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Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Isaac Lenaola, David Shikomera Majanja, Mumbi Ngugi
Citation:	National Gender and Equality Commission v Independent Electoral and Boundaries Commission & another [2013] eKLR
Advocates:	Mr Arwa instructed by Rachier and Amollo Advocates for the petitioner. Mr Mungai instructed by Muriu, Mungai and Company Advocates for the 1st respondent. Ms Munyi, Deputy Chief Litigation Counsel, instructed by the State Law Officer for the 2nd respondent. Mr Mwenesi instructed by S. Musalia Mwenesi Advocates for the 1st interested party. Ms Chelangat, Advocate, instructed by the 2nd interested party. Mr Chigiti, instructed by Chigiti and Chigiti Advocates for the 3rd interested party. Mr Omondi, Advocate, instructed by the 4th interested party. Mr Ochola instructed by Soita and Saende Advocates for the 5th interested party. Ms Menya, Advocate, instructed by Katiba Institute, 1st amicus curiae. Mr Lando, Advocate, instructed by the Kenya National Commission on Human Rights, 2nd amicus curiae.
Case Summary:	<b>Constitutional Law</b> -fundamental rights and freedoms – right to equality and freedom from discrimination –fundamental rights and freedoms of women, the youth, persons with disabilities, minorities and marginalised persons within the political process – allocation of legislative seats based on political party’s lists in Parliament and County assemblies – qualified candidates for nomination to the special seats created under

	<i>Article 90 of the Constitution – the responsibility of IEBC in the creation of political party’s lists, supervising and conducting the election for special seat –responsibility of IEBC to ensure nomination lists submitted by political parties promote the rights of women, the youth, persons with disabilities, minorities and marginalised groups - Elections Act section 34(6) - Election (General) Regulations, 2012 regulation 54, 55-Constitution of Kenya, 2010 article 27, 54,56,90</i>
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION 147 OF 2013**

**BETWEEN**

**THE NATIONAL GENDER AND**

**EQUALITY COMMISSION .....PETITIONER**

**AND**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**ASSOCIATION OF THE PHYSICALLY**

**DISABLED OF KENYA.....1<sup>ST</sup> INTERESTED PARTY**

**INTERNATIONAL FEDERATION OF**

**WOMEN LAWYERS (FIDA).....2<sup>ND</sup> INTERESTED PARTY**

**KENYA PARAPLEGIC**

**ASSOCIATION..... 3<sup>RD</sup> INTERESTED PARTY**

**THE NATIONAL COUNCIL FOR PERSONS**

**WITH DISABILITIES..... 4<sup>TH</sup> INTERESTED PARTY**

**RONGAI ENVIRONMENTAL ACTION**

**INITIATIVE (RENACTI) ..... 5<sup>TH</sup> INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. The parties to this litigation are all agreed that elections constitute an important element of our democratic state. The common thread running throughout the Constitution is that the citizens are sovereign in determining their destiny. The sovereignty of the people is clearly articulated in the preamble to the Constitution. **Article 1** states that all sovereign power belongs to the people of Kenya and may be exercised directly or indirectly through their democratically elected representatives.

2. The people's sovereignty is underwritten by the provisions protecting fundamental freedoms and particularly the political rights contained in **Article 38** and actualised in the various provisions governing the representation of the people and the legislature contained in **Chapter Seven** and **Eight** of the Constitution respectively. The right to participate in political processes is also enshrined in key international human rights instruments among them the **Universal Declaration of Human Rights** which at **Article 21** states that, "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives." **Article 13** of the **African Charter on Human and Peoples' Rights** provides that, "Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law."

3. The parties are also agreed that the Constitution holds dear those who have been historically marginalised; women, youth, persons with disabilities, marginalised communities and other vulnerable persons. **Article 27** requires not only equality and freedom from discrimination but affirmative action to remedy these historical wrongs. The duty of the State to ensure full participation of these groups of persons is also emphasised in **Articles 54** and **56** that elaborate the rights of people with disabilities and minorities and marginalised persons respectively.

4. As regards representation, the Constitution is replete with provisions that guarantee persons historically disadvantaged, representation in Parliament and the County assemblies. The Supreme Court in **Advisory Opinion No. 2 of 2012 [2013] eKLR**, noted "[47] *The Court is fully cognisant of the distinct social imperfection which led to the adoption of Articles 27(8) and 81(b) of the Constitution; that in elective or other public bodies, the participation of women has, for decades, been held at bare nominal levels, on account of discriminatory practices, or gender-indifferent laws, policies and regulations.*" These sentiments equally reflect the position of persons with disabilities, the youth, minorities and marginalised communities.

5. In the case of **Kituo cha Sheria v Independent Electoral and Boundaries Commission and Another Nairobi Petition No. 574 of 2012 [2013]eKLR**, which dealt with the right of prisoners to vote, the Court observed that, "[13] *The Constitution as the supreme law is founded on the sovereignty of the people of Kenya (see Njoya and Others v Attorney General and Others (2008) 2 KLR (EP) 658). This sovereignty is exercised through voting for representatives in the National and County governments who exercise delegated authority of the people in accordance with Article 2. It is beyond argument then that the right to vote is fundamental to our system of government. The Constitution, with its emphasis on the peoples' sovereignty, the values of the rule of law, equity, inclusiveness, equality, human rights as well as the right to vote guaranteed under Article 38 and the qualification of voters provided under Article 83 does not exclude prisoners from being registered to vote and consequently voting in an election. Apart from merely guaranteeing the right, the Constitution places upon the State and its agencies the positive responsibility to ensure that all the people of Kenya and particularly those who are marginalised or vulnerable are able to exercise this fundamental right.*"

6. The nature and extent of the representation guaranteed under **Article 90** of the Constitution and the obligations of the Independent Electoral and Boundaries Commission ("IEBC") is at the heart of this case and we note as the court noted in the case of **Johnson Muthama v Minister for Justice and**

**Constitutional Affairs and Another Nairobi Petition 198 of 2011 [2012]eKLR**, that, *“In bringing this matter for determination, the petitioners have demonstrated the concern of citizens in ensuring that the rights enshrined in the Constitution translate into reality, and that the organs of state entrusted with the duty of implementing the requirements of the Constitution do so in a manner that is faithful to the letter and spirit of the Constitution. This matter is concerned with the exercise of sovereign power by the citizen and with the protection of the citizens’ right to participate in their governance ...”*

## **Background**

7. The petitioner, the National Gender and Equality Commission (“NGEC”), is a Commission established under **Article 59(4)** of the Constitution and the **National Gender and Equality Act, 2011**. Its overall mandate is that of promoting gender equality and freedom from discrimination as provided in **Article 27** of the Constitution. In the petition, it contends that the IEBC has failed in its constitutional responsibility of supervising and conducting party elections for purposes of electing members whose names appear on the party lists as required by **Article 90**.

8. The petitioner brings the petition dated 5<sup>th</sup> March 2013 against the IEBC, seeking declarations relating to the implementation of **Articles 97(1)(c), 98(1)(b), (c) and (d) and 177(1)(b) and (c)** which deal with the allocation of legislative seats based on party lists, in Parliament and County assemblies, as follows;

1. *A declaration that the respondent has contravened the provisions of Article 90 and 91(1)(e) and (f) of the Republic of Kenya together with regulation 54(5) of the Election (General) Regulations 2012.*

2. *A declaration that the party lists so far received by the respondents from political parties in purported compliance with Article 90 of the Constitution are illegal and unconstitutional and accordingly null and void ab initio for want of compliance with mandatory constitutional provisions.*

3. *A conservatory order or an order of injunction restraining the respondents from allocating special seats to political parties on the basis of the purported party lists submitted by political parties under Article 90 of the Constitution.*

4. *An order of mandatory injunction or mandamus directing the respondents to strictly comply with its constitutional duties under Article 90 of the Constitution by supervising and conducting political party elections for purposes of electing members of the party whose names should appear on the party lists for special seats under Articles 97(1)(c), 98(1)(b), (c) and (d) and 177(1)(b) and (c) and ensuring strict compliance with the conditions set out in Article 90(2) and (3).*

5. *A declaration that the failure by the respondents to comply with their constitutional duties under Article 90 of the Constitution infringes upon:*

a) *The rights of political party members to elect from amongst themselves persons who should hold the special seats donated by the Constitution on behalf of their party*

b) *The right of party members who have been duly elected to the party list created by the party under Article 90 of the Constitution to have their chances of eventually occupying the said special seats determined by the party members through the exercise of universal suffrage rather than by the party chiefs through the exercise of....and/or caprice*

c) *The right of Kenyan citizens to have the constitution implemented fully both in its letter as well as spirit*

*d) The right of persons whose interests are sought to be protected through the special seats donated by the Constitution vide Article 97(1)(c), 98(1)(b) and (d) and 177(ii)(b) and (c) to have those interests securely protected.*

*6. That the Honourable court be pleased to issue the following declarations, orders, directions and writs as may be necessary to safeguard and prevent the violation of Article 90 and 91(e) and (f) of the Constitution of the Republic of Kenya.*

*7. That the costs consequent upon this application be borne by the respondent.*

*8. All such other orders that this Honourable court shall deem just.*

9. The petitioner's case is in material respects supported by all the interested parties. They are all agreed that the matters for determination go to the heart of our democratic system and it was important that the Court addresses the issues raised as the IEBC had not acted in accordance with the Constitution in taking into account the interests of persons with disabilities, the youth, minorities and marginalized groups which are the kind of special interests contemplated in the Constitution and which require representation in Parliament and the County assemblies.

10. The IEBC, supported by the Attorney General, denies that it failed to follow the Constitution in the manner it conducted and supervised the election of seats referred to in **Article 90**. It states that it complied with the Constitution by setting guidelines for the generation of party lists and that the ultimate responsibility for the generation of those lists was with the political parties in accordance with the **Political Parties Act (Act No. 11 of 2011)**.

11. The *amici curiae*, Katiba Institute ("KI") and the Kenya National Commission on Human Rights ("KNCHR") filed written submissions and made oral arguments necessary to assist the court come to a fair and just conclusion of the matter.

12. Broadly speaking these arguments set the scene for determination of the issues at hand.

### **The Constitutional and legal provisions**

13. Before we proceed to consider the case and in order to put the case in context, we think it is important to set out the provisions of **Article 90** which deal with "**Allocation of Party list seats**" and it provides as follows;

90. (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.*

14. The relevant provision regarding membership to the National Assembly is dealt with by **Article 97(1)(c)** which states as follows;

**97. (1)** *The National Assembly consists of— (c) twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers.*

15. **Article 98 (1)(b)(c) and (d)** deals with members elected on the basis of party lists to the Senate and it provides as follows;

**98. (1)** *The Senate consists of—*

*(b) sixteen women members who shall be nominated by political parties according to their proportion of members of the senate elected under clause(a) in accordance with Article 90;*

*(c) two members, being one man and one woman, representing the youth;*

*(d) two members, being one man and one woman, representing persons with disabilities; and*

16. **Article 177(b) and (c)** dealing with members elected on the basis of party lists to the County assembly states as follows;

**177. (1)** *A county assembly consists of—*

*(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*

17. The provisions of **Article 90** are given effect by the provisions of **Part III** of the **Elections Act (Act No. 24 of 2011)** particularly **sections 34 to 37** of the Act titled, "**Nomination of party lists.**" Apart from re-stating the provisions of the Constitution, these provisions provide how the party lists are to be compiled. **Section 35** of the **Elections Act, 2011** states that, "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 nomination 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."

### **Issues for determination**

18. After the petition was filed, we heard the application for conservatory orders and by a ruling dated 25<sup>th</sup> March 2013, we issued a conservatory order in the following terms, "[W]e order that pending the

*hearing and determination of the petition the Independent Electoral and Boundaries Commission (IEBC) shall not gazette the nomination of County Assembly Representatives based on the Party Lists submitted to it by Political Parties.” We declined to issue conservatory orders affecting the party list seats to the Senate and National Assembly. We shall deal with the latter point later in the judgment.*

19. We thereafter directed the parties to file their respective depositions and written submissions. We also heard oral submissions by the parties’ advocates. We believe that this matter concerns the interpretation of **Article 90** of the Constitution and its application to the manner in which party lists are constituted.

20. Although the parties raised various issues for determination, we shall address following issues which we have framed;

a) What is the responsibility of the IEBC in the creation of party lists by political parties under **Article 90**”

b) Who are the qualified candidates for nomination to the special seats created under **Articles 97(1)(c), 98(1) (c) and (d) and 177(1)(b) and (c).**

c) Did IEBC comply with its responsibility to supervise and conduct the election for special seats under **Article 90**”

d) If the answer to (c) is negative, what reliefs should the Court grant”

### **General Principles**

21. All the parties addressed us on principles of interpretation of the Constitution applicable to this case.

22. In dealing with the task at hand, this Court is enjoined to be guided by the provisions of **Article 259(1)** which provides that the Constitution shall be interpreted in a manner that promotes its purpose, values and principles, advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights and permits development of the law and contributes to good governance. **Article 259(1)** commands a purposive approach to interpretation of the Constitution. Purposive interpretation was explained by the Supreme Court of Canada in the case of **R v Big M Drug Mart Limited [1985] 1 SCR 295 at para. 116, 117** where the Court stated, *“[T]he proper approach to the definition of rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. .... [T]his analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be ..... a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore ..... be placed in its proper linguistic, philosophic and historical contexts.”*

23. Our Supreme Court in **Re The Matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011** at *para. 51* adopted the words of Mohamed A J in the Namibian case of **State v Acheson 1991(20 SA 805 (Page 813)** where he stated that, *“The Constitution*

*of a nation is not simply a statute which mechanically defines the structures of government and the relationship government and the governed. It is a mirror reflecting the “national soul” the identification of ideas and ..... aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion.”*

24. Apart from complying with the stipulation that the Constitution must be given full life, it is also our duty in considering this matter to give effect to the Constitution as a whole. The various provisions that govern the electoral process must therefore be read together in a manner that gives full effect to the purposes of the Constitution. We fully adopt the principle of harmonization set out in the case of **Centre for Rights Education and Awareness (CREAW) and Others v The Attorney General Nairobi Petition No 16 of 2011 (Unreported)** where the Court, quoting other decisions, stated that, “*In interpreting the Constitution, the letter and the spirit of the supreme law must be respected. Various provisions of the Constitution must be read together to get a proper interpretation.*” (see also **Tinyefuza v The Attorney General Constitutional Appeal No. 1 of 1997 (Unreported)** and **Olum v Attorney General of Uganda** (2002) 2 EA 508).

25. In addition to these principles outlined, counsel for the parties, referred us to international law and treaties that underpin fundamental rights and freedoms of women, the youth, persons with disabilities and marginalised persons within the political process. International law and instruments which Kenya has ratified now have the force of law in Kenya by dint of **Article 2(5)** and **(6)** and must be given effect.

26. Mr Chigiti, learned counsel for the Kenya Paraplegic Association, the 3<sup>rd</sup> interested party, referred us to several international instruments for example the **African Charter on Elections, Democracy and Governance. Article 3(7)** of that Charter provides that State Parties shall adopt legislative and administrative measures to guarantee the rights of women, ethnic minorities, migrants, people with disabilities, refugees and displaced persons and other marginalized and vulnerable social groups. **Article 31(1)** provides that State Parties shall promote participation of social groups with special needs, including the Youth and people with disabilities, in the governance process. Although Kenya has not ratified this Charter, it is persuasive authority for the principles it outlines.

27. **Article 5 (2)** of the **Convention of The Rights of Persons With Disabilities** provides that States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds. **Article 29** provides that States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake to ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected.

28. Ms Chelangat, learned counsel for the Federation of Women Lawyers – Kenya, the 2<sup>nd</sup> interested party, emphasised the international instruments that underpin the rights of women. **The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)** which prohibits discrimination against women. **Article 7(b)** of the Convention obliges State parties to take all appropriate measures to eliminate discrimination against women in political and public life and to ensure that women have, on equal terms with men, the right to participate in the formulation of public policy and hold office and perform all public functions at all level of government.

29. **The Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (Maputo Protocol)** relates to women’s right to participate in the political and decision making process. It obliges State parties to take specific positive action to promote active participation of women

in political life including ensuring that there is increased and effective representation and participation of women at all levels of decision making.

30. These principles we have set out provide the milieu in which the issues in this matter will be considered.

### **What is the responsibility of the IEBC under Article 90 of the Constitution**

31. The first issue we have framed deals with the nature and extent of the IEBC's responsibility in the creation of party lists and more particularly its responsibility to conduct and supervise elections under **Article 90(2)**. In answering this question, the meaning of "election" used in the Article must be understood.

32. The petitioner's case is that **Article 90(1)** postulates an election at the party level which election culminates in the generation of political party lists. It contends that **Article 90** obliges the IEBC to conduct and supervise the party electioneering process for the special seats and it is this obligation that IEBC contravened.

33. Thus the petitioner submits that **Articles 88(4)** as read with **Article 90(2)** imposes a constitutional obligation on IEBC to "conduct and supervise" elections for special seats and ensure that the letter and spirit of the Constitution is met. The petitioner avers that IEBC failed to conduct and supervise the election for special seats as provided under **Article 90** but that it received political party lists which had not been prepared in accordance with **Article 90**.

34. Mr Arwa, learned counsel for the petitioner, argued that **Article 90** required the political parties to hold elections to choose their members to be placed on their party lists as well as the precise position or location on the said lists because priority is given to those on the top of the lists. He further submitted that to hold otherwise would amount to eliminating the element of democratic competition for the limited seats available and that would be contrary to the national values and principles of governance articulated in **Article 10**. The petitioner avers that IEBC failed to ensure that elections which were the primary criterion for the creation of party lists were carried out. Counsel submitted that the argument by the IEBC that there were serious logistical and other challenges was not a reason to lower the constitutional standard and requirement for such elections.

35. The petitioner's position then is that **Article 90(2)** imposes on the IEBC the obligation to conduct and supervise elections for the seats provided under **Article 90(1)** and as such IEBC must work out a mechanism for ensuring strict compliance with its constitutional mandate rather than citing logistical difficulties. Counsel emphasised that the provisions of the Constitution are clear and unambiguous and the words of **Article 90(2)** must be given the clear and ordinary meaning. He referred to the case of **Attorney General of Tanzania v Rev. Christopher Mtikila [2010] 2 EA 13** where the Tanzania Court of Appeal observed that, "The Court can never disregard clear words of a provision of the Constitution. That will cause anarchy."

36. In order to understand the meaning of "elections," APDK urges the Court to read the Constitution and the law relating to elections particularly **section 34 (1) and (10)** of the **Elections Act, 2011** to press the point raised by the Petitioner that **Article 90 (2) (a)** deserves special attention. It submitted that there is no definition of "election" or "elected" or "elect" in the Constitution and the **Elections Act, 2011** defines "election" to mean 'a presidential, parliamentary or county election and includes a by-election'.

37. APDK submits that the "Elections for the seats in Parliament" referred to in **Article 90(1)** are

parliamentary and county elections in the proper and purposive sense of the word. It states that these elections include elections conducted by political parties at the time of a General election to “fill” all the relevant seats under **Article 90(1)** and the IEBC is responsible for the conduct and supervision of those elections.

38. APDK further submits that if the elections are not held at all or not held in accordance with **Article 90** under the auspices of IEBC in order to satisfy the conditions of **Article 90**, and in particular **Article 90(2)** then they contravene the Constitution and are invalid pursuant to **Article 2**.

39. Mr Mwenesi, learned counsel for APDK, submitted that the Constitution and the statutes are drafted on the assumption that there is interplay of the relevant provisions and that the elections being referred to in **Chapter Seven** on the Representation of the People are elections ordinarily so-called. APDK noted that the natural and ordinary meaning of elections is to be found in **Black’s Law Dictionary** which refers to an “Election” as the exercise of a choice or selection by electors, while ‘appointment’ refers to a choice or selection by an individual.” According to ADPK then, the responsibility of the IEBC to conduct and supervise election cannot be denied and must be read to mean that IEBC ensures that the elections are actually held and stands in a supervisory, “*mnyapara-like*” role to ensure that each political party has elected all the persons who “would stand elected if the party were entitled to all the seats” under **Article 90 (1)**.

40. The position taken by IEBC, and supported by the Attorney General, is that the persons in the party lists under **Article 90** are persons who would stand elected if the party were to be entitled to all the seats provided under **Article 90(1)**. It submits that **Article 90(2)** deems the persons who will be nominated by the IEBC from the various party lists as allocated under **Article 90(3)** of the Constitution to be “**elected**.”

41. Mr Mungai, learned counsel for the IEBC, submits that the word “**elected**” as used in **Article 90** does not have the meaning of universal suffrage and that the persons who will be deemed elected for the seats under **Article 90**, will only be so deemed after the completion of the General elections and thereafter allocation of the seats to political parties is made in proportion to the total number of seats won by candidates of a political party at the General elections. In his submission, counsel noted that it is not every person nominated by political parties in their party lists is or will be deemed elected under **Article 90** and that some political parties which participated in the General election and which submitted their party lists to the IEBC under **Article 90(2)** will not have any person in the submitted party lists deemed elected once the allocation under **Article 90(3)** is done. IEBC asserts that the election under **Article 90** is the allocation of the seats to the political parties by the IEBC. The allocation must thereafter be made in the order of their position in the party lists and ensuring, inter-alia, gender equity.

42. The IEBC contends that **Article 90(2)** is clear that it is the duty of political parties participating in the General election to prepare and submit party lists. It relies on **Regulation 88(1)** of **the Election (General) Regulations, 2012 (“the General Regulations”)** which provides that party lists shall be prepared in accordance with the nomination rules of political parties. Counsel further noted that it has not been shown, or even alleged, that any of the political parties that participated in the General elections held on the 4<sup>th</sup> March 2013, breached their nomination rules in preparing and forwarding their party lists to the IEBC.

43. The 1<sup>st</sup> amicus curiae, KI, in its written brief and through the submission of its learned counsel, Ms Menya, addressed the issue of the methodology for nomination and election of party list members to the National Assembly, Senate and County assemblies in its written brief. KI disagrees with the petitioner’s position on the role of the IEBC and submits that the IEBC is, “responsible for the conduct and supervision of elections for seats” in **Article 90(1)**, and it is not responsible for any election for the party

lists. KI argues further that had the drafters intended that the IEBC be responsible for internal party elections for the lists, the law would have been clear that the election referred to were internal party elections and were for places on the lists and not for seats. KI contended that even though political parties are required to have democratic processes in accordance with **Article 89(1)(d)**, there is no indication that the IEBC is responsible for conducting elections within parties for individual candidates.

44. In our view, the word “elections” in **Article 90** must be read in light of the context in which it appears in the Constitution and other provisions governing elections. We therefore agree with the position taken by the respondents and KI that the word “elections” in **Article 90** does not refer to internal party elections for positions on the party lists. As the opening title suggests, **Article 90** deals with the allocation of party seats. It is the allocation of those party seats that results in an election of the party members based on the lists submitted by the political parties to the IEBC.

45. We therefore find and hold that **Article 90(2)** does not deal with elections leading to the constitution of party lists nor concern itself with the manner in which parties come up with the names on the lists. How the election of persons on the list is carried out is a matter entirely within the mandate of the respective political parties. It is for this reason that **regulation 55 (1) of the General Regulations** provides that, *“The party list contemplated under regulation 54 [the lists under Article 90(1) of the Constitution] shall be prepared in accordance with the rules of the political party.”* Furthermore, **paragraph 19 of the Second Schedule to the Political Parties Act (Act No. 11 of 2011)** requires every party to have, *“nomination rules and regulations with respect to elections of the party and rules governing the preparation of party lists.”*

46. Despite what we have stated, we agree with the submission by Mr Lando, learned counsel for KNCHR, that the process of developing the party lists must at a minimum, bear the hallmarks of a democratic, transparent and participatory process. Although the parties have submitted at length on what constitutes an election within a political party, we do not think that this issue falls for consideration in this case as this matter concerns the conduct of the IEBC with regard to party lists and not that of the political parties.

47. Having found that the election contemplated in **Article 90** does not involve or contemplate the direct involvement of the IEBC in the preparation of party lists, it follows that the extent of IEBC’s duty to conduct and supervise elections for seats provided under **Article 90(1)** must be determined in this light.

48. The ordinary meaning of the word conduct can be found in **Concise Oxford English Dictionary, 2011** as, *“directing or managing something.”* While supervise means, *“observe and direct the execution of (a task or activity) or the work of a person.”* Given our finding on the meaning of “election” for purposes of **Article 90**, it follows that the *“directing or managing”* of the election must be in reference to the lists submitted by the political parties.

49. The role of IEBC in conducting and supervising the elections of seats is located in the context of the **Article 90** which are given effect by the provisions of the **Elections Act, 2011. Sections 35, 36 and 37** provide a framework for the implementation of **Article 90**. The IEBC is obliged, in accepting party lists, to ensure that the provisions of the statute are adhered to. **Regulation 55(2) of the General Regulations** also empowers the IEBC to ensure that the party lists comply with the requirements of the Constitution, the **Elections Act, 2011** and the **General Regulations**.

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.

**Candidates qualified for nomination under Articles 97(1)(c), 98(1) (c) and (d) and 177(1)(b) and (c).**

51. As we have held above, the responsibility of the IEBC to conduct and supervise elections under **Article 90(2)** includes the duty to confirm that the persons listed therein are duly qualified for election. The petitioner's grievance is that the only condition that the IEBC met was that the political parties complied with the time limit for submission of the party lists. It argues that IEBC failed to ensure that lists contained the appropriate number of qualified candidates; that gender parity was achieved by alternating male and female candidates and except for County Assembly seats, that the party lists reflected regional and ethnic balance.

52. The petitioner further avers that the IEBC had a duty to determine and give guidance to political parties on the following questions;

- a) Who is a qualified candidate within the meaning of **Article 90(2)(b)**"
- b) What is meant by "*regional*" diversity within the meaning of **Article 90(2)(c)** and which, as between regional and ethnic diversity, prevails over the other"
- c) What is a "*special interest*" within the meaning of **Article 97(1)(c)** and who is a "*youth*", "*person with disability*" or "*worker*"
- d) Who is a member of "*marginalized group*" within the meaning of **Article 177(1)(c)**"

53. The petitioner submits that the IEBC abdicated its responsibility by failing to deal with the issues outlined above and give guidance to political parties. The petitioner seeks the court's guidance on the questions it has framed above and submits that the court should be guided by the principles spelt out in **Njoya and Others v Attorney General and Others [2004] 1 EA 194, 159**, where the Court observed that, "*The Constitution of Kenya which is the supreme law of this country is the will of the people or the mandate they give to indicate the manner in which they ought to be governed.*"

54. The petitioner submits that its position is underpinned by the fact that the Constitution recognises that various categories of people face challenges that may not enable them compete favourably for elective positions. It is for this reason that special seats are created by **Articles 97(1)(c), 98(1)(b)(c) and (d) and 177 (1)(b) and (c)**. Mr Arwa submits in this regard the special interests referred to in these provisions must be those of people who would not otherwise find representation and in support of this position, referred to the case of **San Antonio School District v Rodrigues (1973) 411 US 29**. In that case the United States Supreme Court stated that, "*(A class of people) saddled with such disabilities (economic, social, political or otherwise) or subject to such a history of purposeful unequal treatment or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.*"

55. Learned counsel for APDK, Mr Mwenesi, submits that the rights of persons with disabilities must be jealously guarded and protected particularly where the Constitution envisages a minimum representative

percentage of persons with disabilities in the Assemblies at both levels of Government. He urged the court to bear in mind the struggle for minorities and persons with disabilities and other vulnerable groups to have constitutional recognition in Kenya.

56. The other parties and *amici curiae* cited the case of **Rangal Lemeiguran v Attorney General Nairobi HC Misc. Civil App. 305 of 2004 [2006] eKLR** where the High Court considered the meaning of “special interest group” in light of **section 33** of the former Constitution and observed that, “*Although the Constitution does not define special interests contemplated by section 33(1) they include interests which have not been taken care of by the election process and which are vital to the effectiveness of democratic elections in terms of adequate representation for all – in a democracy. In other words the special interests mean those interests which normal electioneering process has failed to capture and represent.*”

57. The petitioners and the interested parties have filed submissions and depositions demonstrating that the lists submitted by the political parties do not comply with the provisions of the Constitution and why it is necessary for the Court to set the parameters necessary for assessment of such lists.

58. In giving this guidance, the question brought to the fore is the nature of interests to be borne in mind when considering party lists. In **Article 97(1)(c)** the members nominated represent “*special interests.*” **Article 97(1)(c)** states that, “*The National Assembly consists of – (c) twelve members nominated by parliamentary parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers.*” [Emphasis ours]

59. **Article 177(1)(b)** and **(c)** deal with representation in the County assemblies. Two categories of seats are recognised; the gender top-up seats and the seats for marginalised groups. **Article 177(1)(b)** provides for special seats necessary to ensure that no more than two-thirds of the membership of the County assembly are of the same gender while **177(1)(c)** provides for “*members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament.*”

60. Additional statutory obligations are imposed by **section 7** of the **County Government Act, 2012** which provides that;

7. (1) *In addition to the members who are elected under Article 177 (a), or nominated under Article 177 (b) of the Constitution, a county assembly shall comprise*

*(a) six nominated members as contemplated in Article 177 (c) of the Constitution; and*

*(b) the speaker, who is an ex officio member elected in accordance with Article 178 of the Constitution.*

*(2) The political party nominating persons under subsection (1) shall ensure that*

*(a) **community and cultural diversity of the county** is reflected in the county assembly; and*

*(b) there is **adequate representation to protect minorities** within the county in accordance with Article 197 of the Constitution.*

*(3) The number of members nominated under subsection 1(a) shall be reviewed to accord with the number of Wards determined by the Independent Electoral and Boundaries Commission under section 27(3)(a). [Emphasis ours]*

61. These provisions impose on the IEBC an obligation to ensure that the lists submitted by the parties also comply with the Constitution and with statutory provisions that promote the rights of persons with disability and marginalised groups and generally promote community and cultural diversity within the County. The petitioner and the interested parties state that although the IEBC issued formal guidelines, it failed to give guidelines as to the qualifications of candidates necessary to meet the constitutional criteria. The parties have asked us to define each of the terms applicable as the IEBC failed to do so in its guidelines.

62. The position of the IEBC is that it set out guidelines in a document titled, **“Party List Formula & Rules of Submission”** which was annexed to the Supplementary Affidavit of Moses Kipkogei, a Senior Legal Officer at the IEBC and sworn on 5<sup>th</sup> April 2013. We have studied the guidelines and we agree with the petitioners and interested parties that the guidelines are limited to formal requirements. The IEBC did not attempt to define or give guidelines to the terms used in the Constitution like, “special interests”, “marginalized”, “persons with disability” and “ethnic diversity.”

63. The course adopted by the IEBC, we think, was guided by the approach adopted by the court in the case of **Micah Kigen and 2 Others v Attorney General and 2 Others Nairobi Petition No. 268 and 398 of 2012 [2012] eKLR**. In that case the court considered the definition of special interests under the provisions of **Article 97(1)(c)** and it held that, *“the nature of special interests requiring representation is infinite and various and a political party must be permitted to define those interests from time to times ..... any special interests may emerge in future and which the political party may consider require representation.”* Thus IEBC, in formulating its guidelines, left it to the parties to define the special interests and to indicate in their respective party lists the special kind of interests the person so nominated represented. Counsel for the IEBC, submitted that the IEBC ensured that the list submitted complied with the Constitution and the law. In exercising its power to supervise the list, IEBC contended that it drew the parties’ attention to deficiencies in their lists and where necessary, it directed them to rectify the lists.

64. APDK and KI argue that the decision in the **Micah Kigen Case** should be revisited for several reasons. Mr Mwenesi submitted that the case was not applicable to the facts of this case because the matter in issue in that case concerned the constitutionality of particular provisions of the **Elections Act, 2011**. KI on the other hand contended that the learned judge in construing the meaning of “special interests” failed to take into account the whole context, not just of the Article in question but of the entire Constitution which suggests that the whole purpose of the provisions concerning allocation of party seats was to bring into legislative bodies voices that have been historically excluded.

65. While the parties have submitted at length on the need to define the terms such as *“special interest”* to give clarity to the process of nomination, we are of the view that it is not necessary to do so in this case. The Constitution imposes the primary obligation to ensure that the lists are compliant with the Constitution on the IEBC. The IEBC is required to scrutinize the lists forwarded to it to ensure that the lists comply with the Constitution, laws and regulations and in each case to ensure that the special interests are represented in the said lists.

66. In the **Micah Kigen Case** it was observed that, *“[30] .... Article 90(2) ..... bestows upon the IEBC the responsibility of ensuring that the party lists meet certain criteria set out in the Constitution and legislation. The Political Parties themselves, just as any other person or State organ, are bound to observe all provisions of the Constitution including those that require that the rights of minorities, youth and persons with disabilities be promoted and protected.”*

67. We have reflected on whether it is necessary to issue guidelines or even reconsider the findings in

the *Micah Kigen Case*. We decline to do so. In the case of *Prinsloo v Van der Linde and Another 1997 (3) SA 1012 (CC)* at para 20, the Constitutional Court of South Africa warned against making sweeping statements about difficult and complex areas of equality and discrimination. The court observed that in view of the history of that country, “*All this reinforces the idea that this Court should be astute not to lay down sweeping interpretations at this stage but should allow the equality doctrine to develop slowly and, hopefully, surely. This is clearly an area where issues should be dealt with incrementally and on a case by case basis with special emphasis on the actual context in which each problem arises.*” We fully adopt these sentiments particularly as we think that laying down definitions of the various terms that govern allocation of special seats would be limiting the authority of the IEBC to do what it is required to do under the Constitution. We also decline to take the course suggested by the petitioner as we have not had the opportunity to interrogate specific nominees or persons whose inclusion in the party lists is challenged. We have also not heard from the political parties which submitted and prepared the lists. (See also *Community Advocacy and Awareness Trust and Another v Attorney General Nairobi Petition No. 243 of 2011 (Unreported)*)

68. Another reason we have declined the entreaty to set guidelines, is that we think that such a process must be participatory as demanded by **Article 10**. The KNCHR, in its brief, drew our attention to international best practises and comparative jurisprudence that may be worth emulating but in our view the process of developing guidelines must involve all stakeholders like the constitutional and statutory commissions, some of which are party to these proceedings, civil society organisations and political parties. We are convinced that our legal provisions are inadequate in certain respects and may necessitate legislative action but we cannot, by judicial fiat, take over the responsibilities of other constitutional and statutory bodies.

69. The court would, by issuing guidelines at this stage, constrain the constructive engagement between stakeholders that would result in enactment and implementation of measures, policies and regulations that would improve the participation of persons who live on the margins of the political process.

70. We think that the obligation of the IEBC must also be construed in light of the obligation of the State and every State organ to observe, respect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights rooted in **Article 21**. The implementation of fundamental rights cannot be passive and must be active in order to achieve the objects of the Constitution (see *Kituo cha Sheria v Independent Electoral and Boundaries Commission (supra)*). We find that the IEBC did not develop sufficient guidelines or take specific steps aimed at increasing or promoting the participation of vulnerable groups within the electoral process other than passively inspecting the party lists submitted to it.

71. The IEBC and the other constitutional and statutory commissions have a duty, in accordance with **Article 249(1)** to “(a) protect the sovereignty of the people; (b) secure the observance by all State organs of democratic values and principles; and (c) promote constitutionalism.” This means that IEBC and the other commissions must work in concert to ensure that the rights of persons with special interests identified by **Article 90(1)** are realised. Constitutional commissions cannot work in splendid isolation. The need for constitutional and statutory commissions to work together is particularly acute given that the generation of party lists is entirely a political party matter and membership of political parties is voluntary. There must be concerted efforts by those bodies that bear primary responsibility for protecting, promoting and realizing the rights of vulnerable members of society to put in place policies and measures that increase the participation of these groups in the political sphere. The Constitution demands this and the international instruments we have referred to impose this obligation on the State. The fact that this petition has been filed just before the General election by one constitutional commission against another suggests that there is a lack of communication, co-operation, co-ordination and engagement between these bodies. This state of affairs is untenable and must be addressed and

corrected and it is our obligation to so direct.

**Did IEBC comply with its responsibility to conduct and supervise the elections**

72. The fact that we have declined to issue the guidelines sought by the parties does not in any way diminish the responsibility of the High Court. It has been emphasised in many decisions that where there is a breach of the Constitution, the High Court will not hesitate to set the Constitution on its course. See generally *Federation of Women Lawyers of Kenya (FIDA – K) and Others v Attorney General and Others Nairobi Petition No. 102 of 2011 (Unreported)*, *Trusted Society of Human Right Alliance v Attorney General Nairobi Petition No. 299 of 2012 (Unreported)* and *Jeanne W. Gacheche and 6 Others v Judges and Magistrate’s Vetting Board and Others Nairobi Judicial Review No. 295 of 2011, 433, 434 and 438 of 2012 (Unreported)*. We now turn to consider whether the IEBC violated its constitutional responsibility.

73. The manner of compiling the party lists is clearly set out in **regulation 54** of *the General Regulations* which at the pertinent part provides as follows;

*Submission of political party list for allocation of special seats.*

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) *The party list referred to in subregulation (1) shall contain the name, address, age, sex, disability and category of disability, phone number, occupation, elective post sought and such other qualifications as are provided under the Constitution and the Act.*

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

*(a) by signed by the authorised official of the political party submitting the party list; and*

*(b) be submitted in hard copy and in electronic form.*

(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) *The Commission may reject a nominee submitted by a political party for any elective post if that nominee is not qualified to be elected to the office for which the nomination is sought as specified under the Constitution or the Act.*

(6) *The rejection by the Commission of a nominee under this regulation shall not invalidate the entire party list submitted by the political party.*

(7) *The Commission, after making the decision to reject a nominee, inform the political party concerned of that decision and request that political party to submit another name within such time as the Commission shall determine.*

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

circulation. [Emphasis ours]

74. During the hearing of the matter, we directed the IEBC to file and serve on all the parties, the party lists submitted to it under **Article 90**. The IEBC filed the list through the affidavit of Mahamud Jabane sworn on 28<sup>th</sup> March 2013. Due to limited time, we admitted, with the consent of all the parties, an analysis by APDK of the party lists. The analysis disclosed the following;

- Some political parties did not follow their own internal nomination processes.
- Some nominated members appearing on the party lists were not members of the party in whose list they appeared.
- The procedures for nominating persons with disabilities given by IEBC to parties were not followed as some lists did not have male and female representatives from each county.
- Some names appeared in more than one list.
- There was no gender balance in most counties as the parties gave either male or female only lists.
- Some counties did not have lists containing persons with disabilities.
- The parties placed emphasis on certain forms of disabilities thus no deaf person was nominated in any county in the country despite the fact that they applied to be considered for nomination.
- Some nominees are not qualified for the positions.

75. Our review of the evidence and material filed reveals that a substantial part of the grievances before us was that the manner in which the party lists were prepared and dealt with by the IEBC was not transparent. This made it difficult to know whether, in fact the IEBC has addressed the qualifications of the party members on the list and whether the list complied with the provisions of the Constitution and the law.

76. The petitioner and the interested parties are agreed that the IEBC did not publish the final lists in at least two newspapers with nationwide circulation in accordance with **regulation 54(8)** of the **General Regulations**. The final lists that the IEBC is purported to have published on its website were not readily accessible and in some instances could not be downloaded.

77. What is clear to us and we accordingly so find is that the provisions of **regulation 54(8)** of the **General Regulations** were not complied with. The reason for requiring publication of the party lists is not idle. As Mr Ochola, counsel for the 5<sup>th</sup> interested party submitted, part of the responsibility of IEBC is to publish the party lists in order to afford the public an opportunity to review the lists to see whether they comply with the Constitution. Further that since voting at the General election affects the manner in which the special seats are to be distributed, it is therefore necessary for members of the public to know the persons proposed to be elected on the basis of party lists and vote according to their preference. We agree with the 5<sup>th</sup> interested party's submission that compliance with these provisions enhances the political parties as a tool of propounding good governance, integrity, transparency and accountability.

78. Another important reason for publication of the party lists is to enable parties invoke the dispute resolution process provided for under the Constitution. Under **Article 88(4)(e)** of the Constitution, as read with **section 74** of the **Elections Act, 2011**, the IEBC has the mandate to settle electoral disputes including disputes relating to or arising out of nominations. As a result of failure to publicise the party lists, the public was effectively denied the opportunity to demand accountability on the part of the IEBC. In our view, this litigation would have been avoided had the IEBC complied with this provision and made the list available to the public for scrutiny as contemplated by **the General Regulations**. It is also through this process that IEBC would have demanded accountability from the political parties and ensured that the party lists comply with the Constitution and the law.

## **Reliefs**

79. The petitioner has sought several declarations as we have set out above. However, the responsibility of the Court is to craft an appropriate remedy that will vindicate the rights of the persons aggrieved and also remedy the breach of the Constitution. Remedies for breaches of the Constitution are not granted in a vacuum but take into account the existing legal and factual situation. In ***Kituo cha Sheria v Independent Electoral and Boundaries Commission (Supra)***, the court noted that, “Having established a violation to the extent that the State failed in its obligations to the [petitioners], the Court is called upon to consider the relief. Article 23 empowers the Court to frame an appropriate remedy to vindicate the rights of the person aggrieved. The nature of relief to be granted is not merely a theoretical matter but a practical one that must depend on the circumstances of each case.” (See also ***Jeffer Issak Kaur v Ministry of Justice, National Cohesion and Constitutional Affairs and Others Nairobi Petition No. 556 of 2012 (Unreported)***).

80. We note that the General election has already taken place and the elected members of the National Assembly, Senate and the County assemblies are known. The proportion of party list seats allocated to specific parties is also known and as a result of the elections, some parties will not benefit from having their party members elected on the basis of the lists submitted to the IEBC. In granting relief we also bear in mind that it is important that the workings of constitutional bodies must not be unduly constrained particularly in this important transition period. It is also important to ensure that members elected on the basis of party lists begin participating in the legislative activities of their respective bodies as soon as possible to represent special interests.

81. We also take into account the fact that the party lists must be submitted on a certain date and thereafter cannot be amended. In the circumstances, we also agree with the submission by KI that annulling entire party lists may not be feasible at this stage. We however decline to take the course suggested by KI which seeks to involve the court in the minutiae of managing the party lists by striking out names of persons who do not meet the constitutional criteria from the list. We are reluctant to take this course, as the political parties and the members included in those lists did not appear in these proceedings to defend their respective positions.

82. In our view the appropriate remedy is one that recognises the rights of third parties to contest the contents of lists yet imposes on the IEBC the obligation to exercise its constitutional responsibility to satisfy itself that the lists meet constitutional criteria.

83. We shall therefore order IEBC to publish as required by **regulation 54(8)** of the **General Regulations** the party lists of those parties which have qualified under **Article 90(3)**. Thereafter, any person dissatisfied with the list shall be at liberty to file a complaint with the IEBC in accordance with **Article 88(4)(e)** as read with **section 74** of the **Elections Act, 2011**. We shall impose time limits in order to ensure that the process comes to an end.

84. Although the principles we have set out above apply equally to parliamentary seats, our position regarding these seats was clearly spelt out in our ruling of 25<sup>th</sup> March 2013. Members of the Senate and National Assembly nominated under **Articles 97(c), 98(1)(b), (c) and (d)** of the Constitution were Gazetted on 20<sup>th</sup> March 2013 by **Gazette Notice No. 3508**. Upon such gazettelement they became members of the respective houses of Parliament. Under **Article 105** of the Constitution, a question of determination of membership can only be determined by way of an election petition. **Article 105** provides as follows;

Determination of questions of membership.

**105.** (1) *The High Court shall hear and determine any question whether—*

*(a) a person has been validly elected as a member of Parliament; or*

*(b) the seat of a member has become vacant.*

*(2) A question under clause (1) shall be heard and determined within six months of the date of lodging the petition.*

*(3) Parliament shall enact legislation to give full effect to this Article.*

85. We expressed the view that the provisions of **Article 105** are mandatory and any challenge to persons duly gazetted as members of the National Assembly and Senate must now be in accordance with the procedures provided in the ***Elections Act, 2011*** and the ***Elections (Parliamentary and County Elections) Petition Rules, 2013***. These Rules provide that any person may file a petition to challenge the election of a member of Parliament (***Kones v Republic and Another ex-parte Kimani wa Nyoike and Others (2008) 3 KLR EP 29, Ferdinand Waititu v Independent Electoral and Boundaries Commission and Others Nairobi Election Petition No. 1 of 2013 [2013] eKLR***).

86. Likewise, upon Gazettement of any person as a member of the County Assembly, any challenge to his or her membership to the County Assembly must be in accordance with the provisions of **Part VII** of the ***Elections Act, 2011***.

### **Costs**

87. We have reflected on the issue of costs. The award of costs in matters of the nature before us is entirely within our discretion (see ***John Harun Mwau and Other v Attorney General Nairobi Petition No. 65 of 2010 (Unreported) [2012] eKLR***). We do not think that this is a proper case to award costs to the successful party as the petitioner is a constitutional commission just as the 1<sup>st</sup> respondent is and all of them are concerned with promoting constitutionalism, the rule of law and the objects of the Constitution.

### **Conclusion and disposition**

88. In summary and in answer to the issues we framed for determination, we find as follows;

*a) What is the responsibility of the IEBC in the creation of party lists by political parties under **Article 90**?*

The election contemplated in **Article 90** is one for party list seats which means that the responsibility of the IEBC to conduct and supervise elections under **Article 90** is limited to the allocation of party list seats set out in **Article 90(1)** from the lists submitted to it by the political parties by ensuring that such lists comply with the Constitution, ***Elections Act, 2011*** and the regulations made thereunder and other relevant statutes. Membership of the party lists is determined by the political parties in accordance with their own internal procedures and mechanisms.

*b) Who are qualified candidates for nomination to the special seats created under **Articles 97(1)(c), 98(1) (c) and (d) and 177(1)(b) and (c)**.*

Candidates qualified for nomination under **Article 90** are those persons who represent special interests, the youth, workers, persons with disabilities and marginalised groups identified under the provisions

governing party list seats identified by **Article 90(1)** and other relevant statutes. The IEBC in conjunction with the other constitutional and statutory commissions and political parties have the responsibility to define and generate guidelines for representation of special interests in accordance with the objects of the Constitution.

*c) Did IEBC comply with its responsibility to supervise and conduct the election for special seats under **Article 90**"*

In the circumstances of this case the IEBC failed to meet its obligation to conduct and supervise the conduct of the election for special seats under **Article 90** by failing to publicise the party lists submitted to under **regulation 54** the ***Election (General) Regulations, 2012***.

The IEBC also failed to issue sufficient guidelines that consistent with its obligation to observe, respect, protect, promote and fulfil the rights of persons identified as vulnerable and marginalised to participate in the political process.

89. Based on our findings above, we now make the following orders;

i. The IEBC shall within 5 days from the date hereof publish in accordance with **regulation 54** of the ***Election (General) Regulations, 2012*** the party lists submitted for the parties that have qualified in accordance with **Article 90(3)** for membership of the County assemblies under **Article 177** of the Constitution in at least two newspapers of national circulation.

ii. The IEBC shall immediately put in place mechanisms to resolve any disputes concerning the lists in accordance with **Article 88(4)(e)** of the Constitution as read with **section 74** of the ***Elections Act, 2011*** upon publication of the party lists.

iii. The IEBC shall finalise settlement of all disputes submitted to it in respect of the party lists within 7 days from the date of publication of the party lists stated in (i) above.

iv. The final list of nominees shall be gazetted 7 days after the determination of any disputes.

v. We direct the IEBC to develop a program, in conjunction with constitutional and statutory commissions and political parties, to develop policies and measures geared towards increasing the participation of women, youth, persons with disabilities, marginalised groups and other vulnerable persons to effectively participate in political processes.

vi. Each party shall bear its own costs.

90. We thank the counsel who appeared before us for their erudite and helpful submissions. If we did not refer to each argument and every authority cited it is not because it was not helpful.

**DATED and DELIVERED at NAIROBI this 15<sup>th</sup> day of April 2013**

**I. LENAOLA**

**JUDGE**

**M. NGUGI**

**JUDGE**

**D. S. MAJANJA**

**JUDGE**

Mr Arwa instructed by Rachier and Amollo Advocates for the petitioner.

Mr Mungai instructed by Muriu, Mungai and Company Advocates for the 1<sup>st</sup> respondent.

Ms Munyi, Deputy Chief Litigation Counsel, instructed by the State Law Officer for the 2<sup>nd</sup> respondent.

Mr Mwenesi instructed by S. Musalia Mwenesi Advocates for the 1<sup>st</sup> interested party.

Ms Chelangat, Advocate, instructed by the 2<sup>nd</sup> interested party.

Mr Chigiti, instructed by Chigiti and Chigiti Advocates for the 3<sup>rd</sup> interested party.

Mr Omondi, Advocate, instructed by the 4<sup>th</sup> interested party.

Mr Ochola instructed by Soita and Saende Advocates for the 5<sup>th</sup> interested party.

Ms Menya, Advocate, instructed by Katiba Institute, 1<sup>st</sup> amicus curiae.

Mr Lando, Advocate, instructed by the Kenya National Commission on Human Rights, 2<sup>nd</sup> amicus curiae.



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