REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(*Coram: Ibrahim, Ojwang, Wanjala, Njoki & Lenaola SCJJ*)

PETITION NO. 5 OF 2016

-BETWEEN-

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....PETITIONER

VERSUS

JANE CHEPERENGER.....1ST RESPONDENT

UNITED REPUBLICAN PARTY.....2ND RESPONDENT

IRINE KIMUTAI CHESANG.....3RD RESPONDENT

(Being an appeal from the Judgment and Orders of the Court of Appeal at Nairobi (Nambuye, Mwilu, Ouko JJ.A) issued in Civil Appeal No. 200 of 2013 and delivered on 20th December, 2013.)

JUDGMENT

A. INTRODUCTION

[1] The petitioner filed its appeal to this Court pursuant to Article 163 (4) (a) of the Constitution of Kenya 2010, Section 15(2) of the Supreme Court Act 2011 (Act No. 7 of 2011) and Rules 9 & 33 of the Supreme Court Rules, 2012. The petition, dated 9th May, 2016, is an appeal from the Judgment and Orders of the Court of Appeal at Nairobi, dated 20th December, 2013 in *Civil Appeal No. 200 of 2013.*

B. BACKGROUND

[2] In the run-up to the 2013 general elections, the Independent Electoral and Boundaries Commission (IEBC) requested political parties to submit a list of all persons who would qualify for nomination on the basis of political parties' proportional representation in respect of Senate, National Assembly and County Assembly. In compliance, the United Republican Party (URP) forwarded its party list for the proposed nominees for the Bungoma County Assembly with respect to special seats for youth, persons with disabilities, and female gender. Thereafter the IEBC published the allocation of nominees to Bungoma County Assembly special seats.

[3] It is that publication of the party list that triggered the 1st respondent's complaint at the IEBC Nomination Dispute Resolution Committee (IEBC Dispute Committee) alleging that, whereas she had been proposed by URP for nomination to the Bungoma County Assembly, the IEBC list of party nominees did not include her name. She further alleged that her name was replaced by that of the 3rd respondent whom she claimed was not a bonafide URP member and not eligible for nomination.

[4] On 7th June, 2013, the IEBC Dispute Committee dismissed the 1st respondent's complaint for lack of evidence. Aggrieved by that decision, the 1st respondent filed a Judicial Review application at the High Court, *Judicial Review Cause No. 216 of 2013*, seeking to quash the decision of the IEBC Dispute Committee and to compel IEBC to publish her name as a gender top up nominee for URP in Bungoma County Assembly.

[5] On 12th July, 2013, the High Court (*Mumbi, Majanja & Korir JJ)* dismissed her claim holding that the *issue of whether or not the 3rd respondent was entitled to be on the URP list or not, was a matter for the party to decide and hence fell outside the jurisdiction of the Court.* Subsequently, on 17th July, 2013, the IEBC gazetted the 3rd Respondent as the URP gender top up nominee for Bungoma County Assembly.

[6] Aggrieved by the High Court decision, the 1st respondent filed an appeal at the Court of Appeal seeking the following orders:

(a) The setting aside of the High Court judgment.

(b) An order of certiorari quashing the IEBC Committee decision issued on 7th June, 2013 that dismissed the 1st respondent's claim on grounds of insufficient evidence.

(c) Revocation of the 3rd respondent as the URP gender top up nominee for Bungoma County Assembly.

(d) De-gazettement of the 3rd respondent and replacement of her name with the 1st respondent.

(e) An order of mandamus compelling the IEBC to publish and gazette the 1st respondent as the bona-fide URP Bungoma County Assembly gender top up nominee.

[7] In its decision of 20th December, 2013, the Court of Appeal *(Nambuye, Mwilu & Ouko JJ.A)* revoked the nomination and election of the 3rd respondent and also ordered URP to conduct fresh nominations and submit its nominees to the IEBC within a period of 15 days from the date of the judgment.

[8] Aggrieved by that decision, the IEBC moved the Supreme Court, firstly, by filing a Notice of Motion application No. 36 of 2014 dated 16th September, 2014 seeking *inter alia* extension of time to file a Notice of Appeal. On 20th March, 2015, the 1st respondent filed a Notice of Preliminary Objection seeking to strike out the Notice of Motion application on grounds *inter alia* that the intended appeal was devoid of merits and it raised no weighty constitutional issues as alleged. By a Ruling dated 15th December, 2015, this Court dismissed the 1st respondent's preliminary objection.

[9] The Notice of Motion application was however not heard on merits but instead, parties entered into a consent on 28th April, 2016, and agreed as follows:

(a) That the Court be pleased to extend time and grant leave to the applicant to lodge its notice of appeal.

(b) The applicant shall file and serve their Notice of Appeal within 2 days.

(c) The applicant shall file their record of appeal and submissions within 10 days.

(d) The respondents shall file their responses and submissions within 10 days of service.

(e) That applicant may put in a further response within 3 days.

[10] The adoption of the said consent by a single Judge on the same day disposed of the Notice of Motion application paving way for the filing of this petition which is premised on the following summarized grounds"

a) That the learned Judges of Appeal breached the provisions of Article 87(1) of the Constitution and Section 75(1) of the Elections Act when they purported to exercise jurisdiction over the appeal which primarily questioned the nomination of a Member of the Bungoma County Assembly which jurisdiction falls within the Resident Magistrate's Court appointed by the Chief Justice.

b) The learned Judges of the Court of Appeal acted in patent breach of the provisions of Article 90(2)(b) of the Constitution when they disregarded the principle of priority listing in party lists and instead directed URP to conduct fresh nominations and submit its nominee to the petitioner.

c) The learned Judges of the Court of Appeal erred in law by totally disregarding the law and procedure that have been set out clearly in relation to the manner in which election disputes of members of county assembly ought to be instituted and instead sanctioned the judicial review proceedings that were challenging an election of a member of county assembly.

[11] In its Petition, the petitioner seeks the following orders"

a) That the judgment of the Court of Appeal be set aside.

b) Any consequential orders made or actions taken following the judgment of the Court of Appeal in compliance thereof are null and void.

c) That the costs of this appeal be awarded to the petitioner.

d) Any other orders that this court may deem fit in the circumstances.

C. PARTIES' SUBMISSIONS

(a) *Petitioner*

[12] Counsel for the petitioner, Ms. Otieno, relied solely on her written submissions dated 9th May, 2016. The crux of the petitioner's case is that the Court of Appeal lacked jurisdiction to entertain and determine the 1st respondent's appeal in light of Article 87(1) of the Constitution, Section 75(1A) of the Elections Act and Rule 6 of the Elections (Parliamentary and County Elections) Petition Rules, 2013. The invocation of the referenced legal provisions underscores that any challenge in respect to the validity of an election of member of County Assembly is to be determined by a Resident Magistrate Court at the first instance before it progresses through the normal appellate process. According to the petitioner, the Supreme Court case of ***Moses Mwicigi & Others v. the Independent Electoral & Boundaries Commission***, Sup. Ct. Petition No. 1 of 2015 affirmed the position that, immediately upon the gazettement of the list of nominees, any dispute thereafter can only be adjudicated by an Election Court which has been properly moved by way of an election petition.

[13] In that context, the petitioner submits that the Court of Appeal ought to have declined to hear the matter and transferred it to a Resident Magistrate's Court which is properly clothed with jurisdiction to hear election petitions arising out of elections of members of County Assembly. Relying on Article 82(1)(d) of the Constitution and Section 35 and 36 of the Elections Act, the petitioner contends that the Court of Appeal erred by directing the 2nd respondent to conduct fresh nominations. Further, the petitioner submits that its jurisdiction in relation to nomination of parties to special seats ceases to exist immediately after the gazettement of the nominees. In any case, the petitioner submits that incase of any dispute arising thereafter, the principle of priority listing ought to apply and not revocation of a gazette list. Consequently, the petitioner submits that the orders issued by the Court of Appeal are null and void and urges this Court to overturn that decision.

(b) 3rd respondent

[14] Counsel for the 3rd respondent, Miss Olando supported the petition and submitted that the case at hand raises fundamental

constitutional issues with regard to the procedure for resolving disputes arising out of nomination process with respect to special seats. She submitted that the Court of Appeal clothed itself with jurisdiction that it did not have since it was not sitting as an appellate Court in an election petition but on a Judicial Review matter. She also impugned the orders of the Court of Appeal directing the URP to submit a fresh list of nominees instead of asking the IEBC to pick the next person on the list according to the rule of priority listing. She urged the Court to allow the petition with costs.

(c) 1st respondent

[15] Counsel for the 1st respondent, Mr. Ndettoh did not submit on the substantive appeal but instead urged the Court to decline to hear the petitioner's case since some of the pleadings in Court were filed outside the agreed timeframe. By background, counsel submitted that parties entered into a consent on 28th April, 2016 with specific timelines within which all relevant documents ought to have been filed in Court. He submitted that though the record of appeal was filed within time, it was served out of time. He argued that the late service greatly prejudiced the 1st respondent who only had 3 days within which to respond. He also submitted that since the petitioner also filed his submissions out of time, she should first make a formal application seeking extension of time to file and serve the said documents out of time. He urged the Court to allow his objection and deny audience to the petitioner.

D. ISSUES FOR DETERMINATION

[16] from the foregoing, the following issues arise for consideration:

(a) Whether the Court should determine the petitioner's case on merit in view of non-compliance with the agreed timelines as recorded in the consent order.

(b) Whether the Court of Appeal acted within its jurisdiction, by revoking the Gazette Notice and ordering fresh nominations.

(c) What remedy should be issued.

E. ANALYSIS

a) Resolving the puzzle underlying the 1st respondent's objection"Which way forward"

[17] At the heart of the 1st respondent's objection is a consent order recorded by parties on 28th April, 2016 and adopted by a single Judge of this Court on the same day. Of relevance, is Order No. 3 which provides that, *'the applicant shall file their record of appeal and submissions within 10 days.'* We shall briefly restate the facts leading to the adoption of the consent for a better understanding of the matter at hand.

[18] The impugned Court of Appeal decision which is the subject of this appeal was delivered on 20th December, 2013. Ordinarily and in accordance with Rules 31 and 33 of the Supreme Court Rules, 2012, where a party is aggrieved by a decision of the Court of Appeal and desires a further appeal to the Supreme Court, such a person should file a Notice of Appeal within 14 days after the delivery of the Court of Appeal decision. The Notice of Appeal signifies an intention to appeal. Upon the filing of the Notice of Appeal, the intending appellant should file his petition and record of appeal within 30 days. In this case, the petitioner did not file the Notice of Appeal within time necessitating it to approach this Court on 16th September, 2014 seeking an extension of time to file the said Notice of Appeal.

[19] Before the said application for extension of time was heard, the 1st respondent filed a Notice of Preliminary Objection dated 20th March, 2015, seeking to strike out the petitioner's application on grounds *inter alia* that the intended appeal was devoid of merit and it raised no weighty constitutional issues which requires the Court's interpretation and application.

[20] By a Ruling delivered on 15th December, 2015, the Court dismissed the 1st Respondent's objection stating that, *'whether or not the intended appeal raises constitutional issues, is a question which can only be properly raised and determined once the appeal itself is filed, after filing of a notice of appeal— if and when leave is granted for that purpose*.' Thereafter, parties entered into a consent dated 28th April, 2016 allowing the petitioner's application for extension of time to file a Notice of Appeal and further

agreed on specific timelines within which requisite documents ought to have been filed and served on parties.

[21] In compliance with the consent Order, the petitioner filed the Notice of Appeal within two (2) days and further filed the petition and record of appeal on 9th May, 2016, which was within the agreed 10 days period. The basis of the 1st respondent's objection however is that *the record of appeal was served out of time and further the petitioner filed its submissions out of time.* Undoubtedly, the petitioner filed its record of appeal within time, but the 1st respondent submits that he was served out of time, though he did not disclose the exact date when service was effected upon him. He only stated that he had 3 days within which to file a response which accordingly was insufficient.

[22] We note that the concerned consent Order did not specifically provide for the time within which service should have been effected. The said Order reads, ***'the applicant shall file their record of appeal and submissions within 10 days.'*** We are of the view that Mr. Ndettoh was under the impression that service of the record ought to have taken place simultaneously with the filing of the record. Whereas that would have been a valid expectation, we acknowledge that the Court Order was silent as to when service should have taken place. Therefore, Mr. Ndettoh's strong objection and utmost refusal to file any response on the basis of late service is questionable. On what basis for example does he state that he had only 3 days within which to respond, yet the subsequent Order provides that *'the respondents shall file their responses and submissions within 10 days of service"'* This effectively means that, irrespective of the time when service would have been effected, the respondents still had 10 days within which to respond.

[23] Admittedly, we affirm the general principle of law which is now recognized in the Constitution which provides that where a particular time is not prescribed for performing a required act, the act should be done without unreasonable delay. In this case, counsel did not even indicate when service was effected and hence we can only speculate whether service was done within a reasonable time or not. Consequently, we hold that the 1st respondent's objection is for the reasons discussed, unmerited and without any basis. Furthermore, we are of the view that counsel was not in any way prejudiced as to handicap him from responding to the petitioner's case within 10 days after service of the record.

[24] We however acknowledge that the petitioner's submissions were filed out of time. Whereas this would have given Mr. Ndettoh a basis, if at all, for objecting, it is not upon Mr. Ndettoh to decide on the punitive measure to befall upon a party who fails to comply with the directions of the Court, as every other party has a respective individual obligation to honour Court's directions. We underscore the importance of complying with Court Orders and directions given especially with regard to filing and service of documents within the requisite time. That notwithstanding, we take cognizance of Rule 53 of the Supreme Court Rules, 2012 which gives us power to *extend the time limited by the Rules, or by any decision of the Court.* To this extent therefore, the late filing of submissions is not patently incurable.

[25] Interestingly, it has been more than a year since the petitioner filed its submissions on 10th June, 2016, and effected service on the 1st respondent on the same day. Since then, as can be deduced from the various mentions that have been before the Deputy Registrar, counsel for the 1st respondent has repeatedly affirmed his position that he would not respond to the petitioner's case since the petitioner had failed to comply with the Court Orders. One such mention was on 14th June, 2016 wherein Mr Ndettoh sought to vacate the consent Orders and stated that the petitioner needed to first make a formal application in Court seeking extension of time to file the documents out of time. The Deputy Registrar gave a Ruling on the same day and stated as follows:

"…the petitioner had not complied with the consent order with regard to filing of submissions and service of the record within 10 days. Consequently the applicant may have to seek extension of time to file their submissions and serve the record outside the agreement of parties or persuade the parties to consent to the extension of time by consent. The vacation of consent may only be done before a Judge. It is urged that parties agree with the service of record of appeal and file of submissions."

[26] At a further mention of 17th November, 2016, though only the petitioner was represented in Court it was noted that the 3rd respondent had filed her submissions and consequently the Deputy Registrar advised that:

"This being an election matter, its' imperative that all parties comply with the timelines given. The 1st respondent has not put in submissions despite the directions of the Court of April, 2016. The directions were given pursuant to a consent order recorded by the parties. The Registry is to serve Mr. Ndettoh with a notice to put in his submissions within 3 days or have the matter proceed without his input or contribution. The Court will issue a hearing date on notice on the matter."

[27] By a letter dated 24th November, 2016, addressed to the Deputy Registrar, Mr. Ndettoh explained that the Court had ruled that

since the petitioner had not complied with the consent Order with regard to the filing of submissions and serving of the record within the agreed timelines, the petitioner should either seek extension of time to file the submissions and the record out of time or persuade the parties to consent to extension of time. He further noted that the petitioner had not taken any effort to act as advised. He noted that the Deputy Registrar had indicated that a hearing notice should be served on parties but according to him, *there was nothing to be heard*. He therefore suggested that the Court should instead mention the matter so that the petitioner could explain how it proposed to proceed with the matter in view of that Ruling. In response to Mr. Ndettoh's concerns, the Deputy Registrar by a letter dated 28th November, 2016, informed him that *the Court had noted his concerns and he was at liberty to raise the issues therein during the hearing of the matter.*

[28] This case presents an unfortunate state of affairs whereby counsel takes a very strong position to the extent of adamantly failing to abide by repeated Court's directions with the sole aim, as can be deduced from Mr. Ndettoh's conduct, of adverting the dispensation of justice. Though we do not in any way excuse the petitioner's conduct of filing submissions 30 days after the initial agreed period, we are at pains to understand why the 1st respondent's counsel would fail to respond at all to the petitioner's case which has been lying in this Court for more than a year. Suffice to add, Mr. Ndettoh's objection is at the very least an epitome of infringement of Article 159 of the Constitution which not only dissuades us from being tied to the ropes of procedural technicalities but also reminds us that justice delayed is justice denied.

[29] Most unfortunately, it is a fact that we are at another election cycle and still matters such as this which emanates from 2013 general elections are still pending in this Court. While this Court does not condone breach of timelines, we find that the 1st respondent was not prejudiced by the late filing of submissions since she still had 10 days within which to respond. Accordingly, we dismiss the 1st respondent's objection.

[30] Having so held, we shall then proceed to determine the merits of the case. Before we do so, we are aware that the petitioner's case will proceed without the benefit of the 1st respondent's input, since counsel relentlessly refused to respond for reasons we have already stated, even when this Court advised him at the hearing of the case that his client's case would proceed undefended should his objection fail. In addition, both counsel for the petitioner and the 3rd respondent also appeared unprepared for the oral hearing as they were unable to answer specific questions from the bench, touching on their clients' case.

[31] At this juncture we must remind counsel that ultimately their duty is to the Court first. They are officers of the Court and are meant to help the Court in its role of dispensation of justice. Hence, it is absurd when an advocate appears before Court, especially the Supreme Court, not prepared to advance his client's case. This unpreparedness flies on the face of an advocate's role as an officer of the Court, and also borders on breach of his duty to the client"the obligation to diligently represent his/her client. Consequently, before appearing in Court to represent a client, it is of paramount importance that advocates get all the necessary facts clear and appear in Court prepared in order to properly advance their clients' case. Counsel's conduct in this case notwithstanding, we are not absolved from undertaking our duty which is to dispense justice and neither will the said conduct prejudice the Court in execution of its mandate as before the Court, are legal issues which have been clearly fleshed out.

b) Was the Court of Appeal without jurisdiction, in revoking the Gazette Notice and ordering fresh nominations"

[32] The appeal at the Appellate Court arose out of Judicial Review proceedings at the High Court in which the 1st respondent contested the publication of the 3rd respondent as the URP gender top up nominee for Bungoma County Assembly. At the High Court, she alleged that the dismissal of her complaint by the IEBC Dispute Committee infringed on her right to fair administrative action and fair hearing. It is on that basis that she sought specific orders namely; *an order of certiori to quash the decision of the IEBC Dispute Committee; an order prohibiting the IEBC from gazetting the 3rd respondent as the gender top up nominee for Bungoma County Assembly and an order of mandamus to compel URP to submit to IEBC the Bungoma County gender top up nomination list and upon receipt of such list the IEBC be compelled to publish the 1st respondent's name as the URP bonafide gender top up nominee for Bungoma County.*

[33] Upon considering the matter, the High Court held that whether or not the 1st respondent was entitled to be on the URP list was a matter for the party to decide and therefore fell outside the jurisdiction of the Court. The 1st respondent's suit was therefore dismissed. Following the High Court decision dated 12th July, 2013, IEBC published a *Gazette Notice* on the 17th July, 2013 designating the 3rd respondent as the URP member of Bungoma County Assembly.

[34] Being aggrieved by the decision of the High Court and even though the 3rd respondent's name had by then been gazetted, the

1st respondent filed an amended memorandum of appeal, Nairobi *Civil Appeal No. 200 of 2013*, dated 14th October, 2013 seeking to compel IEBC to publish her name as the bona-fide URP gender top-up nominee for Bungoma County Assembly and further de-gazette and revoke the 3rd respondent's name. In its decision dated 20th December, 2013, the Appellate Court *revoked the nomination and election of the 3rd respondent and ordered URP to conduct fresh nominations and submit to the IEBC the proposed names within a period of 15 days from the date of the judgment.* It is this finding of the Court of Appeal that is the subject of the present appeal.

[35] The position of the petitioner and the 3rd respondent is that, once the IEBC gazettes the respective nominees as representatives of specific County Assemblies, such persons immediately becomes duly 'elected' or nominated members and therefore any dispute regarding the validity or otherwise of the nomination can only be resolved through an election petition adjudicated by an Election Court which has been properly clothed with the specific jurisdiction. Hence in accordance with Section 75 of the Elections Act, 2011, such a dispute could only be heard in the first instance by a Resident Magistrate Court designated by the Chief Justice to hear electoral disputes.

[36] This Court has had occasion to pronounce itself on a similar issue in the case of ***Moses Mwicigi & Others v. the Independent Electoral & Boundaries Commission***, Sup. Ct. Petition No. 1 of 2015, in which we were called upon to determine the extent of the powers of the Court of Appeal with regard to hearing of disputes arising from the nomination of members of a County Assembly. In order to sufficiently address that issue, we asked ourselves the following specific question; *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""* At paragraph 106, we expressed the view that:

"The Gazette Notice in this case, signifies the completion of the "election through nomination", and finalizes the process of constituting the Assembly in question."

We therefore proceeded and held that [paragraph 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."

Thus, we pronounced ourselves as follows [paragraph 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."

[37] The above decision clarifies the legal standing with regard to the extent of the powers of various Courts in adjudicating electoral disputes emanating from the election of the nominated members. At this juncture, we reiterate and affirm the position that, upon gazettement of nominated members of County Assemblies, any aggrieved party would have to initiate the process of challenging the said nominations by filing an election petition at the Resident Magistrate Court designated as an Election Court under Section 75 of the Election Act. In this instant matter therefore, upon the gazettement of the name of the 3rd respondent as a nominated member of County Assembly for Bungoma County, any aggrieved party ought to have filed an election petition before an Election Court. It is only upon such filing and determination by an Election Court, and where such a matter rises through the ordinary appellate process, that other Courts in the judicial hierarchy can rightly assume jurisdiction with powers to give any consequent orders. To this extent therefore, we agree with the petitioner and the 3rd respondent that indeed the Court of Appeal had no jurisdiction to revoke the nomination and election of the 3rd respondent or to issue any other consequent orders.

c) What is the appropriate relief to issue"

[38] Having so held that the Court of Appeal had no jurisdiction to revoke the Gazette Notice designating the 3rd respondent as a duly nominated member of County Assembly, the ensuing critical issue to determine is what is the proper remedy to issue in the circumstances"

[39] We are aware that in compliance with the impugned Judgement of the Court of Appeal, the URP went ahead and submitted a

fresh party list to the IEBC and a subsequent Gazette Notice was issued designating the 1st respondent as the URP nominated member for Bungoma County Assembly. In essence, the Court of Appeal decision propelled the start of an entirely new process of nominating a URP nominee. Such a scenario is in tandem with what was once before us in the case of ***Chris Munga N. Bichage v. Richard Nyagaka Tong'i & 2 Others*** Sup. Ct. Petition No. 17 of 2014 (**Bichage Case**) where we observed thus (at paragraph at 53):

"With the green light from the Court of Appeal, the IEBC went ahead and organized for a by-election, in accordance with its constitutional mandate. Arising from that by-election, the 1st respondent was declared and sworn in as the Member of the National Assembly for Nyaribari Chache Constituency."

[40] Previously before that, in the ***Mary Wambui Munene v. Peter Gichuki King'ara & 2 Others*** Sup. Ct. Petition No. 7 of 2014; [2014] eKLR (***Mary Wambui Case***), we had envisaged a situation where, as a result of Court's directions, some constitutional process may have ensued making it difficult to revert to the original process. Particularly, at paragraph 90, we observed that:

"We are aware that several constitutional processes have been concluded, and others ensued as a result of the directions of the Courts while handling electoral disputes following the 2013 General Elections. It is our position that, in either of these scenarios, and as a matter of finality of Court processes, parties cannot reopen concluded causes of action…."

[41] Consequently, in determining the remedies to issue in the ***Bichage*** case, we applied the principles derived from ***Mary Wambui*** and held that (paragraph 55):

" We would affirm the exceptional ratio expressed in the Mary Wambui, case and hold that a constitutional process had been concluded, followed by another, in the form of the by-election held on 30th December, 2013; and this Court is disinclined, in the circumstances, to make any Order which would invalidate the subsequent electoral process."

[42] Likewise, though we have found that the Court of Appeal had no jurisdiction to revoke the Gazette Notice and issue any consequent orders, we hold that, as a result of the Court's pronouncement, other constitutional processes were initiated which culminated in the nomination of the 1st respondent as the URP member of Bungoma County Assembly. Therefore, we are constrained to make any Order which would defeat the resultant electoral process.

D. ORDERS

a) The petition of appeal dated 9th May, 2016, is allowed with the following specific orders"

(i) We affirm that the Court of Appeal had no jurisdiction to revoke the nomination of the 3rd respondent or to give any consequent orders.

(ii) For the reasons that we have already given in the body of the Judgment, the resultant electoral process that culminated in the removal of the 3rd respondent is hereby sustained.

(iii) For the avoidance of doubt, the status quo remains.

b) Parties shall bear their own respective costs.

DATED and DELIVERED at NAIROBI this 27th Day of April , 2018.

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M. K. IBRAHIM **J. B. OJWANG**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

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S. C. WANJALA **N.S . NDUNGU**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

……..

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA