



**Livondo v Attorney General (Petition 31 of 2020) [2024] KEHC 10397 (KLR)
(Constitutional and Human Rights) (26 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10397 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 31 OF 2020

LN MUGAMBI, J

AUGUST 26, 2024

BETWEEN

STANLEY LIVONDO PETITIONER

AND

ATTORNEY GENERAL RESPONDENT

JUDGMENT

Introduction

1. The petition dated January 31, 2020 supported by the petitioner’s calla on this Court to interpret of Articles 179 (1) (2) (a) (b) and 180 (7)(a) (b) of *the Constitution* as read with Section 34 of the *County Governments Act*. The other provisions of law discussed in the Petition are Sections 30, 31 and 32 of the *County Governments Act*.
2. Consequently, the petitioner seeks the following reliefs against the respondent:
 - i. A declaration that Article 180 (7) of *the Constitution* as read with Article 179 (1)(2) be interpreted to mean that a sitting governor having completed two full terms as a governor cannot stand for nomination as a deputy governor of the County.
 - ii. A declaration that Article 187(7)(b) as read with Article 179(1)(2) of *the Constitution* be interpreted to mean that a sitting deputy governor having completed two full terms as the deputy governor cannot stand for nomination as the deputy governor or governor of the county.
 - iii. A declaration that Article 179(1) and 179(2) (a)(b) of *the Constitution* as read with Section 34 of the County Government Act be interpreted to mean that none of the County Executive can stand for nomination as a governor.



- iv. A declaration that the role of the current persons who constitute the County Executive Committee as per Article 179(1)(2) of the County Executive Committee individually including past Executive Committee collectively cease to have any executive role or any other role in the County Government in executive capacity or in any other capacity upon swearing in of the new President in 2022 having regards to Article 259 of *the Constitution*.
- v. The petition is deserving of costs.

Petitioner's Case

3. *The Constitution* provides for the election of a governor under Article 180 (1) and the nomination of a deputy governor under Article 180(5). Principally, for one to be elected as a governor, they must be eligible for election as a member of the County Assembly as directed under Article 193 of *the Constitution*.
4. Further, the County Executive Committee under Article 179 of *the Constitution* includes the governor and the deputy governor. The Petitioner alleged that the Article also provides that the County Executive power is shared between the governor, deputy governor and the County Government Executives. In addition, by virtue of Article 179 (5) of *the Constitution* the deputy governor can exercise the functions of the governor stipulated under Section 30 and 31 of the *County Governments Act* save for nomination, appointment or dismissals as provided under Section 32(5) of the Act.
5. The petitioner stated that the objective of this petition is seek the Court's interpretation of Articles 179 (1)(2) (a) (b) and 180 (7)(a) (b) of *the Constitution* as read with Section 34 of the *County Governments Act*. This is with reference to the eligibility of persons intending to vie for the position of governor.
6. In this regard, the petitioner avers that Article 259 of *the Constitution* allows for an interpretation that embraces societal wishes and one that evolves with time. Further that Article 260 of *the Constitution* does not define executive authority leaving room for its open interpretation to promote the spirit of *the Constitution*.
7. According to the petitioner, the deputy governor and the Committee members who are appointed by the governor during his or her term should be taken to have served their term alongside the governor's term. Furthermore, it is his interpretation that the governor and deputy governor are a unit as demonstrated above. The same can also be discerned by their corresponding Oath of Office as provided under the First Schedule of the *County Governments Act*.
8. It is the petitioner's case therefore that since the terms of the governors was set to expire in August 2022, the deputy governors and those Executive Committee terms shall also end concurrently. For this reason, he contends that all the persons comprising the Executive Committee cannot participate in the general election seeking elective position or nomination as governor or deputy governor.
9. The petitioner argues that by virtue of Article 180 (7) of *the Constitution* the then governors were barred from standing for nominations as candidates in the gubernatorial seat while the Article 180(7) (b) of *the Constitution* bars deputy governors who have served 2 consecutive terms in office from vying for the seat of governor.

Respondent's Case

10. In response, the respondent filed its grounds of opposition dated 10th November 2020 on the basis that:
 - i. In as far as the prayers (a), (b) and (c), in the petition, seek to bar the holder of a position of Governor from ascending to the office of the Deputy Governor upon completing his / her



second term in office and the Deputy Governor contesting for the position of Governor, purely on account of this Court's interpretation of *the Constitution* of Article 179(1) & (2) and Article 180(7) of *the Constitution*, is not only a violation to the candidate's right under Articles 38 of *the Constitution*, but it is also an interdiction of the clear provisions of Article 180(2), (5) & (7) of *the Constitution* in as far as the qualifications of an individual for purposes of nominations as a governor and deputy governor positions within the county governments.

- ii. In as far as prayers (a), (b) and (c) of the Petition seek an interpretation to Articles 179(1) & (2) and Article 180(7) of *the Constitution*, to make provision and meaning that is contrary to the literal interpretation of the said provisions, the same should not be issued. As such it contradicts Article 259 of *the Constitution*.
- iii. The petition as presented seeks to impeach Articles 179 & 180 of *the Constitution*, in as far as it attempts to amend the functions of the Governors and the qualifications/disqualifications for persons who intend to contest for the position of Governors and Deputy Governors. This contradicts the sovereign authority of the people as captured in the Preamble to *the Constitution* in Articles 1 and 2 thereof.
- iv. Granting the Orders and Declarations sought herein will be akin to amending *the Constitution*, particularly Articles 179 & 180 outside the strictures of Articles 255, 256 and 257 of *the Constitution* which will be unconstitutional.
- v. In as far as the issue of appointment and formation of the Executive Arms of Governments, at both the National and County Levels of Government, is concerned – the same remains strictly a concern of the Executive Arms and this court lacks the requisite jurisdiction to change the same through either declarations or orders. Respectfully, granting the Orders and Declarations sought will be an affront to the twin doctrines of deference and separation of powers.
- vi. This court lacks the jurisdiction to entertain this Petition in as far as its main concern is a back-hand amendment of *the Constitution*. The jurisdiction invoked is not within the provisions of Article 165 of *the Constitution* and in toto it is an abuse to this Court's process, it is unmerited and we urge for its dismissal with costs.

Petitioner's Submissions

11. The petitioner herein did not file submissions in the matter however sought to rely on its submissions filed in Constitutional Petition No.14 of 2020; Stanley Livondo vs Attorney General. The same are reiterated below.
12. Khaminwa and Khaminwa Advocates for the petitioner filed submissions dated 6th June 2023. Counsel on the first issue, whether the president and deputy president are eligible to run for another term, submitted that this would be contrary to Articles 142(2) and 148(8) of *the Constitution*.
13. It is submitted that the essence of democracy in this context should be reflected in presidential term limits. Accordingly, it is argued that leadership structure should not be premised on a system that allows a leader to lead indefinitely. In Counsel's view the deputy president's term of office is pegged on the president's term. Hence where a deputy president has served two terms concurrently with the sitting president, it should then be interpreted that the deputy president has served the envisaged two terms and hence not be allowed to vie for presidency if desirous to do so. In Counsel's view the strictures of these two provisions are not unreasonable restrictions rather reflective of the values of our nation.
14. As to the qualifications and disqualifications for election as a president, Counsel in this second issue submitted that Article 137 of *the Constitution* provides the basis upon one can be eligible to vie for



presidency. Correspondingly of importance is that Section 22 (1) of the [Elections Act](#) provides that a person may be nominated as a candidate for election under the Act only if that person is qualified to be elected to that office under [the Constitution](#). These provisions are said to also be applicable to the office of the deputy president.

Respondent's Submissions

15. State Counsel, Christopher Marwa for the respondent filed submissions dated 1st August 2023. Counsel identified the issues for discussion as whether a sitting governor or deputy governor having completed two full terms is barred from standing for nomination as deputy governor or elected as a governor and whether a member of the County Executive can stand for nomination as a governor.
16. Counsel submitted that primarily the issue revolves around the constitutional interpretation of Articles 180 (7) (a) (b), 180 (2), 180 (5) as read with Article 179 of [the Constitution](#). In this regard, he relied in *Apollo Mboya vs Attorney General and 2 Others* (2018) eKLR where the Court held that:

“It is also an established principle of interpretation that Constitutional provisions must be construed purposively and in a contextual manner. Courts are constrained by the language used. Courts may not impose a meaning that the text is not reasonably capable of bearing. In other words, interpretation should not be unduly strained. It should avoid excessive peering at the language to be interpreted.”
17. Similar reliance was placed in *Kenan Menon-vs- State of Bombay* (1951) SCR 228 and *Re the Matter of Interim Independent Electoral Commission* (2011) eKLR.
18. According to Counsel, the meaning of the impugned provisions is not ambiguous as alleged. In fact, Counsel argued that the interpretation proposed by the petitioner is mischievous and self-seeking. Counsel relying on Article 259 of [the Constitution](#), urged this court to interpret [the Constitution](#) in a manner that advances the rule of law and contributes to good governance.
19. With these principles in mind, Counsel on the first issue submitted that Article 180 of [the Constitution](#) provides for the election of the county governor. Further for a candidate to be eligible as a member of the County Assembly, one must meet the requirements set out under Article 193(1) of [the Constitution](#). Likewise, that Article 193 (2) [the Constitution](#) sets out the grounds under which a candidate can be disqualified from being elected as a member of a County Assembly.
20. Consequently, Counsel argued that [the Constitution](#) has clear parameters on how a person can qualify and/or be disqualified from vying for office of the governor or being nominated as a deputy governor. He asserts that [the Constitution](#) does not provide as advanced by the petitioner, for one to be disqualified from holding such an office where one had previously held office in the capacity of deputy governor or member of the county executive committee. As such, Counsel stated that the petitioner's interpretation of these provisions is a narrow and without any legal basis.
21. What is more, Counsel relying on Part V of the County Government Act under Sections 30 and 31 and the dictates of Article 180 of [the Constitution](#), contended that the office of the governor and deputy governor, have distinct roles and powers and therefore the petitioner cannot purport that after completion of their two terms in office the persons are barred from holding either office.



22. Reliance was placed in *Wavinya Ndeti and Another vs Independent Electoral and Boundaries Commission and 2 Others Machakos Election Petition No. 1 of 2017* where it was held that:
- “It is clear from these provisions that a governor is directly elected by the registered voters in a County. He nominates a running mate to be on the same ticket with him. If he is elected the running mate becomes the deputy governor who is deemed to be elected. In other words, the deputy governor is not directly elected by voters in the county. He will only assume office of the governor if it falls vacant under any of the circumstances under Article 182.”
23. Like dependence was placed in *Japheth Muroko and Another vs Independent Electoral and Boundaries Commission (IEBC) and 2 others (2017) eKLR*.
24. Counsel, in the second issue similarly echoed his sentiments stating that it can be inferred from *the Constitution* and Section 35 of the County Government Act, that the governor has the discretion to appoint persons of his or her choice who meet the requirements subject to approval by the County Assembly. As such, interpreting *the Constitution* in the manner proposed by the petitioner, would be curtailing the elected governor’s discretion as embedded in *the Constitution*.
25. Additionally, Counsel noted that despite the dictates of Article 179 (7) of *the Constitution*, this provision does not restrict these persons from vying for the seat of governor or from being nominated as deputy governor. Correspondingly that neither *the Constitution* nor the *County Governments Act* bars a former governor or deputy governor from serving the County in the capacity of an executive member once their respective terms have come to an end. To this end, Counsel, urged the Court to dismiss the petition as the reliefs sought are incapable of being granted.

Analysis and Determination

26. From the pleadings and the submission of the Parties, the issues that form for determination in this Petition are:
- i. Whether this Court has jurisdiction to entertain this petition.
 - ii. What is the legal constitutional interpretation of Articles 179 (1)(2) (a) (b) and 180 (7)(a) (b) of *the Constitution* as read with Section 34 of the *County Governments Act*.
 - iii. Whether this Court should award costs in this suit.

Whether this Court has Jurisdiction to entertain this matter

27. This Court’s jurisdiction to entertain this petition was challenged by the respondent in view of the doctrine of separation of powers.
28. Jurisdiction refers to the authority of the Court to hear a dispute. It is either granted by *the Constitution* or the Statute and a Court can only adjudicate disputes that fall within the scope of its authority. The jurisdiction of the High Court to hear and determine constitutional disputes is granted by Article 165(3) of *the Constitution*.
29. The Supreme Court discussed the issue of jurisdiction Re Matter of the Interim Independent Electoral Commission (supra) in which it guided as follows:

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya)



Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. ”The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*.”

Whether the Court has jurisdiction to hear the Petition

30. In the grounds of opposition dated 10/11/2020; the Respondents stated in part as follows:

“This court lacks the jurisdiction to entertain this Petition in as far as its main concern is a back-hand amendment of *the Constitution*. The jurisdiction invoked is not within the provisions of Article 165 of *the Constitution* and in toto it is an abuse to this Court’s process, it is unmerited and we urge for its dismissed with costs.”

31. The Respondent approaches the question of lack of jurisdiction from the perspective of separation of powers doctrine by pointing out that what the Petitioner wants under the guise of constitutional interpretation, is akin to a backdoor amendment of *the Constitution* by urging the Court read into *the Constitution* what *the Constitution* does not provide through interpretive inventiveness. The Respondent submits taking that route would be in violation of separation of powers doctrine.

32. My view however is that the lack of jurisdiction is not anchored on the separation of powers doctrine but on the principle of Constitutional avoidance by reason of the doctrine of ripeness.

33. My observation is that this dispute was filed prematurely. At the time, there was real or factual case to necessitate this Court to be called upon to exercise its jurisdiction under Article 165 (3). Black’s Law 10th Edition defines ‘ripeness’ to be:

“The State of a dispute that has reached, but has not passed the point when facts have developed sufficiently to permit an intelligent and useful decision to be made.”

34. When this Petition was filed, there was no actual or real controversy at moment, it is only filed in anticipation that the possible factual scenarios presented might arise in the general elections that were expected to take place almost two years from the date of filing that Petition.

35. Reading through the entire Petition and the affidavit in support, there is no actual or specific case that had happened in fact. The Petition was thus founded on hypothesis upon which the Petitioner sought this Court’s interpretation (read opinion) of the cited Constitutional and Statutory provisions.

36. Unlike the Supreme Court which has advisory jurisdiction under Article 163 (6) of *the Constitution*, this Court’s jurisdiction does not have jurisdiction to give advisory opinions and its jurisdiction is thus confined to real disputes or controversies.

37. The Court cannot render advisory opinion on yet to happen controversy. The cases brought before it must be factual or legal controversies. Its duty is not to offer advisories on what the law should be but to apply the law in real controversies. The Petition as presented is thus speculative therefore non-



justiciable as the matter had not sufficiently developed to call for this Court's determination. I hereby dismiss this Petition with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF AUGUST, 2024.

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L N MUGAMBI

JUDGE

