Nomination Dispute Resolution Committee were in error, and should not be allowed to stand.

[53] Counsel urged the Court to lay down guiding rules, essentially prescribing a manual to guide political parties, in the preparation and submission of party lists for nominees, under Article 177(1)b and c of the Constitution.

[54] Counsel urged the Court to uphold the Court of Appeal decision, as it was well reasoned and had taken into consideration the constitutional, legal and statutory dimensions of the relevant issues.

(e) 5th and 6th Respondents

[55] Mr. Gachau, learned counsel for the 5th and 6th respondents, submitted that the appeal lacked validity, as it did not adhere to the provisions of Rule 33 of the Supreme Court Rules, 2012 as regards petitions and records of appeal.

[56] Counsel submitted that the Appellate Court had entertained two separate cases; and thereafter it rendered a joint-Judgment, though with different Orders for each appeal. Counsel urged that the appellants ought to have filed two separate records of appeal, as they had done with the notice of appeal. He invoked the case of ***Zachary Okoth Obado v. Edward Akong'o Oyugi & 2 Others,*** SC civil application No. 7 of 2014 eKLR in which the importance of rules of lodgement of causes had been underlined.

[57] On the issue of jurisdiction, counsel submitted that the 5th and 6th respondents had come before the High Court by way of constitutional petition, raising issues as to breaches to terms of the Constitution, during the formulation and publication of TNA party lists for nominees of Nyandarua County Assembly. He submitted that the cause was lodged before the gazettement of the appellants on the 17th July 2013, and that the constitutional petition was not directed at the "election" of the appellants as TNA MCAs for Nyandarua County Assembly.

[58] Counsel was in agreement with the finding of the Court of Appeal, that the High Court had unfairly withheld its jurisdiction, as the issues raised and relief sought were not within the purview of the Political Parties Disputes Tribunal. He submitted that the case herein has all along been a constitutional petition, and hence, not subject to procedures set down in the Elections Act. Counsel submitted that, in the circumstances, the timelines set down under Elections Act

for determination of election disputes, did not apply to the petition before the High Court and the Court of Appeal.

[59] Counsel submitted that IEBC had exceeded its powers when it accepted two lists from TNA. Counsel urged that IEBC was in breach of its constitutional duty under Articles 88(4) and 249(1) of the Constitution. Counsel urged the Court to find that the acts of IEBC were unconstitutional, and hence, null and void.

[60] In response to the contention that Article 90 of the Constitution exempts party lists for County Assemblies from regional and ethnic diversity, learned counsel concurred with the Appellate Court finding, that the party-list should reflect the face of the County; and he urged that there was no justification for restricting party-list names to just two constituencies, in a County of six constituencies.

[61] Counsel submitted that the Court of Appeal was right in invalidating the election, and ordering fresh nomination in compliance with the Constitution and the law. In this regard he invoked the principle in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*** SC Petition No. 2B of 2014 [2014] eKLR: *where an election is conducted in such a manner as demonstrably violates the principles of the Constitution and the law, such an election stands to be invalidated.*

[62] Counsel urged the Court to strike out the appeal, with costs for being incompetent.

D. ISSUES FOR DETERMINATION

[63] The following are the main issues for determination, such as emerge from the petition of appeal, the responses thereto, and the submissions of counsel:

(i) whether the appeal before this Court is incompetent, for non-compliance with procedure;

(ii) what is the nature of the dispute before this Court?

(iii) what is the mandate of this Court, as regards matters arising from nomination of representatives on the basis party lists?

(iv) whether the Court of Appeal acted within its jurisdiction, by cancelling/revoking the Gazette Notice and ordering fresh nominations by the 2nd respondent.

[64] These issues are interconnected and will be analyzed on that basis, as they all illuminate the process of answering the question as to whether the Court of Appeal erred, in issuing the contested Orders. But first, is it the case, as contended by counsel for the respondents, that the appeal before us is incompetent? It was urged that the appeal is incompetent as it offends Rule 33 of the Supreme Court Rules, 2012.

[65] This Court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of

just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.

[66] Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159 (2) (d) of the Constitution, which proclaims that, ***"… courts and tribunals shall be guided by…[the principle that] justice shall be administered without undue regard to procedural technicalities***". This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the Courts.

[67] As an instance, there are times when the disregard of Rule 33 of the Supreme Court Rules clearly undermines the Court's ability to deliver justice to all the parties in a dispute. (This is concerned with the mode of instituting appeals). In such a situation, the shield of Article 159 (2) (d) will not be deployed by the Court in aid of the offending litigant. Such is, however, not the case in the instant appeal. Notwithstanding the failure to adhere to all the requirements of the Rule at the initial stages, by the appellants herein, their subsequent actions did ensure that the Court was not without all the requisite documentation, for undertaking a consideration of the matter.

[68] We are therefore not inclined to invalidate the appeal on ground only that it does not stand on all fours with Rule 33 of this Court's Rules. An invalidation, indeed, would deprive the Court of an opportunity to pronounce itself on substantial questions of law raised by the submissions of counsel for all the parties.

E. ANALYSIS

[69] From the proceedings herein, this matter has evolved through the entire hierarchy of Superior Courts, after it had its genesis as a dispute involving the nomination of the 2nd respondent's party-list representatives for gender top-up, youth, and marginalized categories for the Nyandarua County Assembly.

[70] The 3rd, 5th and 6th respondents filed a number of complaints against the appellants before the IEBC Dispute Tribunal. On 4th May, 2013 the said Tribunal dismissed the first set of complaints, on the grounds that *there was insufficient evidence; that the complaints lacked merit; and that the names placed on the party list was a matter between the nominating political party and its members, and those dissatisfied should file formal suits for the recovery of their money, or move the Political Parties Dispute Tribunal (PPDT) as appropriate*. Subsequently on 7th June, 2013 the tribunal dismissed the second set of complaints, on ground that the matter was *res judicata* as it had been previously adjudicated.

[71] On 9th May, 2013, the 5th and 6th respondents filed Nairobi Constitutional Petition No. 238 of 2013, ***Esther Njogu & Another v. Independent Electoral Commission,*** contesting the TNA party-list for Nyandarua County Assembly, on grounds that: it was unconstitutional; and that it purports to exclude and discriminate against Ndaragwa, Ol' Kalau and Ol'Jororok Constituencies. They sought *inter alia*: a declaration that the list of nominees to the Nyandarua County Assembly published in the IEBC website violated Articles 90, 98, 174 and 177 of the Constitution, as it purported to exclude and to discriminate against Ndaragwa, Ol' Kalau and Ol'Jororok Constituencies.

[72] Subsequently (on 21st June 2013), the 3rd respondent filed Nairobi High Court Miscellaneous Civil Application (Judicial Review) No. 218 of 2013, ***Republic v. the Independent Electoral Boundaries Commission & 17***

Others ex parte Lydia Nyaguthi Githendu, seeking an Order of certiorari to quash the decision of the IEBC Nomination Tribunal made on 7th June, 2013—on grounds that it does not conform to the provisions of Article 90(2)(b) and 177(1)(b) and (c) of the Constitution.

[73] On 12th July, 2013 the High Court declined jurisdiction and dismissed the matters, on grounds that *the issues raised were party matters that rest entirely with the political party and its* members, *and that no error had been disclosed to impugn the committee's decision.*

[74] In arriving at its decision, the High Court referred to the decision of the IEBC Dispute Resolution Tribunal, ***Complaint No. 223 of 2013*** and ***322 of 2013,*** which dismissed the complaints in the following terms:

> *"The decision as to who gets on the political party lists rests entirely with the political party and its members and it is not a function of IEBC. By authority of* ***National Gender and Equality Commission v. the IEBC and Another****, the IEBC does not have jurisdiction over resolution of disputes related to the process of political parties preparing their party list for nominations to Parliament and the County Assembly. The jurisdiction is vested in the Political Parties Dispute Tribunal."*

[75] Following the High Court decisions dated 12th July 2013, IEBC on the 17th July, 2013 through *Gazette Notice* No. 9794, Volume XCV 105, dated 17th July, 2013 designated the appellants as TNA members of Nyandarua County Assembly. Aggrieved by this decision, the 3rd respondent filed a memorandum of appeal, Nairobi Civil Appeal No. 224 of 2013 dated 28th August, 2013. Similarly the 5th and 6th respondents filed Nairobi Civil Appeal No. 238 of 2013, dated 10th September, 2013—and both were contesting the High Court decision.

[76] The Court of Appeal, upon being moved by the appellants herein, heard and delivered its Judgment on the 23rd January, 2015.

[77] The appellants being aggrieved by the finding of the Court of Appeal, lodged the instant appeal. They urged that upon issuance of *Gazette Notice* No. 9794, Volume XCV 105 dated 17th July, 2013 declaring them to be the nominated MCAs for Nyandarua County, they could only be removed from office by way of an election petition, in accordance with Article 88(4)(e) of the Constitution. Article 88(4)(e) states:

> ***"The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—***
>
> ***....***
>
> ***(e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;"***

[78] The appellants submitted that they had already been nominated; they had accepted nomination; they had been sworn in as serving members of the County Assembly of Nyandarua—and they could only be removed by way of an election petition.

[79] In response to the foregoing argument, counsel for the 5th and 6th respondents submitted that they had approached the High Court by way of a constitutional petition filed on 8th May, 2013, well before the issuance of the Gazette Notice bearing the party list. Learned counsel urged that, the

constitutional petition was not directed at the 'election' of the appellants as TNA MCAs for Nyandarua County Assembly, but at the breach of the Constitution's provisions relating to the preparation of the party list.

[80] Similarly, the 3rd respondent's position was that she had filed the judicial review application on the 12th July, 2013 well before the nomination of the appellants which was done on the 17th July, 2013. She urged the Court to strike a distinction between an election petition, and contest over the validity of political party list of candidates for nomination to County Assembly under Article 177(1)(b) and (c) of the Constitution.

[81] Article 177 of our Constitution provides for the nomination of representatives to the Senate, National Assembly, and County Assemblies. In relation to County Assembly, the Article provides as follows:

> ***"(1) A county assembly consists of—***
>
> ***(a) …***
>
> ***(b) the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender;***
>
> ***(c) the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and***
>
> ***(d) …***
>
> ***"(2) The members contemplated in clause (1) (b) and (c) shall, in each case, be nominated by political parties in proportion to the seats received in that election in that county by each political party under paragraph (a) in accordance with***

Article 90.

"(3) The filling of special seats under clause (1) (b) shall be determined after declaration of elected members from each ward."

[82] This provision is the source of the political parties' mandate to nominate members to the County Assembly. The object of the provision is clear: to guarantee that no more than two-thirds of the memberships of the Assembly belong to the same gender; and to safeguard and ensure the representation from the marginalized groups, more specifically, persons with disabilities, and the youth.

[83] In addition, the said provision recognizes that the conduct of the nominations is to be proportionately matched to the number of seats won in a county by each political party. Thus, allocation can only be done after the declaration of the outcome of the electoral process.

[84] The guiding principles are to be found in Article 90 of the Constitution, which provides as follows:

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

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

(a) each political party participating in a general election

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

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

(c) except in the case of county assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya.

"(3) The seats referred to in clause (1) 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."

[85] Article 90 clearly spells out, and bestows upon IEBC certain duties and responsibilities, which include being *responsible for the conduct and supervision of elections for seats for nomination purposes.* IEBC is also required to ensure that each participating political party *nominates and submits a party list,* indicating the *appropriate number of qualified candidates* and *alternates, between male and female candidates,* in the priority in which they are listed.

[86] These provisions are clearly reflected under Sections 34, 35 and 36 of the Elections Act, under the rubric *"nomination of party list members"*. The said Sections have further set out yet other requirements, including those bearing upon the party-list. Section 34, for instance, provides that:

"(6) The party lists submitted to the Commission under this section ***shall be in accordance with the constitution or nomination rules of the political party concerned.***

"(7) The party lists submitted to the Commission ***shall be valid for the term of Parliament.***

"(8) A person who is nominated by a political party under subsection (2), (3) and (4) ***shall be a person who is a member of the political party on the date of submission of the party list by the political party.***

"(9) The party list ***may contain a name of any Presidential or Deputy Presidential candidate nominated for an election*** *under this Act.*

"(10) A party list submitted for purposes of subsection (2), (3), (4) and (5) ***shall not be amended during the term of Parliament or the county assembly, as the case may be,*** *for which the candidates are elected"* [emphasis supplied].

[87] Section 35 of the Act provides as follows:

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

[88] The Act further provides under Section 36(1) that:

"….

(*e) Article 177 (1) (b) of the Constitution* ***shall include a list of the number of candidates reflecting the number of wards in the county****;*

(f) *Article 177 (1) (c) of the Constitution* ***shall include eight candidates****, at least two of whom shall be persons with disability, two of whom shall be the youth and two of whom shall be persons representing a marginalized group"* [emphasis supplied].

[89] Similar provisions are made in sub-sections (2), (3), (4), (7) and (8) of the same Act, as follows:

"(2) A party list submitted under subsection (1) (a), (c), (d), (e) and (f) ***shall contain alternates between male and female candidates*** *in the priority in which they are listed.*

"(3) The party list referred to under subsection (1) (f) ***shall prioritise*** *a person with disability, the youth and any other candidate representing a marginalized group.*

"(4) ***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.***

"(5) …

"(6) …

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

"(8) For purposes of Article 177(1)(c) of the Constitution, the Commission ***shall draw from the list*** *under subsection (1)(f) four special seat members in the order given by the party"* [emphases supplied].

[90] Yet additional stress on the foregoing provisions, is to be found in Part X of The Elections (General) Regulations, which set out rules governing the nomination of candidates to the County Assembly. In the Regulations (in clauses 54, 55 and 56), it is thus provided:

"54. (1) Each political party shall submit to the Commission a party list of all persons who would stand elected if the party were entitled to seats in the National Assembly, Senate or the County Assembly, as the case may be on the basis of proportional representation in accordance with Article 90 of the Constitution and sections 34, 35, 36 and 37 of the Act….

"(2) ….

"(3) A party list submitted under sub regulation (1) ***shall be in accordance with section 36 of the Act****…*

(a) …

(b) …

"(4) Each political party list nominee shall after nomination, submit to the Commission a letter stating his or her intention to serve if nominated.

"(5) …

"(6) …

"(7) …

"(8) The Commission ***shall publish the final party list*** *in at least two newspapers with nationwide circulation.*

"55. (1) The party list contemplated under ***regulation 54 shall be prepared in accordance with the nomination rules of the political party.***

"(2) The ***Commission may reject any party list that does not comply with the requirements of the Constitution, the Act or these Regulations.***

"(3) ….

"(4) ***A political party submitting a party list under regulation 54 shall submit a declaration to the effect that the political party has complied with its rules relating to the nomination of the names contained in the list****.*

"56. (1) The Commission shall before the election to which a party list applies, ***publish in the Gazette and publicise*** *through electronic and print media of national circulation and other easily accessible medium,* ***the formula for allocating the seats to the respective political parties"*** [emphases supplied].

[91] Such is the context in which this Court has to determine whether the nomination of the appellants as members of the Nyandarua County Assembly, was in accordance with the law. At what point did the appellants become "elected" MCA for Nyandarua County? What is the role of IEBC in the

nomination process? Did IEBC execute its mandate in accordance with the law?

[92] From the legislative provisions set out above, it is clear that political parties have a responsibility to prepare and submit to IEBC, a party list of all persons who would stand elected if the party were entitled to all the seats. Sections 34(4), 35 and 36 of the Elections Act together with Regulation 54 of the Elections (General) Regulations bear the phraseology, *"political party submitting"* or a *"party list submitted by the political party"*.

[93] The foregoing provisions place upon the IEBC the duty to ensure that the party lists submitted comply with the relevant provisions of the law, as set out earlier on. IEBC is expressly designated as the regulatory body to ensure compliance with the law. The Constitution, by Article 88(4)(e), mandates the IEBC to intervene and settle disputes relating to, or arising from nominations. The Constitution, at the same time, denies the IEBC the competence to adjudicate election disputes, and disputes subsequent to the declaration of election results.

[94] Nowhere does the law grant powers to the IEBC to adjudicate upon the nomination processes of a political party: such a role has been left entirely to the political parties. The IEBC only ensures that the party list, as tendered, complies with the relevant laws and regulations. This position has been aptly remarked in the case of ***National Gender and Equality Commission,*** where the High Court thus observed (paragraph 50):

> *"Section 34(6)* of the *Elections Act, 2011* specifically provides that, *'The party lists submitted to the Commission under this section shall be in accordance with the Constitution or nomination rules of the political party concerned.'* ***This role does not extend to directing the manner in which the lists are prepared as these are matters***

within the jurisdiction of the parties but in considering the lists, the IEBC must nevertheless be satisfied that the lists meet constitutional and statutory criteria. *We would hasten to add that in the event there is a dispute in the manner in which the parties conduct themselves in conducting their internal elections then recourse may be had by the aggrieved party members, inter alia, to the Political Parties Disputes Tribunal established under Section 39, Part VI of the* Political Parties Act, 2011 *or to the High Court in appropriate circumstances"* [emphasis supplied].

[95] The effect is that, the process of preparation of the party list is an internal affair of the Political Party, which ought to proceed in accordance with the national Constitution, the Political Party Constitution, and the nomination rules as prescribed under Regulation 55.

[96] A political party has the obligation to present the party list to IEBC, which after ensuring compliance, takes the requisite steps to finalize the "elections" for these special seats. In the event of non-compliance by a political party, IEBC has power to reject the party list, and to require the omission to be rectified, by submitting a fresh party list or by amending the list already submitted.

[97] In the instant case, the IEBC after receiving the party list, and in conformity with the High Court decision in the ***National Gender and Equality Commission Case,*** proceeded to publish it on 15th and 16th May, 2013. Thereafter, on 17th July, 2013, IEBC gazetted the appellants, by *Gazette Notice* No. 9794, Volume XCV 105, as the TNA list for Nyandarua County.

[98] It is the appellants' contention that once the nominees' names had been gazetted on 17th July, 2013, any dispute regarding the validity or otherwise of

their nomination could only be resolved through an election petition; and consequently, the only recourse open to the 3rd, 5th and 6th respondents was to file an election petition, challenging their election as nominated MCAs for Nyandarua County. The appellants submit that once gazetted, a nominee is deemed to have been elected. This argument was supported by the 1st and 2nd respondents.

[99] The 3rd , 5th and 6th respondents, in disagreement, submit that the High Court petitions were filed well before the gazettement of the appellants; and that the dispute disclosed a substantial breach of constitutional provisions, in the generation and publication of the TNA party lists. They urged the Court to lay down clear rules to guide political parties in the preparation and submission of nomination party-lists under Article 177(1) of the Constitution.

[100] It is to be recalled that this Court, in ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others*** Sup. Ct. Petition No. 10 of 2014, as regards the moment of jurisdiction between IEBC and the Courts, had thus held (paragraph 65):

> *"The jurisdiction to handle disputes relating to the electoral process shifts from the Commission to the Judiciary* ***upon the execution of the required mandate by the returning officer.*** *Once the returning officer makes a decision regarding the validity of a ballot or a vote, this decision becomes final, and only challengeable in an* ***election petition.*** *The mandate of the returning officer, according to Regulation 83(3), terminates upon the return of names of the persons-elected to* ***the Commission.*** *The issuance of the certificate in Form 38 to the persons-elected indicates the* ***termination of the returning officer's mandate,*** *thus shifting any issue as to validity, to* ***the election Court.*** *Based on the principle of efficiency and expediency, therefore, the time*

within which a party can challenge the outcome of the election starts to run ***upon this final discharge of duty by the returning officer.”***

[101] At what point in time does the Court become clothed with jurisdiction to determine disputes relating to the *nomination of members of a County Assembly,* by virtue of Article 177(2)(b) and (c) of the Constitution? Is it after the issuance of *Gazette Notice* by the IEBC, or at the close of elections when the nomination process begins?

[102] Article 90(2) of the Constitution provides that the 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 subsection (1)(e), such number of special seat members in the order given by the party, necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender.***

"(8) For purposes of Article 177(1)(c) of the Constitution, the Commission shall draw from the list under subsection (1)(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."

[105] It is clear from the foregoing provisions 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 plain to us that the Constitution and the electoral law envisage the entire process of nomination for the special seats, including the act of gazettement of the nominees' names by the IEBC, as an integral part of the *election process*.

[106] The *Gazette Notice* in this case, signifies the completion 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 was held in the ***Joho Case,*** is in principle, completed by the issuance of Form 38, which terminates the returning officer's mandate, *and shifts any issue as to the validity of results from the IEBC to the Election Court.*

[107] It is therefore clear that the 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.

[108] We have taken note of the argument by counsel for the 3rd, 5th and 6th respondents, that what was before the Court of Appeal (and the High Court), was not an "election petition", but a *constitutional petition* seeking to prevent the *violation of the rights of the respondents*. Counsel for the 3rd respondent urged us to distinguish between an "election petition" and a contestation over the "validity of a political-party list". On this question, however, the broader spectacle is compelling: the electoral-process is dominant; and it allows no separation between Article 90 (which deals with party-list seats) and Article 177 (which deals with membership of County Assemblies).

[109] The respondents had sought a declaration that the list of nominees for Nyandarua County Assembly published by the IEBC, had violated Articles 90, 98, 174 and 177 of the Constitution, as it purported to exclude Ndaragwa, O'l Kalau and O'Jororok Constituencies. Indeed, one of the respondents' contentions in the Court of Appeal was that the High Court erred by failing to consider the diversity of Nyandarua County, in the formulation of TNA's party list. Is it conceivable that such a petition had nothing to do with elections, and was only concerned with constitutional questions? Not in our view: this was a petition contesting the nomination of the appellants—a nomination which we hold to have been an integral part of the electoral process, in the terms of the Constitution and the electoral law.

[110] It follows that only an Election Court had the powers to disturb the *status quo*. Any aggrieved party would have to initiate the process of ventilating grievances by way of an *election petition*, in accordance with Section 75 of the Elections Act. The High Court had declined jurisdiction on the perception that this dispute ought to have originated at the Political Parties Disputes Tribunal. The Appellate Court, however, assumed jurisdiction, and issued Orders as

follows:

> ***"(a) An order of certiorari to issue to quash the decision of the IEBC's Nominations Dispute Resolutions Committee.***
>
> ***"(b) The two TNA nominee party lists published on 15th and 16th May, 2013 revoked, and TNA ordered and directed to submit within 7 days two distinct and valid lists of nominees to the IEBC (pursuant to Section 36(1)(e) and (f) of the Elections Act and Articles 90(1)(e) and 177(1)(b) and (c) of the Constitution).***
>
> ***"(c) The IEBC directed to qualify and select qualified persons from the resubmitted lists within 7 days of the resubmission.***"

[111] The foregoing Orders, it is to be noted, were the very ones sought by the 3rd respondent, in their memorandum of appeal to the Court of Appeal, in Civil Appeal No. 224 of 2013 dated 28th August, 2013. These Orders had the effect of annulling the appointment of the applicants, whose names had been gazetted, and who had taken the oath of office as the TNA-nominated members of Nyandarua County Assembly.

[112] The Constitution, in Article 87, thus provides:

> ***"(1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.***
> ***"(2) Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the***

declaration of the election results by the Independent Electoral and Boundaries Commission."

Pursuant to Article 88 (4) (e) of the Constitution:

[113] The role of the Independent Electoral and Boundaries Commission (1st respondent) is provided for in Article 88(4) of the Constitution, as follows:

"The Commission is responsible for…

(e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results…."

[114] By virtue of legislation as envisaged under Article 87 of the Constitution, the Election Court is recognized as the Judiciary's forum of resolution of electoral disputes. "Election Court" is defined in the Elections Act as: the Supreme Court in exercise of the jurisdiction conferred upon it by Article 163 (3) (*a*); or the High Court in the exercise of the jurisdiction conferred upon it by Article 165 (3) (*a*) of the Constitution, and the Resident Magistrate's Court as designated by the Chief Justice in accordance with Section 75 of the Act. Appeals from the High Court on election matters lie to the Court of Appeal, by virtue of Section 85 A of the Elections Act; while appeals therefrom lie to the Supreme Court, if admitted by the latter, pursuant to Article 163 (4) (a) or (b).

[115] The Elections Act confers jurisdiction upon Magistrates Courts to determine the validity of the election of a member of a County Assembly; Section 75 (1A) of the Act provides that:

> ***"A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice."***

[116] The Act, in addition, provides for the appropriate remedies that Courts may grant, in the following terms (Section 75):

> *"(3) In any proceeding brought under this section, a court may grant appropriate relief, including—*
>
> *(a) a declaration of whether or not the candidate whose election is questioned was validly elected;*
>
> *(b) a declaration of which candidate was validly elected; or*
>
> *(c) an order as to whether a fresh election will be held or not."*

[117] It is clear to us that the Constitution provides for two modes of 'election'. The first is election in the conventional sense, of universal suffrage; the second is 'election' by way of *nomination*, through the party list. It follows from such a conception of the electoral process, that any contest to an election, whatever its manifestation, is to be by way of 'election petition'.

[118] On such a foundation of principle, we hold it to be the case that whereas the Court of Appeal exercised jurisdiction as an appellate electoral Court, it had not been moved as such, in accordance with Section 85 A of the Elections Act, and relevant provisions of the Constitution. The respondents had moved the Appellate Court on the basis that they were aggrieved by the High Court's decision in *judicial review proceedings,* in which that Court had declined jurisdiction. This in our view, would have been a proper case for the Appellate Court to refer the matter back to the High Court, with appropriate directions.

[119] To allow an electoral dispute to be transmuted into a petition for the vindication of fundamental rights under Article 165 (3) of the Constitution, or through judicial review proceedings, in our respectful opinion, carries the risk of opening up a parallel electoral dispute-resolution regime. Such an event would serve not only to complicate, but ultimately, to defeat the *sui generis* character of electoral dispute-resolution mechanisms, and notwithstanding the vital role of electoral dispute-settlement in the progressive governance set-up of the current Constitution.

[120] In fortifying our pronouncement in paragraph 119, we revisit our earlier decision, ***Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others [2014]*** eKLR Sup. Ct Pt No. 14 of 2014 as consolidated with Petition No. 14A of 2014, 14B of 2014 and 14C of 2014—in which this Court considered interpretive theory, in respect of Kenya's Constitution of 2010. Had the interpretative approach we proposed in that decision been taken into account by other Superior Courts, and by the Magistrates Courts, this may have provided a solution to the Court of Appeal's task of interpretation. The proposed theory would have been of service to the Court of Appeal, by focusing that Court's attention upon the constitutional, statutory, and regulatory texts within the history of Kenya's Constitution-making, besides other non-legal phenomena.

[121] One of the objectives of our Constitution is the establishment of firm institutions that have a pivotal role in its implementation. Our electoral dispute-resolution regime has a continuum of institutions that require strengthening, through the judicial system: namely, the political parties; the Political Parties Disputes Tribunal; and the IEBC. These have to comply with the Constitution, and the electoral laws and regulations. Participation of the people under *Article 10 of the Constitution*, in the affairs of the political parties, is not only a

constitutional duty on the part of the citizens, but also a vital pillar in the growth of parties, as democratic institutions under the Constitution. That political parties may evolve into stable institutions requires the full participation of members in their affairs, particularly those that pertain to elections.

[122] It is clear to us that although the foregoing principles were not expressly reflected in the High Court decisions, the learned Judges certainly had them in mind.

F. ORDERS

[123] Upon considering relevant Court records, as well as the learned arguments of counsel; and upon applying the relevant law, and the pertinent considerations of principle, we have come to certain specific conclusions which take expression in the following Orders:

(i) ***The Judgment and Orders of the Court of Appeal dated 23rd January, 2015 are hereby set aside.***

(ii) ***The Petition of Appeal herein, is allowed.***

(iii) ***The parties shall bear their own respective costs.***

DATED and **DELIVERED** at **NAIROBI** this **26th Day** of **April, 2016.**

....

W. M. MUTUNGA
CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

....

J. B. OJWANG
JUSTICE OF THE SUPREME COURT

....

S. C. WANJALA
JUSTICE OF THE SUPREME COURT

....

S. N. NDUNGU
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR
<u>SUPREME COURT OF KENYA</u>