



Case Number:	Election Petition 5 of 2017
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Case Class:	Civil
Court:	Election Petition in Magistrate Courts
Case Action:	Judgment
Judge:	Hon. J. J. Masiga - S M
Citation:	Hamdi Ahmed Ali v Victoria Cheruto Limo & 2 others [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Garissa
Docket Number:	-
History Docket Number:	-
Case Outcome:	Petition allowed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATES COURT AT GARISSA

ELECTION PETITION NO 5 OF 2017

IN THE MATTER OF ARTICLES 1, 3, 38, 81,86,90,91 AND 177 (b) (c) 2, 3 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTION 34, 36 AND 75 (1A) OF THE ELECTIONS ACT, 2011 (ACT NO 24 OF 2011)

AND

IN THE MATTER OF THE ELECTIONS (GENERAL) REGULATIONS, 2012 (LEGAL NOTICE NO 128 OF 2ND NOVEMBER 2012)

AND

IN THE MATTER OF THE ELECTIONS (PARTY PRIMARIES AND PARTY LISTS) REGULATIONS, 2017

AND

IN THE MATTER OF THE KENYA GAZETTE NOTICE NO 8752, VOL CXIX NO 131 OF 6TH SEPTEMBER 2017

AND

IN THE MATTER OF THE PARTY LIST NOMINATION FOR GENDER TOP-UP FOR GARISSA COUNTY ASSEMBLY

BETWEEN

HAMDIA AHMED ALLI.....PETITIONER

AND

VICTORIA CHERUTO LIMO.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

AND

THE NATIONAL COHESION AND

INTEGRATION COMMISSION.....INTERESTED PARTY

JUDGMENT

Vide the petition filed on the 25th September 2017; the Petitioner filed the present petition against the Respondents herein praying for the following orders:

(a) The Honourable Court be pleased to issue a declaration that the Petitioner is the duly elected candidate to the County Assembly of Garissa as the Kenya Patriots Party gender special seat nominee (gender top up) as provided for under Article 177 (1) (b) of the Constitution.

(b) The Honourable Court be pleased to issue a declaration that the election of the Respondent to the County Assembly of Garissa under Article 177 (1) (b) of the Constitution was unlawful and should be declared void.

(c) The Honourable Court be pleased to issue a declaration that the 2nd Respondent contravened the provisions of Article 90 (2) (b) and 177 (1) (b) (c) of the Constitution, together Sections 34 (5) and 36 (1) (e), (7) of the Election Act and Regulation 54 and 55 of the Elections (General) Regulations, 2012 by electing the 1st Respondent to the County Assembly of Garissa as the Kenya Patriot's Party gender special seat nominee (gender top up).

(d) A declaration that the 2nd Respondent also failed to carry out its duty of ensuring that all person on the respective lists are qualified candidates as required by Regulation 54 (5) of the Election (General Regulations 2012).

(e) A declaration that the 2nd Respondent also failed to carry out its duty of ensuring that all persons on the respective party lists are qualified candidates as required by Regulation 54 (5) of the Election (General Regulation) 2012.

(f) That the Honourable court be pleased to nullify the gazettelement of the 1st Respondent as a nominated member of the County Assembly of Garissa as the Kenya Patriot's Party gender special seat nominee (gender top up) conveyed through the Kenya Gazette Notice No 8752 of the 6th September, 2017.

(g) That this Honourable Court be pleased to issue mandatory orders to compel the 2nd Respondent to elect the Petitioner as a member of the County Assembly of Garissa as the Kenya Patriot's Party gender special seat nominee (gender top up) by publishing a Gazette Notice electing the Petitioner to the County Assembly of Garissa.

The Petition is premised on the grounds on the face of it and the supporting affidavits sworn on the 24th September 2014 and 25th September respectively by the Petitioner and Geoffrey Rono, the Chairman of the Kenya Patriot's Party.

The Petition is opposed vide the responses to Petition filed the 1st and 2nd Respondents on the 10th October 2017 and the 27th October respectively. On the 18th October 2017, the Interested Party applied to this court to be enjoined as an interested party in this suit. The application was heard and a ruling allowing the application delivered on the 23rd November 2017. However, the Interested Party's participation was limited to filing of submissions only.

BACKGROUND:

Before, I get into the petition itself, it is important that I outline the brief background of the case. In the month of June 2017, Kenya Patriot's Party (herein after referred to as K.P.P) invited applications from its members who wished to be considered for nomination in various Counties where the party was fielding candidates pursuant to Article 177 (1) (c) of the Constitution and Section 36 of the Election Act, No 24 of 2011. Both the Petitioner and the Respondent applied to be the special seat nominee (gender top-up) of the Party. The party forwarded ten names to the 2nd Respondent which included the names of the Petitioner and the 1st Respondent. On the 21st of July 2017, the 2nd Respondent published a list in which in which the 1st Respondent was listed at position 1 and the Petitioner at position 3. On the 28th August, 2017 the 2nd Respondent herein published a list of nominated members for the Garissa County Assembly vide Gazette Notice No 8380 but the nominees for K.P.P were excluded. On the 6th September 2017, vide Gazette Notice No 8752 corrigenda in Gazette Notice No 8380, the 2nd Respondent published a Notice which indicated that the 1st Respondent had been nominated to be the member of the County assembly of Garissa in the category of special seats (Gender top-up). The Petitioner being dissatisfied with the nomination of the 1st Respondent now brings this petition challenging the same.

PETITIONERS CASE:

Precisely, the Petitioners case is that in or about the month of June, 2017, she applied to be nominated as a member of County Assembly of Garissa under the category of special seats (gender top-up). Upon the application, K.P.P forwarded ten names to the 2nd Respondent who published a list on its website on the 19th July 2017 with her name being in the first position and the 1st Respondent's name being in the third position. The said list is marked as "HAA-2. On the 21st of July 2017, the 2nd Respondent published a final list in which the 1st Respondent was listed in the first position and the Petitioner moved third position. The said list is marked as "HAA-3" The Petitioner avers that this was without any justification. On 24th July 2017, K.P.P wrote to the 2nd Respondent vide the letter dated 24th July, 2017 asking them to revert to the original list where the Petitioner was listed in first position. The said letter is marked as "HAA-4) However, on the 28th August 2017, in disregard to the said letter, the 2nd Respondent vide Gazette Notice No 8330 published a list of nominated members for the County Assembly of Garissa which excluded the nominee from K.P.P. The list is marked as "HAA-6". On the 6th September 2017, the 2nd Respondent published vide Gazette Notice No 8752 corrigenda of Gazette No 8380 and added the 1st Respondent as nominated to the County Assembly of Garissa under the category of special seats (gender top-up). The Petitioner avers that the party again wrote to the 2nd Respondent protesting the inclusion of the 1st Respondent as party nominee and requested them to expunge the 1st Respondents name from the list and replace her name with the Petitioners name as she had been listed first in the party list published on the 19th July 2017. The 2nd Respondent did not respond to the second letter too. The Petitioners evidence is that the 1st Respondent colluded with the 2nd Respondent and/or its agents to alter and publish K.P.P's list and place her at the first position with the full knowledge that she was not the party's first choice. The Petitioner avers that the 1st Respondent fraudulently caused her name to be uploaded to the 2nd Respondent's Candidate Registration Management System (herein after referred to as C.R.M.S system) The Petitioner further alleges that the 1st Respondent did not qualify for nomination to the County assembly of Garissa. Her evidence is that the gazettelement is illegal and did not follow the laid down procedure.

The Petitioner's witness Geoffrey Rono testified that he is the Chairman of K.P.P. In his affidavit which was adapted as evidence by this court, he confirmed the Petitioners testimony. In addition he stated that as far as the party was concerned the 1st Respondent fraudulently caused her name to be uploaded into the 2nd Respondents C.R.M.S system without the knowledge of the party. He stated further that the actions by the 2nd Respondent were illegal and were not in accordance with the procedures laid down by the law. It was his evidence that the Petitioner participated in the activities of the party in Garissa County and was listed as first on the list whereas the 1st Respondent was listed as third. Therefore, the Petitioner is the rightful nominee for seat of member of the County Assembly. He added further that the 1st Respondent is not qualified to be on the K.P.P's party list for the special seat (gender top-up) for Garissa County Assembly because she is not a resident of Garissa County and can therefore not represent the interests of the people of Garissa.

1st RESPONDENTS CASE:

The 1st Respondents case is that, she is a member of K.P.P having joined the party on the 20th March 2016 and bearing registration certificate number KPP31000067. In June 2017, K.P.P invited applications from its members for consideration for nomination in various counties where the party was fielding candidates. The party advised its staff to participate. Together with a number of other staff, the 1st Respondent submitted her application as a member of the County Assembly of Garissa under the gender category. The 1st Respondent avers that her application was the first application in that category. It is her evidence that the applications were considered in the order in which they were received by the party, and accordingly, her application took precedence over the rest in terms of priority. According to her this is what explains the order of the names in the party list. On the 19th July 2017, the party uploaded the party list in the 2nd Respondent's C.R.M.S system with her name being first in the gender category Garissa County. On 23rd July 2017, the 2nd Respondent published in the local dailies a list of candidates proposed by different political parties for nomination for various categories. The same is marked as "VCL1". The 1st Respondent avers that at no time did the 2nd Respondent publish a party list in which the Petitioner's name was first and her name third. On the 6th September 2017, the 2nd Respondent published in the Kenya Gazette Notice No 8752 corrigenda in which it added the 1st Respondents name to the gender top-up list of Garissa County Assembly. The 1st Respondent states further that from the date of the submission of the party list to the 2nd Respondent, neither the Petitioner nor the Chairperson of the party communicated to her any grievance, whether orally or in writing. The 1st Respondent denies fraudulently causing her name to be uploaded into the 2nd Respondent C.R.M.S system or colluding with the 2nd Respondent in removing the Petitioner name from the first position and replacing it with her own name. The 1st Respondent avers she was on leave at that time. The first respondent further states that she is qualified to be nominated as a member of the County Assembly of Garissa.

In support of the 1st Respondent, her first witness Mr Ken Kipchirchir Mutai stated that he is the Finance and Operation Director of

K.P.P. His role is to assist the Chairman in preparation of the party list, and, to upload it in the C.R.M.S system. The only persons with the password of the C.R.M.S system were Mr Rono, the Chairperson, and himself. On the 19th July 2017, together with Mr Rono, they uploaded the party list into the C.R.M.S system as per the training offered to them by the 2nd Respondent. They downloaded a copy thereof and sent it to the 2nd Respondent. A copy thereto is marked as “KKM2”. The 1st Respondent was away on leave at the time they uploaded the party list. Mr Mutai avers that the 1st Respondent's name was always first in the party list and the Petitioner's name third. His evidence was the party selected the applicants on priority basis in the order in which applications were received. He further states that the list produced by the Petitioner and marked as “HAA2” is not the list they uploaded in the C.R.M.S and sent to the 2nd Respondent. He avers that he is not aware of any meeting which convened to deliberate on the 1st Respondent's gazettement. As far as he is concerned the 1st Respondent was validly nominated as a member of the County Assembly of Garissa.

The 1st Respondent's second witness Janet Jemutai stated that she was an employee of K.P.P in charge of data entry and clean up. Sometime in June 2017, K.P.P invited applications from members who wished to be nominated to the County Assemblies in areas which the party was fielding candidates. Jemutai states that she was in charge of receiving the applications, recording and filing them. The 1st Respondent's application was the first application she received in the gender category. The Petitioner's application was the second application she received in the said category. The names of the applicants in the party list appeared in the order of the priority in which the application were received by the party. It is Jemutai's evidence that the 1st Respondent was on leave at the time the party submitted the party list to the 2nd Respondent.

2ND RESPONDENTS CASE:

The 2nd Respondent's witness, Salome Oyugi, the Manager Political Parties and Campaign financing of the 2nd Respondent stated that they published guidelines in Gazette Notice No 5735 on the 12th June 2017 which were to be adhered to by the political parties. The same is marked as SO-G5-1. All political parties were to submit their party lists to the 2nd Respondent 45 days before the General Election as per section 35 of the Elections Act 2011. K.P.P resubmitted its final party list under the hand of the authorised official together with form 6 on the 19th July 2017. The 1st Respondent appeared as the first on the list and the Petitioner as the third. A copy of the list is marked as SO-G5-2. As required by Regulation 54 (8) of the Elections (General) Regulations 2012, the 2nd Respondent went ahead and published the final party list as received from K.P.P in both the Nation and the Standard newspapers on 23rd July 2017. In the Publication the 1st Respondent appeared as the first and the Petitioner as the third. The publication is marked as SO.G5-3. Oyugi stated that the 2nd Respondent issued a public Notice on the 21st July 2017 in both dailies for anyone who was aggrieved by the published party list to lodge complaints. However no complaint was lodged against the inclusion of the 1st Respondent in the party list. The 2nd Respondent was thus bound to go by the party lists in its allocation for special seats. After the general elections on the 8th August 2017 each party was allocated seats commensurate with the number of seats won per County. K.P.P was allocated one through Gazette Notice Number 8752 of the 6th September 2017. The said Gazette Notice is marked as SO.G5-4. Accordingly, the 2nd Respondent picked the person who was listed first on the list as per section 36 (8) of the Elections Act, 2011.

PETITIONERS SUBMISSIONS:

In his submissions, the Petitioner's Advocate contends that the 1st Respondent is not qualified to be on the K.P.P party list for gender nominee for the County Assembly of Garissa by virtue of her not being a resident of Garissa County. Therefore, she cannot represent the interest of the people of Garissa. Apparently, no woman was elected in any ward in Garissa County, and therefore, a “virtual ward” had to be created in Garissa for women. He argues that the representative for the “virtual ward” for women in Garissa must be a resident of Garissa. A non-resident, like the 1st Respondent cannot effectively represent the interest of the women of Garissa County. He further submits that the mandate of preparation of the party list is vested on the political party's Election Board. In support thereof he cites Regulation 10 of the Elections (Party Primaries and Party List). Therefore, it is his submissions that matters to do with party elections and nominations fell under the purview of the Election board and the Chairman. Since the Chairman testified that he prepared and uploaded a list which put the Petitioner as the first and the 1st Respondent as the third, the only conclusion would be that the list uploaded at 1.40 p.m on the 19th July 2017 was done so fraudulently. He posits that the first test whether one was validly nominated to any position is whether such person's nomination was sanctioned by her party's Election Board as provided for under Regulation 10 of the Elections (Party Primaries and Party List) Regulations, 2017. Where it appears such nomination was not sanctioned, then, it would be null and void. The second test would be if the nomination was conducted in a democratic, free, fair, provides equal opportunity to all eligible candidates, open, transparent and accountable. In his view, the nomination of the 1st Respondent was not as such. The Advocate for the Petitioner further submits that, under Rule 8 (1) of the Rules of Procedure in Settlement of Disputes, Legal Notice 139/2012, a party is allowed to a dispute within twenty four hours of the

occurrence of a dispute. He has to notify the commission and any adverse party of the dispute in writing. K.P.P notified the 2nd Respondent of the disputed party list in writing on the 24th July 2017. In his view, the 2nd Respondent had a duty to act on the said letter despite the fact that it did not conform to the form laid down in the rules. He argues further that, by virtue of Article 159 (2) (d) of the Constitution, the 2nd Respondent acting as a quasi-Judicial authority ought to have considered the substance of the letter dated 24th July 2017 as opposed to the form and act appropriately. The 2nd Respondent had at least 10 days within which to act on the said letter but chose not to, thus denying the Petitioner her right of entry in the County Assembly of Garissa. Further, the Advocate for the Petitioner submits the Respondents did not present original or certified copies as exhibits. Specifically, he submits that the documents produced by Salome Oyugi were all scanned copies and not original copies or photocopies. He argues further that the original list was not produced in court by the 2nd Respondent who is the custodian of all election material. In support of his argument. He posits that the contents of a disputed document can only be proved by the production of the primary or by secondary evidence. He cites section 64 of the Evidence Act and the Court of Appeals decision in **KENNETH NYAGA MWIGE-VS-AUSTIN KAGUTA & TWO OTHERS [2015] e KLR.**

1ST RESPONDENTS SUBMISSIONS:

In response, The Advocate for the 1st Respondent submitted on the issues at hand under the following headings;

- a) Whether nomination of the 1st Respondent as member of the County Assembly of Garissa was conducted in accordance with the principles laid down in the Constitution, Election Act and Election (Party Primaries and Party Lists) regulations, 2017"
- b) Whether the Petition proved the allegations in her petition"
- c) Who bears the costs"

On the first issue above, Counsel for the 1st Respondent submits the role of the 2nd Respondent is clearly laid down in the law and is not abstract as to invite the 2nd Respondent to interpret the Constitution, the Election Act and the regulations to ascertain its role. In support thereof he cites Article 88, 90 (1) (2) (b) of the Constitution and section 34 of the Election Act. Secondly, he submits that the legal qualification for nomination as a member of a The County Assembly under the gender top-up category are provided for under the Constitution and the Elections Act. In this regard he refers the court to section 34 (4) (6A) and (6B) of the Elections Act, 54 (5) of the Election (General) Regulations and Gazette Notice No 5735 on the law guiding Party Lists on nomination of member of the County assembly among others. He further refers the Court to Article 193 (1) of the Constitution and section 25 of the Election Act which stipulates the requirements for a person to be cleared to be a member of a County Assembly. Counsel for the 1st Respondent submits that the Petitioner has not Challenged the voter registration status, moral and educational status of the 1st Respondent, but has challenged the residence of the 1st Respondent which in his view is a qualification not known in law. It is his submission that residence and ethnicity are not qualifications for gender top-up representation in the County Assembly. He further argues that the Petitioner did not prove that prior to her nomination, the 1st Respondent was not a resident of Garissa County. Counsel for the 1st Respondent also submits that the Petitioner has not proved any of the allegations, electoral offences and irregularities against the 1st Respondent. He further argues that the Petitioner has not proved that she was listed at position one in the final list of K.P.P Party List. Secondly, she did not prove that the list she relied on was the authentic Party List and that it was the list that was submitted to the 2nd Respondent. He posit further that, the Petitioner ought to have enjoined the K.P.P because it's a body corporate with perpetual succession and a common seal capable of suing and being sued. In support of this argument he cites section 16 of the Political Parties Act No 11 of 2011 and the decision in **HELENA KISIKU KITHEKA-VS- I.E.B.C [2018] e KLR.** In his view, the failure to include the party in these proceedings is fatal to the Petition. He argues that the orders sought by the Petitioner shall require the party to implement, without which the 2nd Respondent cannot effectually comply with the orders sought if granted. In support thereof he cites the ruling of this court in this very case in an earlier application. On the allegations that the 1st Respondent took advantage of her position as the party,s employee in the I.C.T department to have her name uploaded in the 2nd Respondent's C.R.M.S system, Counsel for the 1st Respondent submits that she had already left for the day when the list was submitted. On the allegations that 1st Respondent fraudulently uploaded her name in the 2nd Respondents C'R.M.S system, Counsel for the 1st Respondent submits that there is no evidence that was tendered to prove the same. He argues that fraud is an electoral offence therefore proof is beyond reasonable doubt. In support thereof he cites the decision in **MUSIKARI NAZI KOMBO-vs-MOSES MASIKA WETANGULA & 2 OTHERS[2013] e KLR.** With regard to the allegation of Collusion, Counsel for the 1st Respondent submits that there is no evidence of collusion between between the 1st and 2nd Respondent.

2ND RESPONDENTS SUBMISSIONS:

In his submissions, Counsel for the 2nd Respondent identified the following as the main issues for determination:

- a) Whether the petitioner was legally entitled to be nominated to the Garissa County Assembly under Gender top-up Category"
- b) Whether the election/ nomination of the 1st Respondent was in accordance with the Constitution and other electoral laws and whether the 2nd Respondent contravened the constitution and other electoral laws in nominating the 1st Respondent to the County Assembly of Garissa under Gender Top UP Category"
- c) Whether the Independent Electoral and Boundaries Commission, the 2nd Respondent herein has Powers to alter lists"
- d) Whether the allegations in the petition are vague, generalised are founded on misconception of the applicable law and facts, thus rendering the petition fatally defective.

On the first issue above, Counsel for the 2nd Respondent submits that the Petitioner was not legally entitled to be nominated to the Garissa County Assembly as she did not represent the will of the party which was reflected in the list of K.P.P. He submits that in the said list the 1st Respondent came first, and it was on that basis that she was gazetted as nominee of the party. With regards to the second issue above Counsel for 2nd Respondent has outlined as from paragraph 29 to 32 of his submission the entire process of nomination of a member to the County assembly. In his view the nomination of the 1st Respondent was conducted in accordance with the constitution and other Electoral Laws. He further submits that the allegations by the Petitioner that the Respondents connived to sneak the name of the 1st Respondent in place of the Petitioner is false factually defective and misleading, and, the same has not been proved. On the 3rd issue whether the 2nd Respondent has power to alter party lists, Counsel for the 2nd Respondent submits that it is the responsibility of the political party rather than the courts or the 2nd Respondent to determine which of their members should be included in a party list, in what category, and, what order of priority. He further submits that the commission has no power to alter the political parties preferred candidates. Counsel for the 2nd respondent submits that the petition is vague, lacks particulars and offends Rule 8 of the Elections (Parliamentary and County Elections) Petition Rules 2017.

INTERESTED PARTIES SUBMISSIONS:

The gist of the submissions by Counsel for the interested party is that the Petitioner herein is from a marginalised community while the 1st Respondent is not from a community contemplated as minority within the meaning of Article 260 of the Constitution of Kenya. In his view, it follows that the 1st Respondent being from one of the bigger tribes in Kenya cannot purport to represent a minority or marginalised community.

DETERMINATION:

I have gone through the evidence by the Petitioner. I have also gone through the evidence presented by the Respondents. I have very carefully considered the submissions by Counsels for all parties and the various authorities cited by them. At this point, I wish to appreciate Counsels for all parties for a job well done. Indeed, I appreciate the manner in which Counsels for all parties articulated the Constitution and all other Electoral Laws with regards to *inter alia*; the qualifications of person for nomination to the County Assembly, the role of the 2nd Respondent in the nomination process, the burden and standard of proof in election petitions. However, in my view, the only contentious issue here is, who as between the Petitioner and the 1st Respondent will represent the interest of the women of Garissa better. In his submissions, Counsel for the Petitioner submits that the 1st Respondent cannot represent the interest of the women of Garissa by virtue of her not being a resident of Garissa. On the other hand, Counsel for the 1st Respondent submits that ethnicity is not a criteria known in law for nomination to the county assembly. In my view, In Counties the issue of ethnicity cannot just be wished away. Indeed, Article 90 (2) (c) does recognise the peculiarity of Counties. It is for this reason that Article 90 (2) (c) exempts Counties from the condition that party lists must reflect the regional and ethnic diversity of the people of Kenya. The rationale behind Article 90 (2) (c) is that, some counties are inhabited by predominantly one ethnic community. Therefore because of their peculiarity, it is only reasonable that the condition that the County Assembly reflects the regional and ethnic diversity of the entire country be done away with. Indeed, the County assembly Act at section 7 does stipulate that the community and cultural diversity of the county be reflected in the County Assembly. Turning back to this case, the evidence on record is that the Petitioner is from Garissa County. Having been born and brought up in Garissa, she undoubtedly is familiar with the culture, religion, needs and interests of the people of this Garissa County. The Respondent on the other hand is not from Garissa County. By dint of her own admission she is a registered voter in Uasin Gishu County. Meaning, she cannot vie for any elective post in Garissa County. One would want to ask how the nomination of the 1st Respondent reflects the community and

cultural diversity of Garissa County in terms of section 7 of the County Assembly Act. I would hasten to add that the court was also astounded by the casual manner in which the 1st Respondent answered question relating to her residence in Garissa County. Indeed, on been asked how long she had been residing in Garissa, her answer was she had been around. In my view, that answer was less than satisfactory. For a person who had been around for some time, it was very surprising that she could not tell who the immediate outgoing Governor of Garissa County is. These, on the face of it, would appear to be simple and nonsensical questions, but, they were very telling to this court on the status of the residence of the 1st Respondent in Garissa. As a result, the Court formed an opinion that the 1st Respondent was not in touch with the issues relating to women in Garissa. Therefore, I agree with Counsel for the Petitioner that the 1st Respondent cannot represent the interest of the women of Garissa. That is not to say that a person from another ethnic community represent the interest of people from a different ethnic community. Indeed there are several such instances in this country. However, if you look at these isolated incidences, the said individual have lived with this different community for such a long time, and therefore, they are familiar with their peculiar needs and interest. I do not think this is the case here. I dare say that. it would be very unjust to the women of Garissa to allow a person who is not familiar with their peculiar needs and interests to represent them. The upshot of the above is that ethnicity cannot be casually wished away when it comes to nomination to County Assemblies. The 2nd Respondent ought to have considered this too before allowing the nomination of the 1st Respondent. In my view failure to do so contravened Article 90 (2) (c) of the constitution and section 7 of the County Governments Act No 17 of 2012.

The upshot of the above is that, I allow the petition and order as follows:

1. The nomination of the 1st Respondent as member of the County Assembly of Garissa under the category of special seats (Gender Top-Up) is hereby nullified.
2. The Gazettement of the of the 1st Respondent as the nominated member of the County Assembly of Garissa under the category of special seat (gender top-up) vide Kenya Gazette Notice No 8752 of 6th September 2017 is hereby nullified.
3. Kenya Patriot's Party is hereby directed to carry out fresh nomination within forty five (45) days from date hereof and forward the list to the 2nd Respondent for gazettement.
4. Costs are capped at Kshs 500,000/= to be shared equally between the Respondents
5. The Interested party shall not be entitled to any costs.

DATED, SIGNED AND DELIVERED this 6th dayof MARCH 2018

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J. J.MASIGA

SENIOR RESIDENT MAGISTRATE



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