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Lt. Hon. Speaker

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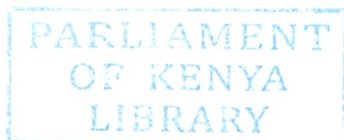
REPUBLIC OF KENYA



THIRTEENTH PARLIAMENT | SECOND SESSION

THE SENATE

STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND
HUMAN RIGHTS



REPORT ON THE PETITION BY MR. LABAN OMUSUNDI
CONCERNING THE ENACTMENT OF A CLAUSE IN THE
ELECTORAL LAWS TO ENSURE THAT ALL NOMINATED
MEMBERS OF COUNTY ASSEMBLY (MCAs) ARE VOTERS AND
RESIDENTS OF THE RESPECTIVE COUNTIES

PAPERS LAID	
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TABLED BY	Sen. Dullo
COMMITTEE	Legal
CLERK AT THE TABLE	Karaka M.

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The Senate,
Parliament Buildings,
NAIROBI.

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LIST OF ABBREVIATIONS AND ACRONYMS

CAF	County Assemblies Forum
COG	Council of Governors
IEBC	Independent Electoral and Boundaries Commission
KLRC	Kenya Law Reform Commission
MCAs	Members of County Assembly
ORPP	Office of the Registrar of Political Parties
PPLC	Political Parties Liaison Committee
PWDs	Persons with Disability
Registrar	Registrar of Political Parties

PRELIMINARIES

Establishment and Mandate of the Committee

The Standing Committee on Justice, Legal Affairs and Human Rights is established under standing order 228 of the Senate Standing Orders and is mandated *'to consider all matters relating to constitutional affairs, the organisation and administration of law and justice, elections, promotion of principles of leadership, ethics, and integrity; agreements, treaties and conventions; and implementation of the provisions of the Constitution on human rights.'*

Membership of the Committee

The Committee is comprised of –

- | | |
|--|--------------------|
| 1) Sen. Wakili Hillary Kiprotich Sigei, MP | - Chairperson |
| 2) Sen. Raphael Chimera Mwinzagu, MP | - Vice-Chairperson |
| 3) Sen. Fatuma Adan Dullo, CBS, MP | - Member |
| 4) Sen. William Cheptumo Kipkiror, CBS, MP | - Member |
| 5) Sen. Hamida Ali Kibwana, MP | - Member |
| 6) Sen. Catherine Muyeka Mumma, MP | - Member |
| 7) Sen. Veronica W. Nduati, MP | - Member |
| 8) Sen. Karen Njeri Nyamu, MP | - Member |
| 9) Sen. Andrew Omtatah Okoiti, MP | - Member |

The Minutes of the Committee in considering the Petition by Mr. Laban Omusundi concerning the enactment of a clause in the electoral laws to ensure that all nominated Members of County Assembly (MCAs) are voters and residents of the respective counties, are attached to this Report as ***Annex 1***.

FOREWORD BY THE CHAIRPERSON

Honourable Speaker,

The Petition by Mr. Laban Omusundi proposing the enactment of a clause in the electoral laws to ensure that all nominated Members of County Assembly (MCAs) are voters and residents of the respective counties was reported in the Senate on Wednesday, 4th October, 2023, following which it was committed to the Standing Committee on Justice, Legal Affairs and Human Rights for consideration.

In the Petition, Mr. Omusundi averred that some nominated MCAs were serving in counties where they are not registered as voters and, therefore, are unaware of the challenges and needs in those specific counties. This practice, he noted, continues to deny the indigenous people who are the voters and who meet all requirements to be given nomination opportunities to serve the people effectively.

Honourable Speaker,

Upon committal of the Petition to the Committee, the Committee invited the Petitioner who presented his arguments before the Committee, after which it invited responses and submissions from key stakeholders who the Committee felt would enrich its consideration of the Petition.

Following this call, the Committee received submissions from the Independent Electoral and Boundaries Commission, the Office of the Registrar of Political Parties, Political Parties Liaison Committee, Kenya Law Reform Commission, Council of Governors, and County Assemblies Forum. Arising from these interactions, the Committee adopted its findings and recommendations, which are set out at Chapters Three and Four of this Report.

Notably, the Committee observed that while it would not be appropriate to place requirements that would be deemed too restrictive and which would run counter to the principles in the Constitution and electoral laws, it was equally important that nominated MCAs have a level of connection with the concerned county, so as to effectively participate in the work of the Assembly and in representation of the interests for which they have been so nominated.

Consequently, the Committee proposes the amendment of section 34 of the Elections Act (No. 24 of 2011) to introduce three-tier criteria that one must meet to be nominated to a county assembly, namely, that one must be **either** –

- i) a registered voter in any of the wards in that county; or
- ii) a resident of that county; or
- iii) have a demonstrated interest in the affairs of that county.

The finer details of how the residency requirements and the interest in the affairs of the county are to be determined may be addressed subsequently through Regulations.

Honourable Speaker,

I take this opportunity to commend the Members of the Committee for their devotion and commitment to duty which made the consideration of the Petition successful. I also wish to thank the Offices of the Speaker and the Clerk of the Senate for the support extended to the Committee in undertaking this assignment.

Honourable Speaker,

It is now my pleasant duty, pursuant to Standing Order 238(2), to present the Report of the Standing Committee on Justice, Legal Affairs and Human rights on the Petition by Mr. Laban Omusundi proposing the enactment of a clause in the electoral laws to ensure that all nominated Members of County Assembly (MCAs) are voters and residents of the respective counties.

Signed

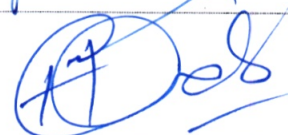


Date.....14.11.2023.....

SEN. WAKILI HILLARY SIGEI, MP
CHAIRPERSON, STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS
AND HUMAN RIGHTS

ADOPTION OF THE REPORT ON THE PETITION BY MR. LABAN OMUSUNDI CONCERNING THE ENACTMENT OF A CLAUSE IN THE ELECTORAL LAWS TO ENSURE THAT ALL NOMINATED MEMBERS OF COUNTY ASSEMBLY (MCAs) ARE VOTERS AND RESIDENTS OF THE RESPECTIVE COUNTIES

We, the undersigned Members of the Standing Committee on Justice, Legal Affairs and Human Rights, do hereby append our signatures to adopt this Report.

No	Name	Signature
1.	Sen. Wakili Hillary Kiprotich Sigei, MP (<i>Chairperson</i>)	
2.	Sen. Raphael Chimera Mwinzagu, MP (<i>Vice-Chairperson</i>)	
3.	Sen. Fatuma Adan Dullo, CBS, MP	
4.	Sen. William Cheptumo Kipkiror, CBS, MP	
5.	Sen. Hamida Ali Kibwana, MP	
6.	Sen. Catherine Muyeka Mumma, MP	
7.	Sen. Veronica W. Nduati, MP	
9.	Sen. Andrew Omtatah Okoiti, MP	

CHAPTER ONE: INTRODUCTION

1.0 Summary of the Petition

1. The right to present petitions to public authorities is provided for at Article 37 of the Constitution. Article 119(1) further provides that *‘Every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation.’*
2. Parliament enacted the Petition to Parliament (Procedure) Act (No. 12 of 2012) to make provision for the procedure for the exercise of this right. Further, Part XXVII of the Standing Orders of the Senate also makes provision of how this right may be exercised.
3. Pursuant to the said provisions, at the sitting of the Senate held on Wednesday, 4th October, 2023, the Speaker of the Senate reported to the Senate that a Petition had been submitted by Mr. Laban Omusundi proposing the enactment of a clause in the electoral laws to ensure that all nominated Members of County Assembly (MCAs) are voters and residents of the respective counties. A copy of the Petition is attached to this Report as *Annex 2*.
4. The salient issues contained in the Petition were –
 - a) That there has been a public outcry on the matter of nominations of Members of the County Assemblies;
 - b) That some of the nominated MCAs are serving in counties they are not registered voters and, therefore, unaware of the challenges and needs in those specific counties. An example is where a person who participated in politics in Kiambu is nominated in Turkana, Nairobi, Kericho, Nakuru, Kakamega, Murangá or Kajiado county assemblies; and
 - c) This practice continues to deny the indigenous people who are the voters and who meet all requirements to be given nomination opportunities to serve the people effectively.
5. The petitioner, therefore, prayed that the Senate intervenes on this matter with a view to enacting a clause in electoral laws that will make sure that all nominated MCAs are registered voters and residents of their respective counties that they are nominated into reflecting ethnic communities in those respective counties.

1.2 Legal Provisions on the Nomination of MCAs

6. The nomination of MCAs is provided for under the Constitution, the Elections Act (No. 24 of 2011), the Elections (General) Regulations of 2012, and the Elections (Party Primaries and Part Lists) Regulations 2017
7. Article 177(1) of Constitution provides that a county assembly consists of—
 - (a) *members elected by the registered voters of the wards, each ward constituting a single member constituency, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year;*
 - (b) *the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender;*
 - (c) *the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and*
 - (d) *the Speaker, who is an ex officio member.*
8. According to Article 177(2) and (3), members elected under Article 177(1)(b) and (c) shall be nominated by political parties in proportion to the seats received in that election in that county by each political party under paragraph (a) in accordance with Article 90, and the number of members shall be determined after declaration of elected members from each ward.
9. Article 90 of the Constitution provides as follows—
 - (1) *Elections for the seats in Parliament provided for under Articles 97 (1) (c) and 98 (1) (b), (c) and (d), and for the members of county assemblies under 177 (1) (b) and (c), shall be on the basis of proportional representation by use of party lists.*
 - (2) *The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) and shall ensure that—*
 - (a) *each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided for under clause (1), within the time prescribed by national legislation;*
 - (b) *except in the case of the seats provided for under Article 98 (1) (b), each party list comprises the appropriate number of*

qualified candidates and alternates between male and female candidates in the priority in which they are listed; and

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

(3) The seats referred to in clause (1) shall be allocated to political parties in proportion to the total number of seats won by candidates of the political party at the general election.

10. Section 25(1) of the **Elections Act (No. 24 of 2011)** provides that—

Unless disqualified under subsection (2), a person qualifies for nomination as a member of a county assembly if the person—

(a) is registered as a voter;

(b) satisfies any educational, moral and ethical requirements prescribed the Constitution and this Act; and

(c) is either-

(i) nominated by a political party; or

(ii) an independent candidate supported by at least five hundred registered voters in the ward concerned.

11. Section 34(1) of the Elections Act replicates Article 90 of the Constitution and provides that the election of members for the National Assembly, Senate and county assemblies for party list seats specified under Articles 97 (1) (c) and 98 (1) (b) (c) and (d) and Article 177 (1) (b) and (c) of the Constitution shall be on the basis of proportional representation and in accordance with Article 90 of the Constitution.
12. Section 34(4) provides that a political party which nominates a candidate for election under Article 177 (1) (a) shall submit to the Commission a party list in accordance with Article 177 (1) (b) and (c) of the Constitution.
13. Section 34(6A) gives the Commission the mandate to review the list to ensure compliance with the prescribed regulations and issue the political party with a certificate of compliance; or require the political party to amend the party list to ensure such compliance failing which the Commission shall reject the list.
14. Section 34(8) provides that a person who is nominated by a political party under subsection (2), (3) and (4) shall be a person who is a member of the political party on the date of submission of the party list by the political party.

15. Section 36 (1) provides that a party list submitted by a political party under Article 177 (1) (b) of the Constitution shall include a list of the number of candidates reflecting the number of wards in the county, while the party list under Article 177 (1) (c) of the Constitution shall include eight candidates, at least two of whom shall be persons with disability, two of whom shall be the youth and two of whom shall be persons representing a marginalised group.
16. Regulation 54(1) of the **Elections (General) Regulations of 2012** provides that 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.
17. Regulation 54(2) provides that for the details to be included to the party list, and these are the name, address, age, sex, disability and category of disability, phone number, occupation, identity card number or passport number and coloured passport size photograph image, elective post sought and such other qualifications as are provided under the Constitution and the Act in the prescribed Form 24B.
18. Regulation 55(1) provides that the party list contemplated under regulation 54 shall be prepared in accordance with the nomination rules of the political party.
19. Regulation 20 of the **Elections (Party Primaries and Part Lists) Regulations 2017** provides that a party list shall contain the names of all the persons who would stand elected if the party were to be entitled to all the seats available under Articles 97(1)(c), 98(1)(b), (c), (d) and 177(1) (b) and (c) and shall alternate between male and female candidates.
20. Regulation 20 (2) provides that a party list submitted under sub regulation (1) shall ensure fair representation to take into consideration the principles of Article 81(b) and Article 100 of the Constitution.

1.3 Previous legislative attempts

21. In 2021, during the 12th Parliament, a Bill amending section 34 of the Elections Act, which deals with submission of party lists, was published by the National Assembly, as the Elections (Amendment) Bill, National Assembly Bills No. 41 of

2021. The Bill was sponsored by Hon. Jeremiah Kioni, the then chairperson of the National Assembly's Constitutional Implementation Oversight Committee.

22. The Bill sought to amend section 34 of the Act to provide that persons nominated to county assemblies should be registered voters in any of the wards within the respective county.
23. The Bill received immense interest and support from both governmental and non-governmental entities, on grounds that it would ensure that the persons nominated understood the issues in the county and would thus be in a position to represent their constituents better and add value to the county assembly, as opposed to persons from outside the county who would only be motivated by monetary gain.
24. The IEBC however opposed the Bill on grounds that persons, under the Constitution, have a right to register as voters and vie for election anywhere they wish within the Republic of Kenya.
25. The Bill was eventually passed by the National Assembly and referred to the Senate, in April 2022, where it lapsed with the term of the 12th Parliament.

CHAPTER TWO: CONSIDERATION OF THE PETITION

2.0 Introduction

26. Upon committal of the Petition to the Standing Committee on Justice, Legal Affairs and Human Rights for consideration, the Committee proceeded to invite the Petitioner who presented his arguments in favour of the prayers contained in the Petition.
27. The Committee further invited written submissions on the Petition, whereupon it received comments from the Independent Electoral and Boundaries Commission, the Office of the Registrar of Political Parties, Political Parties Liaison Committee, Kenya Law Reform Commission, Council of Governors, and County Assemblies Forum.

2.1 Submissions by the Independent Electoral and Boundaries Commission

28. The Independent Electoral and Boundaries Commission (IEBC) submitted comments on the Petition by a letter dated 8th November, 2023 (*Annex 3*). The Commission submitted that –
 - a) there was emerging jurisprudence from the courts that a nominated MCA should be a registered voter and resident in the County of appointment. This was affirmed by the Courts in –
 - i) *Narok Election Petition No. E003 of 2022; Josephine Seneiyo Torome v IEBC & 5 Others*, where the Petitioner averred that the 2nd respondent ought not to have been nominated to Narok County assembly on two grounds: the first being that she was a registered voter and a resident of Nakuru County and, secondly, that the respondent was not a member of the party that nominated her (Jubilee Party). In its determination the court stated that: "*a party list for Narok County assembly must and ought to reflect the face and diversity of the people from Narok. This is important because only a person who hails from Narok, who interacts with the people from Narok on a daily basis or often, can be said to possess adequate knowledge of the aspirations and needs of the people of Narok. Further, an outsider, even with the purest intentions, is not privy to the particular and specific needs of a people he doesn't interact with*". The nomination of the 2nd respondent was declared null and void.

Upon appeal, the High Court upheld the decision of the lower court and stated, "*there is absolute sense that the principle of representation in the County political aspirations and goals should be understood and given meaning within the objects of devolution and principles of devolved governments*".

- ii) ***Kapsabet High Court Election Appeal No. E001 of 2022: Lydia Matuli & ANC v IEBC & 2 Others***, where the High Court upheld the decision of the trial court to annul the nomination of a member to the County Assembly of Nandi while she was registered as a voter in Likuyani, Kakamega County. In upholding the decision of the trial court, the High Court stated that '*while there is no constitutional or statutory provision requiring that a person must be a registered voter in the county whose assembly they seek to be elected in, there should be a purposive interpretation of Article 193(1) of the Constitution which would favour a position that would require a candidate to be a registered voter in that county*'.
 - iii) ***Maralal SPM Election Petition Appeal No. E002 OF 2022; Janet Lenaimalda v Agnes Wambui Nganga & Jubilee Party***. The Petitioner averred that the nomination of Agnes Wambui to the County assembly of Samburu was illegal because she was neither a registered voter nor a resident in Samburu. The court agreed with the Petitioner and the nomination was quashed.
- b) However, there was also jurisprudence from different courts that was completely opposite. For instance, in ***Busia Election Petition No. E001 of 2022; Chairman NEB(DAP-K) V CEO IEBC. Said Jelle Abdi & Another***, the court held that it was not a requirement for a nominated MCA to be a registered voter or a resident of the county of appointment.
- c) The Commission highlighted the decision in ***Petition No.1 of 2019: NGEC v Majority Leader, County Assembly of Nakuru & 4 others; Jubilee Party & Another (Interested Parties) (2019) eKLR***, where the High Court stated that '*Nominated MCAs represent special interest groups especially the vulnerable, minority and historically marginalized groups such as women, youth, persons with disabilities and racial minorities*'. The Court went on to hold that a person need not be a registered voter in a county in order to be nominated in that county, and the qualifications for general registration as a voter should apply even to nominated persons.

- d) On the question of proof of residence, the Commission highlighted the decision in *Constitutional Petition No. E435 of 2022; Charles Makokha Sumba & Others v IEBC & AG*, where the Court held that Regulation 13C of the Election (Registration of Voters) Regulations, 2012 infringes on Article 38 of the Constitution to the extent that it curtails a voter's right to freely make political choices and to transfer registration because of the requirement of being a resident at least six months before the date of transfer.

In practice, it was a problematic regulation to implement as the registration officers often had a difficult time establishing what would suffice as proof of residence. The requirement of residence for special seat nomination would pose a similar challenge.

- e) Highlighting the objects of devolution as set out in the Constitution, IEBC noted that the Constitution envisions that the communities in a county manage their own affairs and that the marginalized groups are protected.
- f) The Commission therefore submitted that the amendments proposed in the Constitution may be deemed unconstitutional for want of adhering to the cited court judgments and the letter of the Constitution.
- g) Additionally, IEBC underscored the need for development of a comprehensive legal framework on the representation of ethnic and other minorities and marginalized groups to realize the intention of Articles 90, 97, 98, 100, 174 and 177 of the Constitution.

2.2 Submissions by the Office of the Registrar of Political Parties

- 29. The Office of the Registrar of Political Parties submitted its comments on the Petition *vide* a letter dated 8th November, 2023 (*Annex 4*). The Registrar submitted that –
 - a) The Constitution appreciates the process of filling the special seats in Parliament and county assemblies as an election.
 - b) In the case of county assemblies, the qualifications for election as a member are documented under Article 193(1) of the Constitution, to wit –

193. (1) Unless disqualified under clause (2), a person is eligible for election as a member of a county assembly if the person—

(a) is registered as a voter;

(b) satisfies any educational, moral and ethical requirements prescribed by this Constitution or an Act of Parliament; and

(c) is either—

(i) nominated by a political party; or

(ii) an independent candidate supported by at least five hundred registered voters in the ward concerned.

- c) Under the Constitution, the requirement for a candidate to be a registered voter is not qualified to whether one is registered in a particular ward or county. One simply must be registered as a voter in Kenya. Further, the Constitution does not provide for separate qualifications for persons who are elected to a county assembly either through gender top-up list or marginalized groups list.
- d) That, residency in an electoral area is neither a ground to register as a voter nor to vie for an elective seat. This could be attributed to various reasons including change of job location, loss of jobs hence changes in residency, historical reasons as to why some Kenyans reside in urban areas but registered as voters in their rural are, as well as freedom of movement.
- e) That the closest residency has had an effect on voting, in recent times, was through Regulation 13C of the Election (Voter Registration) Regulations, 2017, which was declared unconstitutional through *Constitutional Petition No. E435 of 2021; Charles Makokha Sumba & 4 Others v IEBC & AG*.
- f) That the prayer in the Petition would not stand the test of limitation of Article 38 of the Constitution, with regard to the right of every Kenyan to be a candidate for public office without unreasonable restrictions. The unreasonableness may include setting different parameters for party list election, yet Article 193 of the Constitution does not dictate any conditions.
- g) On the effect of the proposed amendment on political parties, ORPP submitted that proposal would offer 'big parties' undue advantage over 'small parties' as the former may have party members who are registered as voters across the 47 counties therefore, they would be the only parties compliant with such party list requirements. Thus, it would have a negative systemic effect on political parties.

- h) Further, by dint of paragraph 19 of the Second Schedule to the Political Parties Act, 2011 and section 34(6B) of the Elections Act, 2011, party nominations provide for various methods of development of party lists. This may include prioritizing party members that participate in party nominations but do not win. Hence, it incentivizes participation in party nominations.
- i) The Registrar highlighted the decision of the High Court in *Election Petition Appeal 5 & 7 of 2018, Victoria Cheruto Limo & Another v IEBC & Another (2018) eKLR*, where the Court observed that ‘my constitutional interpretation is that only those who were registered to vote in Garissa County could qualify for nomination by the party to the County Assembly of Garissa. In my view therefore, Victoria Cheruto Limo being a registered voter of Uasin Gishu County was not qualified and not validly nominated to fil the gender top-up position in the Garissa County Assembly’.

30. In concluding, the Registrar submitted that the voting unit for development of party lists are party members and, while the members may be categorised in electoral areas, section 25 of the Elections Act, 2011 as derived from Article 193 of the Constitution on qualifications for MCAs only anticipate the candidates to be registered voters.

2.3 Submissions by Kenya Law Reform Commission

31. The Kenya Law Reform Commission submitted its comments on the Petition vide a letter dated 31st October, 2023 (*Annex 5*). The Commission submitted that –
- a) On the question of residency and area of registration as a voter, KLRC observed that the Constitution provides for special seat members and representatives of marginalized groups to promote inclusivity, diversity, and the protection of the rights and interests of traditionally underrepresented and disadvantaged communities. This inclusion is based on key principles and reasons including promotion of equality and inclusivity, protection of minority rights and interests, enhancement of democracy, and fostering national unity and social inclusion.
 - b) These provisions were intended to address historical imbalances, protect the rights of underrepresented communities, and strengthen the principles of democracy and inclusion in the country’s political processes.

- c) The requirement that elected or nominated individuals to political offices should be residents or registered voters in areas they represent was based on principles related to representation, accountability, connection to the community, preventing outside influence and legitimacy and trust.
- d) There was therefore a need to balance the principles of representation and accountability with the need for diversity and expertise.
- e) KLRC noted that, while the Constitution does not speak to residency in clauses relating to nomination of the MCAs or Governor, the Commission leaned towards an adoption of the proposal based on the social, economic, and political reasons already enumerated.
- f) On the question whether reflection of the ethnic communities in respective counties was necessary in determining who can be nominated as an MCA, KLRC submitted that electoral laws and provisions must be consistent with constitutional principles and must not infringe upon fundamental rights. Thus, adopting the proposal contained in the petition could result in constitutional or legal challenges such as potential violations of the freedom of movement, association, and non-discrimination.

32. In concluding, KLRC submitted that –

- i) There was more merit for the requirement of residency and voter registration for a nominated MCA in the respective county of nomination, over the cons on the requirement of residency; and
- ii) The proposal for ethnic consideration in the nomination of MCAs would lead to Constitutional infringement, and therefore should be rejected.

2.4 Submissions by Political Parties Liaison Committee

33. The Political Parties Liaison Committee submitted written comments (*Annex 6*) and appeared before the Committee on Thursday, 9th November, 2023 where it submitted as follows –

- a) The role of political parties in Kenya's democratisation, national cohesion and championing the rights of special interest groups was a crucial aspect of the political landscape. This is achieved by providing members a platform to participate, promoting inclusivity and minority rights advocacy.

- b) The National Cohesion and Integration Act, 2008 provides a legal framework for promoting national cohesion and addressing ethnic tensions in Kenya. Political Parties are therefore required to adopt internal mechanisms that ensure representation of all ethnic groups and refrain from engaging in practices that foster discrimination and exclusion.
- c) The Petition requiring nominated MCAs to be registered voters in the county of appointment would be an affront to political parties in realising the above mandate and left unchallenged, would undoubtedly lead to ethnic balkanization.
- d) PPLC further submitted that the modern nature of residency and ethnicity currently would make it challenging to ascertain the grounds with which to validate the suitability of candidates.
- e) That the current legal provisions do not necessitate that candidates should be registered voters nor be resident in the County of appointment. Further, the Constitution contemplated the need for community and diversity in representation in the County executives and County governments. Indeed Section 65 (1)(e) of the County Government Act 2012, obligates county governments to ensure that at least 30% of public positions are filled by people not from the dominant ethnic community in the County.
- f) That nomination of Members contemplated under Article 177(b) and (c) is solely a preserve of political parties and nomination under special elect category is reserved for the special interest groups. Therefore, political parties should be allowed to nominate individuals with relevant expertise. Additionally in the fulfilment of their mandate to national values, political parties should be allowed to nominate any Kenyan to county assemblies and any legislation otherwise would be encroaching on the mandate of political parties.
- g) That there is a major difference between residents and voters. Countless voters reside elsewhere from where they vote, an example being civil servants who are registered in different areas from where they work and reside. Additionally, the Kenyan urban phenomena of urban Kenyans who vote in villages while residing in towns. This reinforces the discrimination aspect.

34. PPLC therefore urged the Committee to not grant the prayers sought in the Petition, as this would be counterproductive to the initiatives of political parties in promoting national cohesion.

2.5 Submissions by the Council of County Governors

35. The Council of Governors submitted its comments on the Petition (*Annex 7*) where it submitted as follows –
- a) Article 177 of the Constitution provides for the membership of a county assembly, and is supplemented by section 7 of the County Governments Act, 2012. These provisions do not contain a requirement that the members of county assembly, whether directly or specially elected, should be residents of the respective counties. The only requirement prescribed in law, at section 25 of the Elections Act, 2011, is that the person must be a registered voter and has been a citizen of Kenya for at least 10 years before the elections.
 - b) It could therefore be deduced that the requirements under section 7(2) of the Act is that MCAs should be persons who are not only voters in the county but are also residents on that county. This is the only way that the community and cultural diversity of the county and adequate representation to protect minorities within the county may be achieved.
 - c) Noting that the roles of MCAs include to maintain close contact with the electorate and consult them on issues before or under discussion in the county assembly, present views, opinions and proposals of the electorate to the county assembly, and provide a linkage between the county assembly and the electorate on public service delivery, the Council of Governors submitted that only MCAs resident in the county can discharge those functions.
36. The Council of Governors therefore urged the Committee to accede to the prayers contained in the Petition and, further, to amend section 25(1)(a) and 2(c) of the Elections Act, 2011 to require that, for one to be nominated as a MCA, then that person –
- i) must be a registered voter in that county; and
 - ii) must be a resident of the county for at least five years immediately preceding the date of elections.

2.6 Submissions by the County Assemblies Forum

37. The County Assemblies Forum submitted written comments vide a letter dated 9th November, 2023 (*Annex 8*) and appeared before the Committee on the same day where it submitted as follows –

- a) While the petitioner's emphasis on ethnic community representation may be well-intentioned, it may inadvertently promote division on ethnic lines. Emphasising ethnicity in the selection process could lead to tension, exclusion, and favouritism among communities which may not be in the best interest of fostering unity and cohesion.
- b) Requiring nominated MCAs to be residents of their respective counties may introduce complexities in practice, as defining residency and verifying it for all candidates could pose administrative and logistical challenges, potentially slowing down the selection process.
- c) Implementing the Petitioner's proposals might limit the autonomy of political parties in selecting nominated MCAs. While transparency and community involvement are vital, excessive constraints on party nominations could hinder their ability to field the most qualified and aligned candidates.
- d) CAF therefore recommended reinforcing existing provisions to ensure the selection of nominated members who are residents of their respective counties. This could be done by incorporating clear guidelines that specify the residency requirements for nominated MCAs in the electoral laws.

CHAPTER THREE: OBSERVATIONS

38. Having considered the Petition and the submissions received thereon, the Standing Committee on Justice, Legal Affairs and Human Rights observes that –

- a) The Constitution and electoral laws do not require members of county assembly, whether directly or specially elected, to be registered as voters in the respective counties or to be resident in the said counties. Instead, the requirement is for one to be registered as a voter, to satisfy the educational and other requirements prescribed in law, and to be nominated by a political or, if an independent candidate, to be supported by at least five hundred registered voters in the concerned ward.
- b) There have been conflicting decisions of the High Court on whether it is mandatory that, for one to be nominated as a member of county assembly, they must be a registered voter in that county. There is therefore a need to clarify, through legislation, both the question whether one must be a registered voter in the concerned county and whether one must be a resident of that county.
- c) Introducing a mandatory residency requirement for one to be nominated as a member of county assembly would pose administrative and logistical challenges in its implementation.
- d) It would be discriminatory to impose separate eligibility requirements for elected and nominated members of a county assembly, noting that, once elected, both are considered equal and perform similar functions in the assembly.
- e) At the same time, there is need to ensure that nominated members of county assembly have a demonstrable connection to the county in which they seek to be nominated as members. This may be achieved by providing several avenues through which one may qualify for nomination, including registration as a voter in the concerned county, residency within that county, or a demonstrable interest in the affairs of that county.
- f) Requiring the nomination of MCAs to reflect the ethnic composition of the relevant county would result in constitutional or legal challenges such as potential violations of the freedom of movement, association, and non-discrimination.

- g) Political parties, in developing lists for nomination of members to county assemblies, must comply with provisions of the Constitution, statutes and regulations including on the promotion of inclusivity, diversity, and the protection of the rights and interests of traditionally underrepresented and disadvantaged communities.
- h) There is need for development of a comprehensive legal framework on the representation of ethnic and other minorities and marginalized groups to realize the intention of Articles 90, 97, 98, 100, 174 and 177 of the Constitution.

CHAPTER FOUR: RECOMMENDATION

39. Arising from its observations as set out in the preceding Chapter, the Standing Committee on Justice, Legal Affairs and Human Rights recommends that section 34 of the Elections Act (No. 24 of 2011) be amended to provide that, for one to be eligible for nomination to a county assembly, one would need to demonstrate that he or she is either a registered voter in any of the wards in that county, is a resident of that county, or has a demonstrated interest in the affairs of that county.

LIST OF ANNEXES

- Annex 1:*** Minutes of the Committee in Considering the Petition
- Annex 2:*** Copy of the Petition
- Annex 3:*** Submissions by Independent Electoral and Boundaries Commission
- Annex 4:*** Submissions by Office of the Registrar of Political Parties
- Annex 5:*** Submissions by Kenya Law Reform Commission
- Annex 6:*** Submissions by Political Parties Liaison Committee
- Annex 7:*** Submissions by Council of County Governors
- Annex 8:*** Submissions by County Assemblies Forum

Annex 1: Minutes of the Committee in
Considering the Petition



13TH PARLIAMENT | 2ND SESSION

MINUTES OF THE NINETIETH SITTING OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON TUESDAY, 9TH NOVEMBER, 2023 AT 9.30 A.M. AT COMMITTEE ROOM 5, FIRST FLOOR, MAIN PARLIAMENT BUILDINGS

PRESENT

- | | |
|--|-----------------------------------|
| 1. Sen. Wakili Hillary Kiprotich Sigei, MP | - Chairperson (<i>Chairing</i>) |
| 2. Sen. Veronica W. Maina, MP | - Member |
| 3. Sen. Catherine Muyeka Mumma, MP | - Member |
| 4. Sen. Karen Njeri Nyamu, MP | - Member |
| 5. Sen. Andrew Omtatah Okoiti, MP | - Member |

ABSENT WITH APOLOGY

- | | |
|--|--------------|
| 1. Sen. Raphael Chimera Mwinzagu, MP | - Vice-Chair |
| 2. Sen. Fatuma Adan Dullo, CBS, MP | - Member |
| 3. Sen. William Cheptumo Kipkiror, CBS, MP | - Member |
| 4. Sen. Hamida Ali Kibwana, MP | - Member |

SECRETARIAT

- | | |
|--------------------------|---|
| 1. Mr. Charles Munyua | - Senior Cler Assistant |
| 2. Ms. Lilian Waweru | - Legal Counsel II |
| 3. Ms. Lynn Aseka | - Clerk Assistant III (<i>Taking Minutes</i>) |
| 4. Mr. Constant Wamayuyi | - Research Officer III |
| 5. Ms. Ndindi Kibathi | - Research Officer III |
| 6. Ms. Ngesa Rosebella | - Public Communications Officer III |
| 7. Ms. Judith Aoka | - Assistant Audio Officer |

INATTENDANCE

- | | |
|-----------------------|--------------------------|
| 1. Mr. Laban Omusundi | - Petitioner |
| 2. Ms. Mary Wangui | - Nakuru Resident |
| 3. Mr. Evans Misati | - PPLC, Chairperson |
| 4. Mr. Kilonzo Chris | - PPLC, Vice-chairperson |
| 5. Mr. Julius Wambua | - PPLC, Officer |
| 6. Mr. Gerry Owiti | - PPLC, Officer |
| 7. Mr. Austine Munene | - CAF |
| 8. Mr. Chege Mwaura | - CAF |

MIN. NO. 440/2023

PRELIMINARIES

The Chairperson called the meeting to order at thirty-five minutes past nine O'clock and opened with a word of prayer. This was followed by a self – introductory session by the Members, Secretariat, and the invited stakeholders.

MIN. NO. 441/2023

ADOPTION OF THE AGENDA

The agenda of the meeting was adopted having been proposed by Sen. Karen Njeri Nyamu, MP, and seconded by Sen. Veronica W. Maina, MP.

MIN. NO. 442/2023

**MEETING WITH THE PETITIONER AND OTHER
STAKEHOLDERS TO RECEIVE SUBMISSIONS ON
THE PETITION BY MR. LABAN OMUSUNDI
CONCERNING THE ENACTMENT OF A CLAUSE
IN THE ELECTORAL LAWS THAT WILL MAKE
SURE THAT ALL NOMINATED MEMBERS OF
THE COUNTY ASSEMBLY (MCAS) ARE VOTERS
AND RESIDENTS OF RESPECTIVE COUNTIES**

The Committee commenced consideration of the Petition by Mr. Laban Omusundi concerning the enactment of a clause in the electoral laws that will make sure that all nominated Members of the County Assembly (MCAs) are voters and residents of respective counties.

a) Mr. Laban Omusundi, the Petitioner

The Petitioner took the Committee through the Petition and urged the Committee to accede with the prayers set out therein.

b) Political Parties Liaison Committee

Upon invitation, the Chairperson of the Political Parties Liaison Committee, Mr. James Misati, submitted that –

- i) The legal regime governing qualifications for nomination to the County Assembly was provided for under Article 193 (1) (a) of the Constitution;
- ii) A Kenya Citizen is allowed to vie anywhere for as long as they are registered voters;
- iii) Under the political parties Act, parties are supposed to be National. Therefore, the political parties should be allowed to nominate any Kenyan to Assemblies and any legislation otherwise it would be encroaching on the mandate of the political parties to fulfill its obligations under the Constitution and relevant Acts;
- iv) There is a difference between voters and residents. Many voters reside elsewhere from where they vote. There are Kenyans who vote in the villages while residing in towns, would that not be discriminating them on basis on where they are registered?

- v) If the prayers as sought by the Petitioner were to be granted, this would be counterproductive to the initiatives of political parties in promoting national cohesion and will perpetuate ethnic hostilities.

c) *County Assemblies Forum*

The Secretary General of the County Assemblies, Hon. Chege Mwaura, took the Committee through the submissions. CAF supported the petition on amending electoral laws to ensure the nominated MCAs are registered voters and residents of their respective counties. CAF recommended a comprehensive review of the electoral laws, involving relevant stakeholders, to achieve a balanced and effective solution.

Following deliberations, the Committee resolved to resume consideration of the Petition at its next meeting.

MIN. NO. 443/2023

ADJOURNMENT

The Chair adjourned the meeting at forty-five minutes past ten O'clock. The next meeting was scheduled to be held on Friday, 10th November, at nine O'clock.



SIGNED:

DATE:



13TH PARLIAMENT | 2ND SESSION

MINUTES OF THE NINETY-SECOND SITTING OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON FRIDAY, 10TH NOVEMBER, 2023 AT 2.00 P.M. AT SAROVA WHITESANDS HOTEL, IN MOMBASA COUNTY

PRESENT

- | | |
|--------------------------------------|----------------------------------|
| 1. Sen. Raphael Chimera Mwinzagu, MP | - Vice-Chair (<i>Chairing</i>) |
| 2. Sen. Catherine Muyeka Mumma, MP | - Member |
| 3. Sen. Andrew Omtatah Okoiti, MP | - Member |

ABSENT WITH APOLOGY

- | | |
|--|---------------|
| 1. Sen. Wakili Hillary Kiprotich Sigei, MP | - Chairperson |
| 2. Sen. Fatuma Adan Dullo, CBS, MP | - Member |
| 3. Sen. William Cheptumo Kipkiror, CBS, MP | - Member |
| 4. Sen. Hamida Ali Kibwana, MP | - Member |
| 5. Sen. Veronica W. Maina, MP | - Member |
| 6. Sen. Karen Njeri Nyamu, MP | - Member |

SECRETARIAT

- | | |
|--------------------------|---|
| 1. Mr. S. Njenga Nguguna | - Director |
| 2. Mr. Charles Munyua | - Senior Cler Assistant |
| 3. Ms. Lilian Waweru | - Legal Counsel II |
| 4. Ms. Lynn Aseka | - Clerk Assistant III (<i>Taking Minutes</i>) |
| 5. Mr. Constant Wamayuyi | - Research Officer III |
| 6. Ms. Ndindi Kibathi | - Research Officer III |
| 7. Ms. Ngesa Rosebella | - Public Communications Officer III |
| 8. Ms. Judith Aoka | - Assistant Audio Officer |

MIN. NO. 451/2023

PRELIMINARIES

The Chairperson called the meeting to order at fifteen minutes past two O'clock and opened with a word of prayer.

MIN. NO. 452/2023

ADOPTION OF THE AGENDA

The agenda of the meeting was adopted having been proposed by Sen. Andrew Okoiti Omtatah, MP and seconded by Sen. Catherine Muyeka Mumma, MP.

MIN. NO. 453/2023

**CONSIDERATION OF THE PETITION BY
TARATISIO IRERI KAWA CONCERNING
INTRODUCTION OF AN AMENDMENT TO THE
CONSTITUTION OF KENYA AND OTHER
RELEVANT LAWS ON THE ELECTION OF THE
DEPUTY PRESIDENT AND DEPUTY GOVERNORS.**

The Committee resumed consideration of the Petition by Mr. Taratisio Ileri Kawa concerning introduction of an amendment to the Constitution of Kenya and other relevant laws on the election of the Deputy President and Deputy Governors.

The Committee was taken through and considered the draft Report on the Petition and Members made proposals be incorporated as observations and recommendations at chapters Three and Four of the report, following which the report will be scheduled for adoption.

MIN. NO. 454/2023

**CONSIDERATION OF THE PETITION BY MUINDI
MBINGU MEMORIAL NGELANI ASSOCIATION
CONCERNING HISTORICAL INJUSTICES
SUFFERED BY RESIDENTS OF NGELANI AREA IN
MACHAKOS COUNTY DURING THE COLONIAL
PERIOD.**

The Committee resumed consideration of the Petition by Muindi Mbingu Memorial Ngelani Association concerning historical injustices suffered by residents of Ngelani area in Machakos County during the colonial period.

The Committee was taken through and considered the draft Report on the Petition and Members made proposals be incorporated as observations and recommendations at chapters Three and Four of the report, following which the report will be scheduled for adoption.

MIN. NO. 455/2023

**CONSIDERATION OF THE PETITION BY MR.
LABAN OMUSUNDI ON BEHALF OF RESIDENTS
OF NAKURU COUNTY CONCERNING THE
ENACTMENT OF A CLAUSE IN THE ELECTORAL
LAWS THAT WILL MAKE SURE THAT ALL
NOMINATED MEMBERS OF THE COUNTY
ASSEMBLY (MCAS) ARE VOTERS AND
RESIDENTS OF RESPECTIVE COUNTIES.**

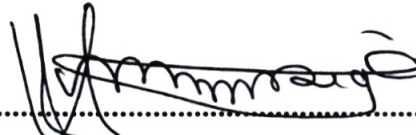
The Committee resumed consideration of the Petition by Mr. Laban Omusundi on behalf of residents of Nakuru County concerning the enactment of a clause in the electoral laws that will make sure that all nominated Members of the County Assembly (MCAs) are voters and residents of respective counties.

The Committee was taken through and considered the draft Report on the Petition and Members made proposals be incorporated as observations and recommendations at chapters Three and Four of the report, following which the report will be scheduled for adoption.

MIN. NO. 456/2023

ADJOURNMENT

The Vice-Chairperson adjourned the meeting at fifty-five minutes past three O'clock. The next meeting was scheduled to be held on Tuesday, 14th November, 2023 at eight O'clock.

SIGNED: 

DATE: 21/11/2023



13TH PARLIAMENT | 2ND SESSION

MINUTES OF THE NINETY-THIRD SITTING OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON TUESDAY, 14TH NOVEMBER, 2023 AT 8.00 A.M. AT COMMITTEE ROOM 5, FIRST FLOOR, MAIN PARLIAMENT BUILDINGS AND ON THE ZOOM ONLINE MEETING PLATFORM

PRESENT

- | | |
|--|-----------------------------------|
| 1. Sen. Wakili Hillary Kiprotich Sigei, MP | - Chairperson (<i>Chairing</i>) |
| 2. Sen. Raphael Chimera Mwinzagu, MP | - Vice-Chair |
| 3. Sen. Fatuma Adan Dullo, CBS, MP | - Member |
| 4. Sen. Catherine Muyeka Mumma, MP | - Member |
| 5. Sen. Karen Njeri Nyamu, MP | - Member |
| 6. Sen. Andrew Omtatah Okoiti, MP | - Member |

ABSENT WITH APOLOGY

- | | |
|--|----------|
| 1. Sen. William Cheptumo Kipkiror, CBS, MP | - Member |
| 2. Sen. Hamida Ali Kibwana, MP | - Member |
| 3. Sen. Veronica W. Maina, MP | - Member |

SECRETARIAT

- | | |
|--------------------------|---|
| 1. Mr. Charles Munyua | - Senior Clerk Assistant |
| 2. Ms. Lilian Waweru | - Legal Counsel II |
| 3. Ms. Lynn Aseka | - Clerk Assistant III (<i>Taking Minutes</i>) |
| 4. Mr. Constant Wamayuyi | - Research Officer III |
| 5. Ms. Ndindi Kibathi | - Research Officer III |
| 6. Mr. Josphat Ng'eno | - Media Relations Officer III |
| 7. Ms. Ngesa Rosebella | - Public Communications Officer III |
| 8. Ms. Judith Aoka | - Assistant Audio Officer |

MIN. NO. 457/2023

PRELIMINARIES

The Chairperson called the meeting to order at twenty minutes past eight O'clock and opened with a word of prayer.

MIN. NO. 458/2023

ADOPTION OF THE AGENDA

The agenda of the meeting was adopted having been proposed by Sen. Catherine Muyeka Mumma, MP and seconded by Sen. Karen Njeri Nyamu, MP.

MIN. NO. 459/2023

THE PARLIAMENTARY POWERS AND PRIVILEGES (AMENDMENT) BILL, 2023 (SENATE BILLS NO. 37 OF 2023)

The Committee was taken through and considered the draft Report on the Parliamentary Powers and Privileges (Amendment) Bill, 2023 (Senate Bills No. 37 of 2023) with the proposed amendments incorporated as observations and recommendations at chapters three and four of the Report.

Thereafter the Committee adopted the Report, having been proposed by Sen. Andrew Omtatah Okoiti, MP and seconded by Sen. Karen Njeri Nyamu, MP.

MIN. NO. 460/2023

PETITION BY MS. ZIPPORAH C. K. SERONEY CONCERNING MISTREATMENT, HARASSMENT, PROPERTY LOSS AND HUMAN RIGHTS VIOLATIONS METED ON THE FAMILY OF THE LATE HON. JEAN MARIE SERONEY

The Committee considered the draft Report as revised to incorporate the observations and recommendations proposed by Members.

Thereupon, the Committee adopted the Report, having been proposed by Sen. Fatuma Adan Dullo, CBS, MP and seconded by Sen. Raphael Chimera Mwinzagu, MP.

MIN. NO. 461/2023

PETITION BY TARATISIO IRERI KAWA CONCERNING INTRODUCTION OF AN AMENDMENT TO THE CONSTITUTION OF KENYA AND OTHER RELEVANT LAWS ON THE ELECTION OF THE DEPUTY PRESIDENT AND DEPUTY GOVERNORS

The Committee considered the draft Report as revised to incorporate the observations and recommendations proposed by Members.

Thereupon the Committee adopted the Report, having been proposed by Sen. Andrew Omtatah Okoiti, MP and seconded by Sen. Catherine Muyeka Mumma, MP.

MIN. NO. 462/2023

PETITION BY MUINDI MBINGU MEMORIAL NGELANI ASSOCIATION CONCERNING HISTORICAL INJUSTICES SUFFERED BY RESIDENTS OF NGELANI AREA IN MACHAKOS COUNTY DURING THE COLONIAL PERIOD

The Committee considered the draft Report as revised to incorporate the observations and recommendations proposed by Members.

Thereupon the Committee adopted the Report, having been proposed by Sen. Catherine Muyeka Mumma, MP and seconded by Sen. Andrew Omtatah Okoiti, MP.

MIN. NO. 463/2023

**PETITION BY MR. LABAN OMUSUNDI ON
BEHALF OF RESIDENTS OF NAKURU COUNTY
CONCERNING THE ENACTMENT OF A CLAUSE
IN THE ELECTORAL LAWS THAT WILL MAKE
SURE THAT ALL NOMINATED MEMBERS OF
THE COUNTY ASSEMBLY (MCAS) ARE VOTERS
AND RESIDENTS OF RESPECTIVE COUNTIES**

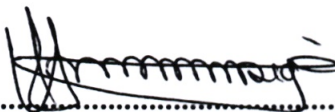
The Committee considered the draft Report as revised to incorporate the observations and recommendations proposed by Members.

Thereupon the Committee adopted the Report, having been proposed by Sen. Catherine Muyeka Mumma, MP and seconded by Sen. Andrew Omtatah Okoiti, MP

MIN. NO. 464/2023

ADJOURNMENT

The Chairperson adjourned the meeting at twelve minutes past nine O'clock. The next meeting was scheduled to be held on Wednesday, 15th November, 2023 at eight O'clock.

SIGNED:

DATE:21/11/2023.....

Annex 2: Copy of the Petition

Natasha
Kindly review and
facilitate the
Petition
s. Chania.
12/09/23

PS process

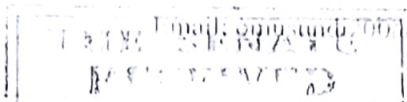
8/9/23
WLM

please deal.

201
11.09.23

GRASSROOT CIVILIAN OVERSIGHT INITIATIVE

P.O Box 9789, 20100 Nakuru



11 SEP 2023

DIRECTOR LEGISLATIVE AND
PROCEDURAL SERVICES

TO THE
SENATE ASSEMBLY OF REPUBLIC OF KENYA

A PUBLIC PETITION.

IN THE MATTER OF ENACTING A CLAUSE IN THE ELECTORAL
LAWS THAT WILL MAKE SURE THAT ALL NOMINATED MCAS ARE
VOTERS AND RESIDENTS OF THEIR RESPECTIVE COUNTIES.

I a resident of Nakuru county, a Director of Grassroot Civilian Oversight an initiative that focuses on Governance matters and a citizen of the republic of Kenya, herein draw your attention to the following fronts:

1. **THAT** it has come to my attention that there has been a public outcry o the matter of nomination of the Members of County Assemblies in the County Assemblies.
2. **THAT** there has been massive swapping and some nominated MCAs serving in some counties which they are indeed strangers and which they are unaware of their respective needs and challenges.
3. **THAT** an example is where a person who participated in politics in Kiambu is nominated in Turkana, Nairobi to Kericho, Nakuru to Kakamega, Murang'a to Kajiado. E.t.c.
4. **THAT** these nominated Members of County Assemblies are unaware of the needs and challenges of those respective counties. They are too strangers to the residents of those respective counties.
5. **THAT** these culture denies the indigenous people who are voters and who have all requirements to be given those nomination opportunities to serve the people effectively for they know the needs and challenges facing them.
6. **THAT** this matter is a nuisance to many for its morally incorrect, done by a high end political elites and it is time for check and balances to be in place.



6th August 2023.

PS
Phase deal
8/9/23

IN THE MATTER OF ENACTING A CLAUSE IN THE ELECTORAL LAWS THAT WILL MAKE SURE THAT ALL NOMINATED MCAS ARE VOTERS AND RESIDENTS OF THEIR RESPECTIVE COUNTIES.

7. **THAT** this matter is not pending in court in the republic of Kenya between the parties.

8. THEREFORE, I PRAY FOR THE FOLLOWING RELIEFS; -

a) To enact a clause in the electoral laws that will make sure that all nominated Members of County Assemblies are **REGISTERED VOTERS, RESIDENTS OF THEIR RESPECTIVE COUNTIES THEY ARE NOMINATED INTO AND SHOULD REFLECT ETHNIC COMMUNITIES IN THOSE RESPECTIVE COUNTIES.**

b) Any other reliefs that deems fit to enhance and advance the subject matter by creating sanity in our progressive politics and constitutionalism in making Kenya a little heaven for the mighty and commoners to excel in political opportunities that are there in the constitution. AMEN.

Yours



Laban Omusundi

An active citizen based in Nakuru

CC: - NAKURU COUNTY SENATOR HON. TABITHA KARANJA

Annex 3: Submissions by Independent
Electoral and Boundaries
Commission

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION



REF: IEBC/DLS/CORR/11/2023

8th November, 2023

J.M. Nyegenye, CBS
Clerk of the Senate
The Senate
Clerk's Chambers
Parliament Buildings
P.O. Box 41842 - 00100
NAIROBI



② HOD-Governance
SCA-JLAHR
Kindly deal
14/11/2023

Dear Mr. Nyegenye,

RE: SUBMISSIONS ON THE PETITION TO AMEND THE ELECTORAL LAWS TO ENSURE NOMINATED MEMBERS OF COUNTY ASSEMBLIES ARE REGISTERED VOTERS AND RESIDENTS OF THEIR RESPECTIVE COUNTIES

Reference is made to your letter Ref. No. SEN/DGAC/DGC/JLAHRC/2023(146) dated 13th October, 2023 and received on 19th October, 2023 on the above subject matter.

As per your request, the Commission forwards its representations on the Petition for your consideration.

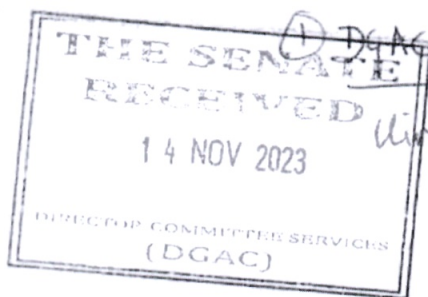
Please do not hesitate to contact the undersigned for any clarification or further information.

Yours

Sincerely,


Marjan Hussein Marjan, MBS
Commission Secretary/ CEO

Encl. - (1) Submissions



① DGAC
Kindly deal

10/11/2023

address: Anniversary Towers, 6th Floor, off University Way, P.O Box 45371-00100 Nairobi, Kenya
phone: +254 (0) 2769000, fax: +254 (0) 20 2219185, email: info@iebc.or.ke, website: www.iebc.or.ke

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION



THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

SUBMISSION ON
THE PETITION TO AMEND THE ELECTORAL LAWS TO ENSURE
NOMINATED MEMBERS OF COUNTY ASSEMBLIES ARE REGISTERED
VOTERS AND RESIDENTS OF THEIR RESPECTIVE COUNTIES

Dated 8th November, 2023

Independent Electoral & Boundaries Commission (IEBC)

Anniversary Towers, 6th Floor, Off University Way

P.O. Box 45371 – 00100, Nairobi – Kenya

Telephone: + 254 (0) 20 29925

A. INTRODUCTION

1. The Independent Electoral and Boundaries Commission (IEBC) is a Constitutional Commission established under Article 88 of the Constitution of Kenya.
2. Article 88(4) of the Constitution outlines IEBC's mandate to, among others, conduct and supervise referenda and elections to any elective body or office established by the Constitution and regulate the process by which parties nominate candidates for election.
3. Article 177(1)(c) of the Constitution provides for the membership of the County Assembly as follows -
 - (1) *A county assembly consists of—*
 - (a) *members elected by the registered voters of the wards, each ward constituting a single member constituency, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year;*
 - (b) *the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender;*
 - (c) *the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament;*
and
 - (d) *the Speaker, who is an ex officio member.*
 - (2) *The members contemplated in clause (1) (b) and (c) shall, in each case, be nominated by political parties in proportion to the seats received in that election in that county by each political party under paragraph (a) in accordance with Article 90.*
 - (3) *The filling of special seats under clause (1) (b) shall be determined after declaration of elected members from each ward.*

(4) *A county assembly is elected for a term of five years.*

4. Article 90 of the Constitution speaks to the allocation of party list seats in Parliament and the County Assemblies based on proportional representation popularly known as 'nominated seats'.
5. Article 90(2) of the Constitution read together with Section 36 of the Elections Act, 2011, mandates the Commission to conduct and supervise elections for the allocation of the seats aforesaid.

B. REQUIREMENTS FOR THE PARTY LISTS AND ALLOCATION OF SEATS

6. Pursuant to Section 35 of the Elections Act, 2011, political parties are required to submit their party lists to the IEBC at least forty-five days before the date of the General Election. The IEBC then reviews the lists for compliance and is mandated to require political parties to amend the lists to ensure compliance in the event of non-compliance.
7. Sections 34 and 36 of the Elections Act, 2011 outlines the requirements that political parties should adhere to while submitting their lists to the IEBC in accordance with the provisions of the Constitution and the party's rules. The requirements are further espoused in the Elections (General) Regulations, 2012 and Elections (Party Primaries and Party Lists) Regulations, 2017.
8. In cognizance of Regulation 54 (8) of the Elections (General) Regulations, 2012 and pursuant to *Constitutional Petition No. 147 of 2013 National Gender and Equality Commission v IEBC & Another*, the IEBC is required to publish the lists in two (2) Newspapers of nationwide circulation.

9. Following publication, members of the public or nominees have an opportunity to lodge any disputes which are to be determined within ten (10) days pursuant to Section 74 of the Elections Act. Political Parties seized of orders from the dispute resolution process in respect of the various lists are required to re-submit amended lists to the IEBC in compliance with the orders issued.
10. In line with Section 36(4) of the Elections Act, the IEBC is obligated to allocate the seats within thirty days after the declaration of election results for the General Election. A gazette notice is published to this effect for the purpose of administration of oath at the respective County Assemblies.
11. It is worth noting, that there is no Constitutional or statutory provision requiring the nominees in the party lists submitted under Article 177 1(b) and (c) (nominees to the County Assembly) to either be registered voters or residents of the respective counties that they are nominated in.
12. However, there is emerging jurisprudence from judicial determinations providing that a nominated Member of County Assembly should be a registered voter and resident in the county they are nominated in.

C. CASE LAW

13. In *Narok Election Petition No. E003 of 2022; Josephine Seneyio Torome v IEBC & 5 Others*, the Petitioner averred that the 2nd Respondent ought not to have been nominated to Narok County Assembly on the basis that she was a voter and resident of Nakuru County and that she was not a member of Jubilee Party (the party that nominated her to the Assembly). She contended that the nomination of the 2nd Respondent disenfranchises able residents and voters of Narok County who are better placed to agitate for the interests of Narok County as opposed to an outsider.

With regard to the claim that she was not a registered voter in Narok County, the 2nd Respondent contended that the law does not define where a voter is supposed to be registered in order to be nominated or elected to the county assembly. Further, she opined that there was no ground under Section 25(2) of the Elections Act that disqualified her from being nominated in as much as she was a registered voter in Nakuru County.

In its determination, the Court stated, “A party list for Narok County Assembly must and ought to reflect the face and diversity of the people of Narok County. This is important because it is only a person who hails from Narok County, who interacts with the residents of Narok County on a daily or often basis who can be said to possess adequate knowledge of the aspirations and needs of the people of Narok County. An outsider, even with the purest of intentions is not privy to the particular and specific needs of a people he or she does not interact with.” The nomination of the 2nd Respondent was declared null and void.

On appeal, the High Court upheld the decision of the lower Court and stated that “There is absolute sense that the principle of representation in the county political aspirations and goals should be understood and given meaning within the objects of devolution and principles of devolved government in order to build a robust constitutional philosophy around this subject.”

14. In *Kapsabet High Court Election Petition Appeal No. E001 of 2022; Lydia Matuli and ANC v IEBC and 2 Others*, The High Court upheld the decision of the trial Court to annul the appellant’s nomination as a member of the county assembly of Nandi under the ANC party gender top up list. The Court held that the appellant could not be nominated as a member of Nandi county assembly since she was registered as a voter in Likuyani constituency in Kakamega county. The court

directed IEBC to gazette the next nominee on the list who was a resident of Nandi county.

In upholding the decision of the trial Court, the High Court noted that while there is no constitutional or statutory provision requiring that a person must be a registered voter in the county whose county assembly they seek to be elected in, there should be a purposive interpretation of Article 193(1) of the Constitution which would favor a position that would require a candidate to be a registered voter in that county. (emphasis ours)

The Court stated the basis of the approach relying on the decision of *The Supreme Court of Kenya in the Speaker of the Senate & Another v Attorney General & 4 Others, Sup Ct. Advisory Opinion No. 2 of 2103; [2013] eKLR* where the Court opined, “courts, this court included, are to resolve constitution-making contradictions; clarify draftsmanship-gaps; and settle constitutional disputes that may have arisen from constitution-making compromises that often attend the constitution-making process. In doing so, this court is to adopt a purposive approach which promotes the dreams and aspirations of the Kenyan people.”

15. This was further reiterated in *Maralal SPM Election Petition Appeal No. E002 of 2022; Janet Lenaimalda Vs IEBC, Agnes Wambui Nganga & Jubilee Party*. The Petitioner averred that the nomination of Agnes Wambui Nganga to the County Assembly of Samburu was illegal because she was neither a registered voter nor a resident in Samburu County. The Court agreed with the Petitioner and quashed the nomination of Ms. Nganga.

16. However, some courts have adopted a reasoning different from the above cited decisions. In *Busia Election Petition No. E001 of 2022; Chairman NEB(DAP -K) v CEO IEBC, Said Jelle Abdi & Another*, the Court disagreed that a member need not be registered nor a resident of the county he/she is nominated.

D. ISSUES FOR CONSIDERATION

17. While noting the proposed amendments to the law and the issues highlighted by the Courts, the following issues must be considered;

- i. **Should the law be amended to include the requirement that a nominated MCA must be a registered voter and resident in the county they are nominated in?**

While there is no constitutional or statutory provision with this requirement, it is a settled provision of law that the jurisprudence espoused in the Courts is a source of law where a decision has been rendered. The question that arises however is what should be done in the event of conflicting decisions by the Courts?

- ii. **Constitutionality of the amending the law to include this requirement only for nominative seats but not elective seats?**

While appreciating the proposal in the petition, the Commission is alive to the landmark case; Petition No 1 of 2019 National Gender and Equality Commission v Majority Leader, County Assembly of Nakuru & 4 others; Jubilee Party & another (Interested Parties) [2019] eKLR delivered by Hon. Justice Joel Ngugi, the High Court declared that nominated MCAs have equal opportunities, responsibilities and privileges including opportunities for leadership positions in the County Assembly Committees just like their elected counterparts effectively quashing the decision of the County Assembly. **"Nominated MCAs represent special interest groups especially the vulnerable, minority and historically marginalized groups such as women, youth, persons with disabilities and racial minorities."**

The import of this court decision is that a person need not be a registered voter in a county in order to be nominated in that county and that these qualification for general registration as a voter should apply even to nominated persons.

It is the Commission's considered view that this proposal may be deemed a non-starter given the reasoned decision by Hon Justice Ngugi highlighted above.

iii. What is proof of residence?

A look at several Court decisions show that the Courts specify that for nomination, one needs to be a registered voter and/or a resident in the concerned county. The question that arises, therefore, is what is proof of residence? What is it that evidences residence? And is incidence on proof of residence unconstitutional?

In *Constitutional Petition No. E435 OF 2022; Charles Makokha Sumba & Others v IEBC & AG*, the Court held that Regulation 13 C of the Election (Registration of Voters) Regulations, 2012 infringes on Article 38 of the Constitution to the extent that it curtails a voters' right to freely make political choices and to transfer registration because of the requirement of being a resident at least six months before the date of transfer. In practice, it was a problematic regulation to implement as the registration officers often had a difficult time to establish what would suffice as proof of residence. The requirement of residence for special seat nomination poses a similar challenge.

iv. What is the intent of the objects of devolution?

Article 174 of the Constitution provides;

Objects of devolution

The objects of the devolution of government are—

- (a) to promote democratic and accountable exercise of power;
- (b) to foster national unity by recognizing diversity;
- (c) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;
- (d) to recognize the right of communities to manage their own affairs and to further their development;

- (e) to protect and promote the interests and rights of minorities and marginalized communities;
- (f) to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;
- (g) to ensure equitable sharing of national and local resources throughout Kenya;
- (h) to facilitate the decentralization of State organs, their functions and services, from the capital of Kenya; and
- (i) to enhance checks and balances and the separation of powers.

A reading of this provision of the Constitution outlines clearly that the Constitution envisions that the communities in a county manage their own affairs and that the marginalized groups are protected. In line with Article 259(1), the Constitution must be purposively interpreted in a manner that gives it full life and promotes its purpose, in line with the interests it was intended to protect while contributing to good governance. Given the decision by Hon Justice Ngugi, perhaps it is also timely for a discourse on legislating requirement for elective positions for one to be registered in the electoral area they aspire to be elected in? Food for thought.

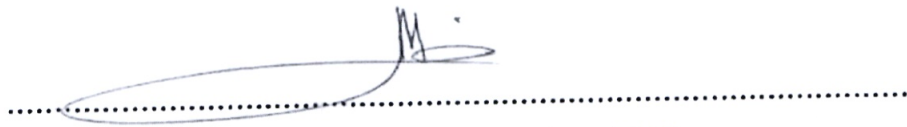
But would this restriction not fall foul of Article 38 of the Constitution on political rights of Kenyans to be registered at a place of choice and to contest elections in similar vein?

E. CONCLUSION

Owing to the foregoing and the case law cited above, it is the IEBC's considered view that the proposal by the petitioner may be deemed unconstitutional for want of adhering to the parameters set out in the Judgements and the letter of the Constitution.

In addition, the Commission suggests that in keeping with the holding of Justice Ngugi there is need for development of a comprehensive legal framework on the representation of ethnic and other minorities and marginalized groups in order to realize the intention of

Articles 90, 97, 98, 100, 174 and 177 of the Constitution. This will enhance the protection of the rights of nominated persons and ensure that they have equal status and are entitled to equal opportunities, responsibilities and privileges including opportunities for leadership positions at the county assembly committees.

A handwritten signature in blue ink, consisting of a large, sweeping loop followed by a smaller, more complex mark, positioned above a horizontal dotted line.

Marjan Hussein Marjan, MBS
Commission Secretary/CEO

Annex 4: Submissions by Office of the
Registrar of Political Parties



Telephone: +254(0)204022000
Mobile: 0772281357
Email: info@orpp.or.ke
Website: www.orpp.or.ke



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Off Waiyaki Way
P.O. Box 1131-00606
Sarit Centre, Nairobi.

Ref: RPP/ORG/34 Vol. VII (46)

Clerk of the Senate
Clerk's Chambers
National Assembly, Parliament Buildings
P.O. Box 41842-00100
NAIROBI



Date: 8th November, 2023

Dear Sir,

RE: MEMORANDUM ON THE PETITION BY LABAN OMUSUNDI CONCERNING AMENDMENT OF ELECTORAL LAWS TO ENSURE NOMINATED MEMBERS OF COUNTY ASSEMBLY (MCAs) ARE REGISTERED VOTERS AND RESIDENTS OF THEIR RESPECTIVE COUNTIES

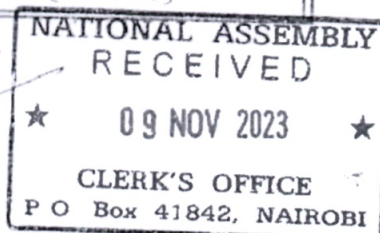
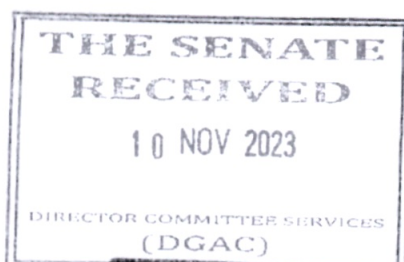
Reference is made to your letter Ref. SEN/DGAC/DGC/JLAHRC/2023/(150) dated 13th October 2023 on the above subject matter.

This Office opposes the referenced petition on account of unconstitutionality and not being appreciative of the role of political parties in party list election.

Annexed herewith is a memorandum providing submissions in opposition to the Petition.

Yours faithfully,

Ann N. Nderitu, CBS
Registrar of Political Parties/CEO



Encl: (1)

*Ass/Lead Clave, JLAHRC
Please find
& deal
my 10/11/2023*

DGAC

kindly deal

09/11/2023



OFFICE OF THE REGISTRAR OF POLITICAL PARTIES' MEMORANDUM ON THE PETITION BY LABAN OMUSUNDI CONCERNING AMENDMENT OF ELECTORAL LAWS TO ENSURE NOMINATED MEMBERS OF COUNTY ASSEMBLY (MCAs) ARE REGISTERED VOTERS AND RESIDENTS OF THEIR RESPECTIVE COUNTIES

I. INTRODUCTION

1. The Standing Committee on Justice, Legal Affairs and Human Rights vide a letter dated 13th October 2023 invited the Office of the Registrar of Political Parties to make submissions on a petition by Laban Omusundi, dated 6th August 2023, concerning amendment of electoral laws to ensure nominated members of county assembly (MCAs) are registered voters and residents of their respective counties.
2. The Office of the Registrar of Political Parties is established under Section 33 of the Political Parties Act, 2011 as an independent state office within the meaning of Article 260 of the Constitution. Its role on party list election includes certifying that party list nominees are members of the nominating political parties— Section 34 (fc) of the Political Parties Act, 2011.
3. The petitioner prays for limiting of party list nominees to their counties of voter registration so as to realize special seat MCAs that are aware of the issues of the electorate and to offer an opportunity to the residents.

II. SUBSTANCE OF SUBMISSIONS

Qualifications for MCA elections

4. The Constitution appreciates the process of filling the special seats in Parliament and county assemblies as an election. Article 90 of the Constitution provides, *inter alia*, that elections for the members of county assemblies under 177 (1) (b) and (c) of the Constitution shall be on the basis of proportional representation by use of party lists.
5. In terms of Article 177 of the Constitution, the membership of a county assembly includes the gender top-up seats and representation of marginalised groups— 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 and the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament.

6. The qualifications for elections as a member of county assembly are documented under Article 193(1) of the Constitution— a person is eligible for election as a member of a county assembly if the person is a registered voter, satisfies any educational, moral and ethical requirements prescribed by this Constitution or an Act of Parliament, and is either nominated by a political party or an independent candidate supported by at least five hundred registered voters in the ward concerned. A party candidate is therefore required to be a registered voter, nominated by a political party, and satisfies educational moral and ethical requirements.
7. Under the Constitution, the requirement for a candidate to be a registered voter is not qualified to whether one is registered in a particular ward or county; one simply has to be a registered as a voter in Kenya. Further, the Constitution does not provide for separate qualifications for persons who are elected to a county assembly either through gender top-up list or marginalised groups list.
8. Residency in an electoral area is neither a ground to register as a voter nor to vie for an elective seat. This, in our view, is attributed to various reasons including change of job locations, loss of jobs hence changes in living locations, historical reasons as to why some Kenyans reside in urban areas but register as voters in rural areas as that is where they consider home, and freedom of movement.
9. The closest residency has had an effect on voting, in recent times, was through Regulation 13C of the Election (Voter Registration) Regulations, 2017 which was declared unconstitutional through Constitutional Petition E435 of 2021 Charles Makokha Sumba & 4 Others Vs IEBC & AG. The Regulation provided that a voter is not qualified to transfer his or her registration unless at the date of his or her application to be transferred he or she was ordinarily resident in that constituency six months immediately preceding the date of his or her application for transfer.
10. The prayer in the petition, if adopted in law, may not stand the test of limitation of Article 38 of the Constitution with regard to the right of every Kenya to be a candidate for public office without unreasonable restrictions. The unreasonableness may include setting different parameters for party list election yet Article 193 of the Constitution does not dictate any conditions.

Effect on political parties

11. Political parties have the sole mandate to develop party lists. Articles 90 (1) and 90(2) (a) of the Constitution require political parties to submit to the Independent Electoral Boundaries Commission 98 party lists inclusive of 94 party lists for county assemblies.

12. Under Article 91 of the Constitution, a political party is required to have a national character as prescribed by an Act of Parliament. Parliament implemented the provision through, among others, Section 7(2) (a) which requires a political party to recruit at least one thousand registered voters from each of more than half of the counties. In essence, the mandatory requirement is that parties must recruit party members from at least 24 counties.
13. Given that party lists nominees must be members of political parties, and noting that a party is not required to recruit members from all the 47 counties but is required to submit party lists for 47 counties, limiting a county party list to persons registered as voters in that county amounts to assigning a new meaning to Article 91 of the Constitution away from the one appreciated by Parliament. Further, this would amount to parties being unable to submit the required 94 county assembly party lists due to the lack of party members who are registered as voters in some counties.
14. Additionally, the proposal would offer the “big parties” undue advantage over “small parties” as the former may have party members, who are registered voters, across all the 47 counties. It is only the big parties that would manage to submit the required party lists. This has a negative systematic effect on political parties.
15. By dint of Paragraph 19 of the Second Schedule to the Political Parties Act, 2011 and Section 34 (6B) of the Elections Act, 2011, party nomination rules provide for various methods of development of party lists. This may include parties prioritizing party members that participate in party nominations but do not win; it incentivizes participation in party nominations.

Select case law

16. While the courts have not specifically found that county party lists are a preserve of persons registered as voters in those counties, they had occasion to address the issue of voter registration status with respect to party lists whenever they have been approached by an aggrieved person. The High Court in **Election Petition Appeal 5 & 7 of 2018 Victoria Cheruto Limo & another v Independent Electoral and Boundaries Commission (IEBC) & another** [2018] eKLR, the court observed as follows:

“...my constitutional interpretation is that only those who were registered to vote in Wards in Garissa County could qualify for nomination by the party to the County Assembly of Garissa. In my view therefore, Victoria Cheruto Limo being a registered voter of Uasin Gishu County was not qualified and not validly nominated to fill the gender top-up position in the Garissa County Assembly.”

17. In Nakuru High Court Election Petition No.1 of 2019 National Gender and Equality Commission Vs Majority Leader, County Assembly of Nakuru & 4 others; Jubilee Party & another (Interested Parties) [2019] Eklr, the court addressed the issue of equality between single member MCAs and special seat MCAs. The county assembly had purported to resolve that special seat MCAs could not be chairpersons and Vice Chairpersons of Membership of Sectoral and Select Committees. The court found the resolution as null and void on grounds that all MCAs, whether elected through a general election or a party list election, are equal.

III. CONCLUSION

18. The voting unit for development of party lists are party members, and while the members may be categorised in electoral areas, Section 25 of the Elections Act, 2011 as derived from Article 193 of the Constitution on qualifications for MCAs only anticipate the candidates to be registered voters.
19. Flowing from the foregoing, ORPP beseeches the Committee to dismiss the petition on account of the grounds provided hereinabove.



ANN N. NDERITU, CBS
REGISTRAR OF POLITICAL PARTIES

Annex 5: Submissions by Kenya Law Reform
Commission

KENYA LAW REFORM COMMISSION



"A Vibrant Agency for Responsive Law Reform"

Telegrams: "LAWREFORM" NAIROBI

Telephone: Nairobi, +254-20-2241186/2241200

Fax: +254-20-2225786

www.info@klrc.go.ke

When replying please quote

Ref. No. **KLRC/8/86/(12)** and Date



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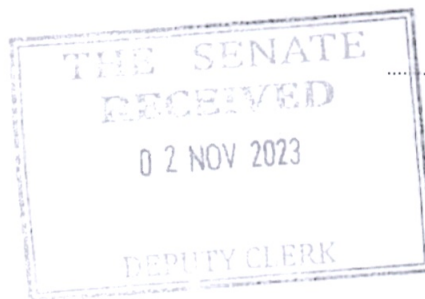


KENYA LAW REFORM COMMISSION
REINSURANCE PLAZA
3RD FLOOR

TAIFA ROAD

P.O. Box 34999-00100

NAIROBI, KENYA



31st October, 2023

Mr. J. M. Nyegenye, CBS
Clerk of the Senate
Parliament Buildings
P. O. BOX 41842-00100
NAIROBI

Dear *Jere,*

DGAC

Kindly deal

EF 23/11/2023

REF: PETITION BY LABAN OMUSUNDI CONCERNING AMENDMENT OF ELECTORAL LAWS TO ENSURE NOMINATED MEMBERS OF COUNTY ASSEMBLY (MCAs) ARE REGISTERED VOTERS AND RESIDENTS OF THEIR RESPECTIVE COUNTIES

We acknowledge with thanks receipt of your letter Ref. No. SEN/DGAC/JLAHRC/2023(130) dated 13th October, 2023 on the above matter.

1.0 INTRODUCTION

KLRC has, in accordance with its mandate to ensure that all the laws conform to the letter and spirit of the Constitution and to keep all the laws of Kenya under review and to ensure its systematic development and reform, received an invitation from the Senate to consider and give its perspective on a Petition filed by Mr. Laban Omusundi. Mr. Omusundi is a resident of Nakuru County and a Director of an initiative named Grassroot Civilian Oversight that focuses on Governance matters.

The Petition proposes that, as a result of public outcry on the matter of nomination of Members of County Assemblies (MCAs), the swapping seen in the nomination process for

*Hsb / Lead Clerk / JLArc
please deal
3/11/2023*

MCA seats and MCAs serving in counties in which they are strangers, electoral laws should be amended to allow only registered voters in the county to be eligible for nomination to the respective County Assemblies. Further, the petition proposes that the nominated persons should be resident in the respective counties of nomination and also reflect the ethnic communities in those counties.

2.0 BACKGROUND

The Petition premises its rationale on a number of reasons.

Firstly, the Petitioner avers that there has been a lot of public outcry on the manner of nomination of MCAs to the county assemblies. The outcry has been occasioned by massive swapping of MCAs seats within the political elite where some MCAs serve in counties which according to the Petitioner, they are strangers to and therefore do not understand the respective needs and challenges. The Petitioner gives the examples of counties where this is practice. He states that a person who participated in politics in Kiambu has been nominated to the county assembly of Turkana. The same is seen in Kericho, Kakamega and Kajiado, where nominated members participated in politics in Nairobi, Nakuru and Murang'a, respectively.

Secondly, the Petitioner avers that these nominated MCAs do not understand the needs and challenges of the counties they are nominated into and also, that they remain as strangers to those counties since they do not reside in the particular counties.

Thirdly, the Petitioner states that this practice denies the indigenous people who are voters and who have all requirements to be nominated an opportunity to serve the people effectively as they possess a better understanding of their needs and challenges.

Lastly, the Petitioner's contention is that the matter of nomination of MCAs in the manner described is a nuisance to many because it is morally incorrect, being perpetrated by the high end political elites and that there should therefore be in place, checks and balances.

3.0 PETITIONER'S PRAYERS AND ISSUES FOR CONSIDERATION

The Petitioner prays that the Senate in considering the petition, considers enacting a clause in the electoral laws that will make sure that all nominated MCAs are;

- (a) registered voters in the counties where they are nominated;
- (b) residents of the respective counties where they are nominated; and

(c) reflect the ethnic communities in those respective counties.

A further review of the Petition thus brings to the fore nomination as a special seat member or a representative of marginalized groups, including persons with disabilities and minority communities as the thematic area of concern in the Petition. Special seat members are MCAs who secure nomination to the county assembly through a process that has been provided for in sections 34 and 36 of the Elections Act, 2011.

The Constitution or the existing electoral laws have not provided a separate framework of qualifications to be met by persons for nomination into these special or marginalized MCA seats other than being in the party lists and meeting the criteria provided for under the Constitution and the Elections Act, 2011. The implication of the petition is that these set of MCAs should be nominated based on qualifications or criteria that is different from that of other (elected) MCAs.

We therefore consider the qualifications for nomination as an MCA as the legal thematic area of interest in the Petition.

4.0 OUR CONSIDERATION OF THE PETITION

Our consideration of the Petition by Mr. Omusundi leads us to two questions that we believe by attempting answers to, will render our considered view on the merits or demerits of the Petition. Thus:

A. Is residency and area of registration as a voter necessary in determining who can be nominated as an MCA?

B. Is a reflection of the ethnic communities in respective counties necessary in determining who can be nominated as an MCA?

Our consideration of the above questions are enumerated hereunder.

A. Is residency and area of registration as a voter necessary in determining who can be nominated as an MCA?

Article 193 of the Kenyan Constitution outlines the qualifications for candidates seeking to be elected as MCAs. Arising from the Petition therefore is the question whether the constitutional provisions require to be bolstered in the case of the nominated members.

Firstly, the Constitution provides for special seat members and representatives of marginalized groups to promote inclusivity, diversity and the protection of the rights and interests of traditionally underrepresented and disadvantaged communities. This inclusion is based on several key principles and reasons:

(a) Promotion of Equality and Inclusivity

Kenya's Constitution includes special seat members to promote equality, inclusivity and the protection of marginalized groups' rights. This addresses past imbalances, breaks gender barriers and helps to ensure diverse representation in governance.

(b) Protection of Minority Rights and Interests

Special seats protect the rights and interests of marginalized ethnic communities, minorities and persons with disabilities. This representation ensures their unique concerns are considered in policymaking and legislative processes.

(c) Enhancement of Democracy

Representation from marginalized groups enriches the democratic process by bringing diverse perspectives and experiences to decision-making. It ensures governance is responsive to a wide range of citizen interests.

(d) Fostering National Unity and Social Inclusion

Inclusive governance promotes a sense of national unity and fosters social and economic inclusion. It demonstrates the government's commitment to the welfare of all citizens, regardless of their background.

In summary, it is needful to note that the provision for special seat members and representatives of marginalized groups in Kenya's Constitution reflects the nation's commitment to equity, diversity and inclusive governance. These provisions are intended to address historical imbalances, protect the rights of underrepresented communities and strengthen the principles of democracy and equality in the country's political processes.

Secondly, the requirement that elected or nominated individuals to political offices should be residents or registered voters in the areas they represent is often based on principles related to representation, accountability and democracy. The key aspects to consider include:

(a) Representation

The fundamental idea behind this requirement is that elected officials should be representative of the people they serve. By being residents of the area they represent, they are more likely to understand the needs, concerns and values of their constituents. This, in

turn, can lead to better decision-making and policies that align with the preferences of the local population.

(b) Accountability

When elected officials are residents or registered voters in the area they represent, they are more directly accountable to their constituents. If they make decisions that are unpopular or fail to address local issues, they are more likely to face consequences in the form of voter backlash during the next election. This accountability mechanism helps ensure that elected officials remain responsive to the needs of the community.

(c) Connection to the Community

Elected officials who are residents of the area they represent are more likely to have a personal connection to the community. They may have lived there, raised their families there, or have deep roots in the area. This personal connection can foster a sense of dedication and a genuine desire to improve the community.

(d) Preventing Outside Influence

Requiring that elected officials be residents or registered voters in the area can help prevent outside interests from exerting undue influence on the local political process. It reduces the risk of individuals or organizations from other regions "parachuting in" and attempting to control local politics for their own gain.

(e) Legitimacy and Trust

When constituents know that their elected officials live in the same community and are registered voters, it can enhance the legitimacy and trust in the political process. People are more likely to trust elected officials who are part of their own community and have a direct stake in its well-being.

It's important to note that the specific requirements for political office can vary by country, state or locality. Some offices may have more stringent residency requirements than others. These requirements are often set in law and they can be subject to change through the legislative process.

However, there are also debates surrounding these requirements. Critics argue that such requirements may limit the pool of candidates and exclude individuals who, while not residents, may still have valuable expertise or perspectives to offer. This in our opinion, is a minimal concern for Kenya as these persons can be brought on board as staff of the county governments and do not necessarily have to be MCAs.

Balancing the principles of representation and accountability with the need for diversity and expertise is indeed an ongoing discussion in democratic systems around the world.

Constitutional and Legal Position

While the Constitution and the Elections Act, 2011 have provided the basic requirements to be met by a citizen for election as an MCA, none has provided an additional layer of requirements for nominated MCAs. This is ostensibly because the members while transacting business as MCAs remain equal and the rationale for their nomination is premised on constitutional principles that aim to promote inclusivity, diversity and the protection of the rights and interests of traditionally underrepresented and disadvantaged communities. This is indeed the reason behind having nominated representatives.

On the question of residency and that nominated MCAs be registered voters, we will take a look at Article 180(1) of the Constitution.

Article 180(1) of the Constitution provides that “the county governor shall be directly elected by the voters registered in the county...” The Article is explicit on who exactly can vote for a county governor. Juxtaposed against the Petition that requires a nominated MCA to be a registered voter in the county of nomination, we opine that a purposive interpretation of Article 180(1) supports the Petition given that the MCAs in their totality will be responsible for oversight of the Executive at the county government level, where the Governor is elected into.

By requiring that the Governor is elected by registered voters in the county, the Constitution has rendered weight to the status of registration of voters to be relevant in the process. We opine that the Constitution, even though silent on it, anticipates that an MCA who is responsible for overseeing the Governor and the Executive that the Governor is in charge of, should at the basic level also be a registered voter in the county.

The Constitution however does not speak to residency in clauses relating to the nomination of the MCAs or Governor, but our rationale leans towards an adoption of the proposal based on the social, economic and political reasons already enumerated.

We thus conclude by opining that it is necessary for the reasons already given that nominated MCAs be resident and be registered voters in the counties where they are nominated.

B. Is a reflection of the ethnic communities in respective counties necessary in determining who can be nominated as an MCA?

On this second part of our consideration of the Petition, we opine that electoral laws and provisions must be consistent with constitutional principles and must not infringe upon fundamental rights. The fundamental principles of the Kenyan Constitution, including those related to equality, non-discrimination and the protection of individual rights and freedoms require that ethnicity should not be used as the basis of any social, political or economic consideration in public and private spheres. Adopting this bit of the Petition could therefore result in constitutional or legal challenges such as potential violations of the freedom of movement, association and non-discrimination.

5.0 CONCLUSION

Critics of residency requirements for elected or nominated political office often raise several arguments against these restrictions.

Residency requirements for political office can have significant implications. They can exclude highly qualified candidates who are not residents of the area they seek to represent, potentially depriving the community of expertise. In regions with high mobility, like cities or college towns, these rules can deter eligible candidates and hinder local political participation. In today's interconnected world, traditional residency rules may not align with modern realities, where people often have multiple ties and work in different places. Some jurisdictions have tried to address these issues with exceptions, but finding the right balance between ensuring a strong connection to constituents and fostering diverse and qualified candidates remains a complex challenge in democratic governance.

Our assessment of the Petition however provides more merit for the requirement of residency and voter registration for a nominated MCA in the respective county of nomination, over the cons on the requirement for residency.

On the ethnicity of the nominated MCA, we propone that further consideration of the subject as provided in the Petition would lead to constitutional infringement and therefore propose its rejection *in toto*.

As always, we remain committed to upholding the principles of democratic governance and the rule of law in Kenya by supporting every effort to improve our laws in response to the social, economic and political needs of the country.

We appreciate your invitation to appear and present our consideration of the Petition and hereby confirm our attendance.

Yours *Sincerely,*



Joash Dache, MBS

SECRETARY/CEO

Copy to: Ms. Christine A. Agimba
Chairperson,
Kenya Law Reform Commission

Annex 6: Submissions by Political Parties
Liaison Committee



POLITICAL PARTIES LIAISON COMMITTEE (PPLC)

C/o Office of the Registrar of Political Parties, Lions Place, 1st Floor

Karuna Close, Waiyaki Way, Westlands

P.O Box 1131-00606, Sarit Centre, Nairobi, Kenya.

Email: pplcparties@gmail.com

The Clerk,
Senate of Kenya,
Parliament Buildings,
P.O. Box 41842-00100,
NAIROBI.

Dear Sir,

**RE: RESPONSE TO THE PETITION BY LABAN OMUSUNDI CONCERNING
AMENDMENT OF ELECTORAL LAWS TO ENSURE NOMINATED
MEMBERS OF COUNTY ASSEMBLY (MCAs) ARE REGISTERED VOTERS
AND RESIDENTS OF THEIR RESPECTIVE COUNTIES**

This is the response by the Political Parties Liaison Committee (PPLC) to the above-captioned petition. PPLC is created under Section 38 of the Political Parties Act, 2011 and its principal function is to provide a platform for dialogue between the Registrar, Electoral Commission and Political Parties.

The role of political parties in Kenya's democratization, national cohesion, and championing the rights of special interest groups is a crucial aspect of our country's political system. This is achieved by shaping and consolidating democracy by providing a platform for members to participate in the political processes, promoting inclusivity, and advocating for the rights and interests of various groups within society.

Democracy is predicated on the principle of popular participation in governance, and political parties serve as vehicles for this participation. The Political Parties Act provides legal backing for the establishment and regulation of political parties in Kenya. Section 4A of the Act highlights the aims and objectives of political parties to include nomination of candidates for elections and promoting and enhancing national unity. Political parties are mandated to promote democracy within their structures and work towards enhancing

political pluralism, inclusivity, and fair representation of all citizens. Through this provision, political parties create an enabling environment for political competition, voter mobilization, and the articulation of diverse perspectives, which are essential elements of a thriving democracy.

Furthermore, political parties in Kenya play a crucial role in fostering national cohesion and unity. In a multi-ethnic and diverse society like ours, it is important to have political parties that embrace inclusivity, respect for cultural diversity, and promote national integration. The National Cohesion and Integration Act of 2008 provides a legal framework for promoting national cohesion and addressing ethnic tensions in Kenya. Political parties have a pivotal role in promoting national cohesion by encouraging the inclusion of all citizens, irrespective of their ethnic, religious, or regional backgrounds in the management of Parties. Political parties are, therefore, required to adopt internal mechanisms that ensure equal representation of all ethnic groups and refrain from engaging in acts that promote discrimination in representation. By adhering to these provisions, political parties contribute to the building of a united and harmonious society.

Political parties are legally obliged to promote democracy, foster societal unity, and ensure the full participation and representation of special interest groups such as women, youth and the marginalised. By fulfilling these roles, political parties contribute to an inclusive and vibrant democratic system that upholds the principles of fairness, equality, and social justice in Kenya.

The current petition requiring members elected on special seats by political parties to the County Assemblies to be registered in a specific county is an affront to the rights of political parties in realising the above-espoused mandate and if left unchallenged, it will serve to entrench ethnic balkanization.

The legal regime governing qualifications for nomination to the County Assembly is provided for under Article 193 (1) (a) of the Constitution as reproduced hereunder:

- (1) *Unless disqualified under clause(2), a person is eligible for election as a member of a county assembly if the person –*

(a) is registered as voter;

Similarly, Article 177 of the Constitution outlines the membership of a County Assembly to include:

1) A county assembly consists of--

(a) members elected by the registered voters of the wards, each ward constituting a single member constituency, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year;

(b) the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender;

(c) the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and

(d) the Speaker, who is an ex officio member.

Section 25 of the Elections Act, 2011 provides that:

(1) Unless disqualified under subsection (2), a person qualifies for nomination as a member of a county assembly if the person—

(a) is registered as a voter;

From the foregoing, there is no legal requirement that one has to be a **resident** or a **registered voter** in the county where they are nominated to a County Assembly.

In the devolved system of governance, the Constitution contemplated the need for community and cultural diversity in representation at both the County Executive and Assembly. Indeed Section 65 (1) (e) of the County Governments Act, 2012 obligates County governments to ensure that at least 30 per cent of public positions are filled by people not from the dominant ethnic community in the County.

Nomination of members contemplated under Article 177 (b) & (c) of the Constitution is solely a preserve of political parties. In realising this mandate, political parties are supposed to undertake this process in accordance with the values and principles of national governance as espoused in Article 10 of the Constitution and Paragraphs 5 and 6 of the First Schedule of Political Parties Act.

Moreover, election under the Special Elect category is for the special interest groups (SIGs). The needs of SIGs interests are national issues and not county specific. Therefore, political parties should be allowed to nominate individuals who have the requisite expertise to represent and articulate the interests of these categories in the County Assemblies.

Further, under the political parties Act, parties are supposed to be national and the provisions of the Act geared towards fulfillment of national values. The political parties therefore should be allowed to nominate any Kenyan to Assemblies and any legislation otherwise will be encroaching on the mandate of the political parties to fulfill its obligations under the Constitution and the relevant Acts.

On a practical basis there is a major difference between voters and residents, countless voters reside elsewhere from where they vote, an example the Civil servants are registered in different areas from where they work and reside and the Kenyan phenomena of urban Kenyans who vote in villages while residing in towns, would that not be discriminating them on basis on where they are registered as voters?

If the prayers as sought by the Petitioner were to be granted, this would therefore be counterproductive to the initiatives of political parties in promoting national cohesion and will perpetuate ethnic hostilities.

Yours Sincerely,



Evans Misati James
Chairman - PPLC

Annex 7: Submissions by Council of County
Governors



COUNCIL OF GOVERNORS

SUBMISSION ON THE PETITION BY LABAN OMUSUNDI CONCERNING AMENDMENT OF ELECTORAL LAWS TO ENSURE NOMINATED MCAS ARE REGISTERED VOTERS AND RESIDENTS OF RESPECTIVE COUNTIES

A. Introduction

The Petitioner, Mr. Laban Omusundi, a resident of Nakuru County has petitioned Senate pursuant to the provisions of the Constitution. In his petition, he is proposing amendments of electoral laws to ensure that the nominated Members of County Assembly (MCAs) are registered voters, residents of their respective counties and are nominated into and should reflect ethnic communities in those Counties.

The Petition is premised on the fact that a nominated MCA who is not from the county may not be able to understand the challenges and issues affecting the interest groups to which they ought to represent in the Assembly.

The Council of Governors acknowledges the pertinent issues raised in the petition and wishes to note as follows:

B. Composition of the County Assembly

Article 177 of the Constitution as read together with section 7 of the County Governments Act, 2012 stipulates that a county assembly consists of:

- a) elected members as per the wards in the county, and nominated members based on the following:
 - i. 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; and
 - ii. the number of members of marginalized groups, including persons with disabilities and the youth, prescribed by an Act of Parliament.

The nomination of members of the Assembly is done through political parties in proportion to the seats received in that election in that county in accordance with Article 90 of the Constitution. The same shall therefore be determined after declaration of elected members from each ward.

Section 7 (2) of the Act also requires the political party nominating persons as MCAs to ensure that the community and cultural diversity of the county is reflected in the county assembly; and there is adequate representation to protect minorities within the county in accordance with Article 197 of the Constitution.

It is noted that these provisions of the law do not provide a requirement that the nominated Members and by extension the elected Members of the Assembly should be resident of the County. The only requirement prescribed in law is provided under section 25 of the Elections Act, 2011 which is that the person must a voter and has been a citizen of Kenya for at least 10 years before the elections. The said section reads as follows:

“25. Qualifications for nomination as member of county assembly

(1) Unless disqualified under subsection (2), a person qualifies for nomination as a member of a county assembly if the person—

(a) **is registered as a voter;**

(b) satisfies any educational, moral and ethical requirements prescribed the Constitution and this Act; and

(c) is either-

(i) nominated by a political party; or

(ii) an independent candidate supported by at least five hundred registered voters in the ward concerned.”

Additionally, section 25(2) (2) provides instances where a person is disqualified from being elected a member of a county assembly which includes, if a person—

- i. is a State officer or other public officer, other than a member of the county assembly;
- ii. has, at any time within the five years immediately before the date of election, held office as a member of the Commission;
- iii. has not **been a citizen of Kenya for at least the ten years immediately preceding the date of election;**
- iv. is of unsound mind;
- v. is an undischarged bankrupt;
- vi. is serving a sentence of imprisonment of at least six months; or
- vii. has been found, in accordance with any law, to have misused or abused a State office or public office or to have contravened Chapter Six of the Constitution.

It can therefore be deduced that the requirements imposed under section 7(2) of the Act is that Members of the County Assembly should be persons who are not only voters in the county but also residence of the county. That is the only way the community and cultural diversity of the county and adequate representation to protect minorities within the county in accordance with Article 197 of the Constitution can be achieved.

C. Role of members of the county assembly

The Council further notes that section 9 of the Act provides the role of members of the county assembly to include—

- a) maintain close contact with the electorate and consult them on issues before or under discussion in the county assembly;
- b) present views, opinions and proposals of the electorate to the county assembly;
- c) provide a linkage between the county assembly and the electorate on public service delivery;

The Council agrees with the petitioner that only MCAs residents of the county can discharge the aforementioned roles. It is therefore imperative that the MCAs have a direct connection to and understanding of the needs and concerns of the people in their respective counties.

D. Conclusion and recommendations

In conclusion, it is important to note that pursuant to provisions of Article 174 of the Constitution, the objects of devolution of government include; to promote democratic and accountable exercise of power, foster national unity by recognizing diversity; give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them; recognize the right of communities to manage their own affairs and to further their development; protect and promote the interests and rights of minorities and marginalized communities among others.

For these objects to be realized in discharging the legislative authority of the County, it is important that persons who are members of the County Assembly are not only voters in the county but have also resided in the said county for at least five years before the election.

In view of the above, the Council supports the petition and recommends as follows:

1. Amendment of section 25(1)(a) and 2(c) of the Elections Act No. 24 of 2011 to provide for additional requirement for nomination of a member of County Assembly which includes a registered voter in the county and must have resided in the County for at least three years. The proposed amendment is as follows:

“ 25. Qualifications for nomination as member of county assembly

(1) Unless disqualified under subsection (2), a person qualifies for nomination as a member of a county assembly if the person—

(a) is registered as a voter in the concerned county;

Introduce a new subsection **1(d)** to read as follows:

(d) Must be a resident of the county for at least five years immediately preceding the date of elections;

We believe that this legislative proposal will increase accountability, better understanding of local issues, and more effective representation which is in line with the objects and purpose of devolution as stipulated in Articles 174 and 175 of the Constitution.

Annex 8: Submissions by County Assemblies
Forum



COUNTY ASSEMBLIES FORUM (CAF)

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**CAF MEMORANDUM ON THE PETITION BY LABAN OMISUNDI CONCERNING
AMENDMENT ELECTORAL LAWS TO ENSURE NOMINATED MEMEBERS OF THE COUNTY
ASSEMBLY (MCAs) ARE REGISTERED VOTERS AND RESIDENTS OF THEIR RESPECTIVE
COUNTIES**

TO: Mr. Jeremiah Nyegenye, CBS, Clerk of the Senate, Parliament of Kenya.

FROM: The County Assemblies Forum.

DATE: 09th November 2023.

1.0 INTRODUCTION

1. The County Assemblies Forum (CAF) is the coordinating body of the 47 County Assemblies in Kenya. The primary mandate of CAF is to promote networking and synergy among the 47 County Assemblies, coordinate intergovernmental relations and enhance good practice in legislative development. Our Mission is to provide effective leadership and coordination of the 47 County Assemblies and through policy and legislative action, promote a conducive working environment for all its members, and in that way deliver quality services to the people.
2. As one of the pillars of the devolved government system, CAF is committed to engage in processes that encourage inclusivity and equitable representation in County Assemblies.

2.0. BACKGROUND

- 2.1. The petition submitted by Laban Omisundi addresses proposed amendments to electoral laws with the aim of ensuring that nominated Members of County Assembly (MCAs) in Kenya meet specific eligibility criteria. These criteria include being registered voters and residents of their respective counties. The petitioner also calls for a selection process that emphasizes ethnic community representation.
- 2.2. Kenya's county assemblies play a crucial role in local governance and decision-making, with nominated MCAs complementing elected representatives in these assemblies. Nominated MCAs are appointed by political parties based on their performance in county assembly elections, ensuring that various groups, including women, youth, and marginalized communities, are adequately represented.
- 2.3. Laban Omisundi's petition acknowledges the significance of nominated MCAs in promoting diversity and representation in county assemblies. The petitioner asserts that by requiring nominated MCAs to be registered voters and residents of their respective counties, a stronger connection can be established between the representatives and the communities they serve. This move is intended to enhance accountability and the quality of local governance.
- 2.4. Furthermore, the petitioner's emphasis on ethnic community representation seeks to address concerns related to local interests and community ties. It aims to promote a more community-oriented approach to decision-making within county assemblies, fostering cooperation among different ethnic groups.
- 2.5. However, it's important to consider both the merits and potential challenges associated with these proposed amendments. While they reflect a commitment to inclusivity and local



governance, there is a need to assess the potential impact on political parties' autonomy in selecting candidates, as well as the administrative complexities of defining and verifying residency.

- 2.6. The debate surrounding this petition highlights the ongoing efforts to refine and improve the electoral laws governing county assemblies in Kenya, with a focus on enhancing representation, inclusivity, and the effectiveness of local governance.
- 2.7. The Petition concerns counties and contains provisions that affect the functions and powers of the county governments as set out in the Fourth Schedule to the Constitution

3.0.GENERAL COMMENTS.

- 3.1. The petitioner, Laban Omisundi, demonstrates a commendable commitment to inclusivity and equitable representation in county assemblies. By proposing amendments to electoral laws that would require nominated MCAs to be registered voters and residents of their respective counties, the petitioner underscores the importance of ensuring that nominated representatives are deeply connected to and vested in their communities.
- 3.2. The Laban Omisundi's petition underscores the significance of local governance by advocating for the selection of nominated MCAs from ethnic communities within their respective counties. This approach has the potential to foster more effective, community-based decision-making and governance.
- 3.3. The petitioner's call for amendments to the electoral laws to ensure that nominated MCAs meet specific criteria such as voter registration and residency aligns with the values enshrined in the Constitution. It reflects a dedication to upholding the principles of representative democracy and local governance.
- 3.4. While the petitioner's emphasis on ethnic community representation is well-intentioned, it may inadvertently promote division along ethnic lines. Emphasizing ethnicity in the selection process could lead to tensions, exclusivity, and favoritism among various communities, which may not be in the best interest of fostering unity and cooperation.
- 3.5. The petitioner's proposal to require nominated MCAs to be residents of their respective counties may introduce complexities in practice. Defining residency and verifying it for all candidates could pose administrative and logistical challenges, potentially slowing down the selection process.
- 3.6. Implementing the petitioner's proposed amendments might limit the autonomy of political parties in selecting nominated MCAs. While transparency and community involvement are vital, excessive constraints on party nominations could hinder their ability to field the most qualified and aligned candidates.
- 3.7. CAF appreciates the opportunity to contribute to this Bill and on the basis of the foregoing proposes the following amendments:

4.0. THE FORUM VIEWS ON THE PETITION

- 4.1. We believe that political parties should have the liberty and power to select nominated members as they see fit. However, we also support the petitioner's recommendations for a more transparent and inclusive selection process involving various stakeholders from the County Government, political parties, and the Registrar of Political Parties.
- 4.2. Political parties play a crucial role in the selection of nominated MCAs. As per the Constitution, political parties have the mandate to nominate candidates in proportion to the seats received in elections. This process ensures that the political parties maintain diversity and representation in county assemblies. Allowing political parties to select nominated members empowers them to bring in individuals who align with their values and policies, contributing to effective governance.
- 4.3. We acknowledge the importance of ensuring that nominated MCAs are registered voters and residents of their respective counties. While we support the petitioner's goal of enhancing the selection process, we believe that the existing legal framework already provides mechanisms for parties to nominate individuals from the local communities.
- 4.4. Further, We fully endorse the petitioner's primary argument that nominated MCAs should be registered voters and residents of their respective counties. This fundamental requirement aligns with the core principle of representative democracy and ensures that MCAs have a direct stake in the local communities they are meant to serve.
- 4.5. The petitioner's proposal to amend electoral laws by emphasizing ethnic community representation is commendable. It promotes inclusivity, diversity, and ensures that MCAs genuinely understand and address the unique needs and challenges of their communities.
- 4.6. We appreciate the petitioner's focus on transparency in the selection process. The proposal for broader public participation, public consultations, and involvement of County Governments, as suggested, would enhance the legitimacy of the nomination process and make it more accountable to the electorate.

- 4.7. The Laws Governing the nomination of the members of the County Assembly are:-

Article 177 of the Constitution of Kenya :

“membership of County Assembly shall consists of :-

(a) Members elected by the registered voters of the wards each ward constituting a single member constituency on the same day as a general election of members of parliament being the second Tuesday in August in every fifth year.

(b) The number of special seat members necessary to ensure that no more than two thirds of the members of the assembly are of the same gender.

(c) The members of marginalized groups, including persons with disability and the youth, prescribed by an act of parliament.

(d) The speaker (ii) The members contemplated in clause 1 (b) and (c) shall in each case be nominated by political parties in proportion to seats received in that election in that county by each political party under paragraph (a) in accordance with article 90.”

- 4.8. Section 25 (1) of the Election Act, which specifies the qualifications for nomination as a member of County Assembly and states: -

(1) unless disqualified under section

(2) a person qualifies for nomination as a member of a County Assembly if the person:-

(a) Is registered as a voter.

(b) Satisfies any educational moral and ethical requirements prescribed, the constitution and the said act.

(c) is either

(i) Nominated by political party

(ii) an independent candidate supported by at least five hundred registered voters in the ward concerned.

- 4.9. Section 36 of the Elections Act provides that:-

“36. (1) A party list submitted by a political party under—

(a) Article 97 (1) (c) of the Constitution shall include twelve

candidates;

(b) Article 98 (1) (b) of the Constitution shall include sixteen candidates;

(c) Article 98 (1) (c) of the Constitution shall include two candidates;

(d) Article 98 (1) (d) of the Constitution shall include two candidates;

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

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

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

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

(4) Within thirty days after the declaration of the election results, the Commission shall designate, from each qualifying list, the party representatives on the basis of proportional representation.

(5) The allocation of seats by the Commission under Article 97 (1) (c) of the Constitution will be proportional to the number of seats won by the party under Article 97 (1) (a) and (b) of the Constitution.

(6) The allocation of seats by the Commission under Article 98 (1) (b), (c) and (d) of the Constitution shall be proportional to the number of seats won by the party under Article 98 (1) (a) of the Constitution.

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

(8) For purposes of Article 177(1)(c) of the Constitution, the

Commission shall draw from the list under subsection (1)(f) four special seat members in the order given by the party.

(9) The allocation of seats by the Commission under Article 177

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

4.10. We recommend reinforcing existing provisions that ensure the selection of nominated members who are residents of their respective counties. This can be done by incorporating clear guidelines that specify the residency requirements for nominated MCAs in the electoral laws.

4.11. The Forum proposes for a greater engagement with stakeholders, including County Governments, political parties, and the Registrar of Political Parties. Such collaboration can lead to a more transparent and inclusive selection process. County Governments should play a significant role in ensuring that nominated MCAs represent the interests of local communities. The Forum recommends the following:

a) **County Governments:**

1. We recommend that County Governments work in tandem with political parties to identify suitable candidates who have the backing of the community.
2. Implement continuous civic education programs focusing on the roles and responsibilities of elected and nominated officials, public participation opportunities, and constitutional provisions related to youth and women's participation.

b) **Senate**

1. We recommend further strengthening existing provisions that stipulate the need for nominated MCAs to be residents of their respective counties. This can be achieved by incorporating explicit guidelines in electoral laws that outline residency requirements for nominated MCAs, thereby ensuring they genuinely represent their communities.

c) **The Independent Electoral and Boundaries Commission (IEBC):**

1. Implement continuous civic education programs during the electoral cycle, focusing on the roles of elected and nominated officials, public participation opportunities, and constitutional provisions related to youth and women's participation.

d) **Political Parties:**

1. Reform party structures to ensure selection of nominated Members of County Assemblies are elected from their respective Counties.

e) **Office of the Registrar of Political Parties (ORPP):**

1. The Registrar of Political Parties should take on a facilitative role in coordinating and overseeing the selection process. Their guidance can ensure that the selection process aligns with the Constitution and electoral laws, promoting transparency and inclusivity.
2. Monitor, regulate, and enforce compliance with the Political Parties Act provisions related to youth and women political participation.
3. Implement regular capacity-building and training programs for personnel to enhance understanding of relevant provisions.
4. Conduct regular audits of political parties to assess compliance.
5. Implement public education programs to raise awareness about the role of political parties and how to register to vote.

4.12. In conclusion, CAF supports the petitioner's call for amending electoral laws to ensure that nominated MCAs are registered voters and residents of their respective counties. We recognize the merits of these proposals in enhancing local representation, fostering community-oriented governance, and promoting transparency. However, we also acknowledge the need for careful consideration to balance these objectives with party autonomy and practical implementation challenges.

4.13. We recommend a comprehensive review of the electoral laws, involving relevant stakeholders, to achieve a balanced and effective solution. We look forward to the Senate's thoughtful consideration of these proposals, keeping in mind the best interests of the Kenyan electorate and the principles of representative democracy.

Thank you.
Yours sincerely,

HON. PHILEMON SABULEI
CHAIRPERSON, CAF

