Wambui & 10 others v Speaker of the National Assembly & 6 others (Constitutional Petition 28 of 2021 & Petition E549, E037 & E065 of 2021 & E077 of 2022 (Consolidated)) [2022] KEHC 10275 (KLR) (Constitutional and Human Rights) (13 April 2022) (Judgment)

Paul Macharia Wambui & 10 others v Speaker of the National Assembly & 6 others [2022] eKLR

Neutral citation: [2022] KEHC 10275 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION 28 OF 2021 & PETITION E549, E037 & E065 OF 2021 & E077 OF 2022 (CONSOLIDATED)

AC MRIMA, J

APRIL 13, 2022

BETWEEN

PAUL MACHARIA WAMBUI ..... 1ST PETITIONER

JOSEPH KARANJA MUCHAI ..... 2ND PETITIONER

DAVID KIMANI NJENGA ..... 3RD PETITIONER

DONALD MAKANA ..... 4TH PETITIONER

STEPHEN MUTHUKA ..... 5TH PETITIONER

FESTUS NDETO ..... 6TH PETITIONER

ADRIAN KAMOTHO NJENGA ..... 7TH PETITIONER

KIPAS LENGUES ..... 8TH PETITIONER

JIMMY PARNYUMBE LUKA ..... 9TH PETITIONER

NOONYUAT SANKEI ..... 10TH PETITIONER

TIPAPA OLE KIRPOKOP ..... 11TH PETITIONER

AND

SPEAKER OF THE NATIONAL ASSEMBLY ..... 1ST RESPONDENT

NATIONAL ASSEMBLY ..... 2ND RESPONDENT

SPEAKER OF THE SENATE ..... 3RD RESPONDENT

SENATE ..... 4TH RESPONDENT

ATTORNEY GENERAL ..... 5TH RESPONDENT

MINISTER FOR JUSTICE & CONST. AFFAIRS ..... 6TH RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 7TH RESPONDENT

Section 22(1)(b)(i) of the Elections Act on the requirement of a degree qualification as a pre-condition for nomination for election declared unconstitutional.

The case challenged section 22(1)(b)(i) of the Elections Act which made a university degree qualification a pre-condition to nomination for election and/or political party lists for Members of Parliament. The court held that section 22(1)(b)(i) was unconstitutional as it violated articles 10(2)(a), 24, 27, 38(3) and 56 of the Constitution.

Reported by Kakai Toili

Constitutional Law *– constitutionality of statutes – constitutionality of section 22(1)(b)(i) of the Elections Act which made a university degree qualification a pre-condition to nomination for election and/or political party lists for Members of Parliament – claim that section 22(1)(b)(i) violated article 27 of the Constitution on equality and freedom from discrimination to the extent that it discriminated on the basis of educational qualifications – claim that section 22(1)(b)(i) violated articles 38(3) and 56 of the Constitution by placing unreasonable restrictions to the exercise of political rights and for failing to take into account the rights of the minority and marginalised groups – whether section 22(1)(b)(i) violated articles 24, 27, 38(3) and 56 of the Constitution and thus unconstitutional - Constitution of Kenya, 2010, articles 24, 27, 38(3) and 56; Elections Act, 2011, section 22(1)(b)(i).*

Constitutional Law *– fundamental rights and freedoms – limitation of fundamental rights and freedoms – limitation of political rights – claim that section 22(1)(b)(i) of the Elections Act which made a university degree qualification a pre-condition to nomination for election and/or political party lists for Members of Parliament limited the rights for people seeking to vie for parliamentary positions – claim that the National Qualifications Act accorded a less restrictive means to achieve the very purpose aimed at by section 22(1)(b)(i) – whether section 22(1)(b)(i) of the Elections Act violated article 24 of the Constitution on limitation of rights and fundamental freedoms and thus unconstitutional – Constitution of Kenya, 2010, article 24; Elections Act, 2011, section 22(1)(b)(i).*

Constitutional Law *– interpretation of the Constitution – principles to be considered in the interpretation of the Constitution and statutes – interpretation of article 119 of the Constitution on the right to petition Parliament – whether article 119 took away the right of a party to question the constitutionality of an Act of Parliament or any action taken by the Legislature in court – Constitution of Kenya, 2010, articles 119 and 259.*

Constitutional Law *– national values and principles of governance – public participation – public participation in the enactment of legislation – what was the nature of public participation required in the enactment of legislations – Constitution of Kenya, 2010.*

Brief facts

The consolidated petitions variously challenged the constitutionality of section 22(1)(b)(i) of the Elections Act as introduced by an amendment through the Election Laws (Amendment) Act, No. 1 of 2017 (the impugned provision). The impugned provision provided for a university degree qualification as a pre-condition to nomination for election and/or political party lists for Members of Parliament.

The petitioners claimed that the impugned provision was unconstitutional for violating various articles of the Constitution such as articles 10(2), 24, 27, 38(3) and 56 on the national values and principles of governance, limitation of rights and fundamental freedoms, equality and freedom from discrimination, political rights and minority and marginalized groups respectively. The respondents argued that the consolidated petitions were *res judicata*, that the impugned provision enjoyed the presumption of constitutionality and that there was no evidence to show that the impugned provision was unconstitutional.

Issues

i. Whether section 22(1)(b)(i) of the Elections Act which made a university degree qualification a pre-condition to nomination for election and/or political party lists for Members of Parliament violated article 24 of the Constitution on limitation of rights and fundamental freedoms and was thus unconstitutional.

ii. Whether section 22(1)(b)(i) of the Elections Act violated article 27 of the Constitution on equality and freedom from discrimination to the extent that it discriminated on the basis of educational qualifications and was thus unconstitutional**.**

iii. Whether section 22(1)(b)(i) of the Elections Act violated articles 38(3) and 56 of the Constitution by placing unreasonable restrictions to the exercise of political rights and for failing to take into account the rights of the minority and marginalised groups and was thus unconstitutional**.**

iv. Whether article 119 of the Constitution on the right to petition Parliament took away the right of a party to question the constitutionality of an Act of Parliament or any action taken by the Legislature in court.

v. What were the principles to be considered in the interpretation of the Constitution and statutes?

vi. What was the nature of public participation required in the enactment of legislation?

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 119 - Right to petition Parliament

1. *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 shall make provision for the procedure for the exercise of this right.*

Kenya National Qualifications Act, 2014

Section 2 - Interpretation

"National Qualifications Framework" *means the national system for the articulation, classification, registration, quality assurance, and the monitoring and evaluation of national qualifications as developed in accordance with this Act;*

"qualifications" *means qualification in education and training as recognized by the Authority in accordance with this Act;*

"training" *means any activity aimed at imparting skills, knowledge, competences, values, attitudes and information towards assisting the recipient improve their performance;*

Held

1. The doctrine of *res judicata* was a jurisdictional issue. It went to the root of a dispute and had to be considered at the earliest opportunity. The decisions in *John Harun Mwau v Independent Electoral and Boundaries Commission & another* [2013] eKLR and *Johnson Muthama v Minister for Justice and Constitutional Affairs & another* [2012] eKLR did not deal with section 22(1)(b)(i) of the Elections Act which was the subject of the consolidated petitions. The consolidated petitions challenged an amendment passed in 2017 whereas the earlier decisions dealt with some other amendments passed earlier on.
2. The issues in the consolidated petitions were non-existent before 2017. It could only be illogical to sustain an argument that the non-existent matter was settled way before it arose. The only forum which presented itself for a possible adjudication of the issues raised in the consolidated petitions was the case in *Okiya Omtatah Okoiti & Another v Attorney General & Another,* Petition No. 593 of 2013 [2014] eKLR. However, the court declined jurisdiction and the matter was not fully and finally determined. The consolidated petitions were not *res judicata*.
3. The ripeness doctrine was one facet of the larger principle of non-justiciability. It was a jurisdictional issue that barred a court from considering a dispute whose resolution had not crystallized enough to

warrant a court's intervention. Its operation was informed by the idea that there existed other fora with the capacity to resolve the dispute other than court process.

4. Article 119 of the Constitution was not intended to take away the right of a party to question the constitutionality of an Act of Parliament, or any action taken by the Legislature, guaranteed under articles 22 and 258 of the Constitution. Article 119 could not also be taken as ousting the jurisdiction of the court under article 165(3)(d) of the Constitution to determine any question respecting the interpretation of the Constitution, including the question whether any law was inconsistent with or in contravention of the Constitution, or under article 165(3)(d)(iii), to determine any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of Government.
5. The power of Parliament under article 119 of the Constitution to enact, amend or repeal any legislation was not in any way curtailed by the High Court's exercise of its jurisdiction under article 165(3) of the Constitution. Whereas Parliament had the preserve to enact, amend or repeal any legislation, courts had the duty to ensure that Parliament *inter alia* kept within the constitutional borders while discharging its mandate. That was where the difference lay. The court's exercise of its jurisdiction in determining whether Parliament acted within the Constitution in coming up with the impugned law could not be seen as an afront to the doctrine of separation of powers. The two were distinct mandates under the Constitution.
6. The petitioners contended that the National Assembly in passing the amendment that resulted to the impugned section 22(1)(b)(ii) of the Elections Act did not act within the Constitution. That was very different from the Parliament's power to reconsider and possibly amend or repeal the impugned provision. In any event, there was no proposition that the decision of Parliament on the public petitions presented before Parliament concerning the constitutionality of section 22(1)(b)(i) of the Elections Act was binding on the court. Courts had to remain vigilant and cautious when wading through such waters and ensure that the courts did not infringe upon the doctrine of separation of powers. The contention that the consolidated petitions were caught up by the doctrine of ripeness failed and was dismissed.
7. The Constitution was a document *sui generis*. It was the ultimate source of law in the land. It commanded superiority and dominance in every aspect and its interpretation as of necessity had to be in a manner that all other laws bowed to. As provided by article 259, the Constitution had to be interpreted in a manner that promoted its purposes, values and principles; advanced rule of law, human rights and fundamental freedoms and permitted development of the law and contributed to good governance. The spirit and tenor of the Constitution had to preside and permeate the process of judicial interpretation and judicial discretion.
8. The Constitution had to be interpreted broadly, liberally and purposively so as to avoid the austerity of tabulated legalism. The entire Constitution had to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle). Those principles were not new and also applied to the construction of statutes.

9. There were other important principles which applied to the construction of statues which, also applied to the construction of a constitution such as;
    a. presumption against absurdity – meaning that a court should avoid a construction that produced an absurd result;
    b. the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produced unworkable or impracticable result;
    c. presumption against anomalous or illogical result - meaning that a court should find against a construction that created an anomaly or otherwise produced an irrational or illogical result;
    d. the presumption against artificial result – meaning that a court should find against a construction that produced artificial result;
    e. the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which was in any way adverse to public interest, economic, social and political or otherwise.
10. The dominant perception at the time of constitution-making was that such the de-concentration of powers would open up the scope for political self-fulfilment, through an enlarged scheme of actual participation in governance mechanisms by the people thus giving more fulfilment to the concept of democracy.
11. Limitations to fundamental rights and freedoms by a statute had to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.
12. The 2019 Kenya Population and Housing Census Report (the Report) was part of the evidence in the consolidated petitions. The Report was not in any way controverted neither was there any other contradictory evidence. Since the Report was a public document which remained uncontested, the court adopted it as admissible evidence in accordance with Part IV of the Evidence Act. With such uncontroverted evidence, the impugned provision would have adverse effects on the representation of the people at the constituency level. Indeed, unless the contrary was proved, and it was not, the impugned provision had the effect of leaving some sub-counties without representation in Parliament.
13. Section 3 of the Kenya National Qualifications Act gave the guiding principles of the national framework as, among others, to promote access to and equity in education, quality and relevance of qualifications, evidence-based competence, and flexibility of access to and affordability of education, training assessment and qualifications. Sections 3, 4 and 6 of the Act revealed the position that the law recognized other modes of qualifications further to the conventional ones. The law established the manner in which relevant qualifications could be awarded to a person. Such qualifications could, in appropriate instances, be equated to conventional degrees. There was, therefore, a law which attained the same purpose as the impugned provision.
14. The danger posed by the impugned provision was that it tended to disregard any other qualification, but for a university degree. It, therefore, rendered the provisions of the National Qualifications Act inapplicable in the election of Members of Parliament. The National Qualifications Act accorded a less restrictive means to achieve the very purpose aimed at by the impugned provision. The National Qualifications Act did not constrict the number of those who could contest for the positions of Members of Parliament to conventional degrees' holders, but widened the cage to a holder of any other relevant qualification. The National Qualifications Act recognized the truism that a person could, through other qualifications, attain an equivalent of a university degree. The impugned provision was irrational, unreasonable and unjustifiable in an open and democratic society.
15. The cost of obtaining a degree qualification in Kenya was not within the reach of the majority of Kenyans. The prevailing situation which the court took judicial notice of was that most Kenyans were literary surviving from hand to mouth with the wealthy few increasing their insatiable appetite for more by the day. Subjecting all the candidates for the positions of Members of Parliament to a minimum of

university degrees at once, therefore, highly prejudiced the rights and fundamental freedoms of those who were not able to directly acquire the university degrees.

16. The *covid-19* pandemic interfered with the university academic programmes such that there were those students who were to graduate before 2022, but for the pandemic. If such a group of persons was to be left out on account of the impugned provision, then they would be unfairly discriminated against and yet the effects of the pandemic were way far beyond the world's control. Such a class of university students would stand discriminated if the impugned provision stood.
17. The impugned provision did not augur well with several constitutional provisions. For instance, it did not pass the test of limitation in article 24 of the Constitution. The impugned provision was, hence, an affront to the Constitution. Further, the impugned provision offended article 27 of the Constitution to the extent that it, unfairly and without justification, discriminated election candidates on the basis of educational qualifications.
18. The impugned provision failed to treat every person equally before the law. Whereas the law recognized equivalent qualifications, the impugned provision out-rightly disregarded that and firmly settled for only conventional university degrees. The impugned provision also failed to take into account the category of the people who, while already admitted into the university, could not graduate before 2022 as a result of the effects of the global *covid-19* pandemic.
19. Article 38(3) of the Constitution was infringed to the extent that the impugned provision placed unreasonable restrictions to the exercise of political rights. The impugned provision likewise failed to take into account the dictates in article 56 of the Constitution regarding the rights of the minority and marginalized groups.
20. The impugned provision was not well thought out. To equate the academic qualifications of all elective positions in Kenya at par, without any differentiation, without regard to the different attending responsibilities and by disregarding the different remuneration and benefits, the impugned provision ran *contra* several provisions of the Constitution. There was the need for the impugned provision to be re-looked at, at least with a view of taking into account the need for differentiated qualifications and in keeping with the prevailing and targeted social, economic and educational realities in Kenya.
21. Participation of the people was a national value and principle of governance that was introduced in Kenya under article 10 of the Constitution.
22. Public participation was an irreducible minimum in the process of enacting any legislation. Parliament had to always strictly adhere to the requirement of and carry out adequate public participation for any of its legislation to gain legitimacy. For Parliament to have come up with an enactment in the nature of the impugned provision, there was need for elaborate and comprehensive public participation and stakeholder engagement.
23. There was need for Parliament to consider national statistics, to consult with experts in devolution and educational matters and to generally be alive to the truism that the impugned provision had to always be in tandem with the various realities in Kenya. Parliament was then to balance all that with the right to representation. Unfortunately, Parliament chose to ignore all that and the Senate only received presentations from some few entities without disclosing how invitations were done. Given the appalling state of affairs, there was no meaningful public participation towards the enactment of the impugned provision. The impugned provision fell short of the constitutional requirement under article 10(2)(a) of the Constitution.
24. Section 22 of the Elections Act was omitted and it had to have been for good reason. The law, in that regard, was unsettled because the provision was being challenged in court and before Parliament and as such there was need to avoid confusion in the qualifications, at least pending the resolution of the issue.
25. As the impugned provision had been rendered unconstitutional and the rest of the provisions cited in the Gazette Notices rightly so captured the qualifications, the need for issuance of a *corrigendum* did not arise.

26. **[*Obiter*]** "As I come to the end of this issue, it must be clear that I am not fronting the position that university educational qualifications or their equivalent are not necessary for those seeking the candidature of Members of Parliament, not at all! The reality is that Kenya is a member of the international community and has so far taken several steps and programmes in attaining some of the globally agreed standards. Such include the effort in attaining the sustainable development goals (SDGs) as well as political rights through various initiatives including, but not limited to, execution of international covenants. Therefore, a time is soon catching up with us when the dictates of global demands and trends will make a university degree qualification or its equivalent an inevitable necessity in every elective position."

Consolidated petitions partly allowed.

Orders

i. *Declaration issued that section 22(1)(b)(i) of the Elections Act was unconstitutional and in violation of article 10(2)(a) of the Constitution for failure to undertake adequate public participation.*

ii. *Declaration issued that section 22(1)(b)(i) of the Elections Act was unconstitutional and in violation of articles 24, 27, 38(3) and 56 of the Constitution.*

iii. *Order issued that section 22(1)(b)(i) of the Elections Act was in-operational, of no legal effect and void ab initio. For clarity, the requirement that a person had to possess a degree from a university recognized in Kenya to qualify to be a Member of Parliament in Kenya was nullified.*

iv. *No order as to costs.*

Citations

Cases

Kenya

1. *Center for Rights Education and Awareness & anothers v John Harun Mwau & 6 others* Civil Appeal 74 & 82 of 2012; [2012] KECA 249 (KLR) - (Applied)
2. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14A, 14B & 14C of 2014 (Consolidated); [2014] KESC 53 (KLR) - (Explained)
3. *Council of Governors & 3 others v Senate & 53 others* Petition 381 & 430 of 2014; [2015] KEHC 6965 (KLR) - (Applied)
4. *Council of Governors & 6 others v Senate* Petition 413 of 2014; [2015] KEHC 6967 (KLR) - (Explained)
5. *Gakuru, Robert N & others v Governor Kiambu County & 3 others* Petition 532 of 2014; [2014] KEHC 7516 (KLR); [2014] 3 KLR 170 - (Applied)
6. *In the Matter of Kenya National Commission on Human Rights* Reference 1 of 2014; [2014] KESC 33 (KLR); [2014] 2 KLR 356 - (Applied)
7. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* Advisory Opinions Application 2 of 2012; [2012] KESC 5 (KLR); [2012] 3 KLR 718 - (Applied)
8. *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* Civil Appeal 105 of 2017; [2017] eKLR - (Explained)
9. *Institute of Social Accountability & another v National Assembly & 4 others* Petition 71 of 2013; [2015] KEHC 6975 (KLR) - (Applied)
10. *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* Civil Appeal 42 of 2014; [2015] KECA 472 (KLR) - (Explained)
11. *Karia & another v Attorney General & others* [2005] 1 EA 83 - (Applied)
12. *Kenya Commercial Bank Limited v Benjoh Amalgamated Limited* Civil Appeal 107 of 2010; [2017] KECA 98 (KLR) - (Explained)
13. *Kiriro wa Ngugi & 19 others v Attorney General & 2 others* Petition 254 of 2019; [2020] KEHC 8819 (KLR) - (Applied)

14. *Koross, William (Legal personal Representative of Elijah CA Koross) v Hezekiah Kiptoo Komen & 4 others* Civil Appeal 223 of 2013; [2015] KECA 906 (KLR) - (Explained)
15. *Law Society of Kenya v Attorney General & another* Constitutional Petition No E327 of 2020; [2021] eKLR - (Applied)
16. *Mbugua, Simon & another v Central Bank of Kenya & 2 others* Petition 210 & 214 of 2019; [2019] KEHC 4223 (KLR) - (Applied)
17. *Muthama, Johnstone v Minister for Justice & Constitutional Affairs & another* Petitions 198, 166 & 172 of 2011; [2012] KEHC 4003 (KLR) - (Explained)
18. *Mwau v Independent Electoral and Boundaries Commission & another* Petition 26 of 2013; [2013] KEHC 6762 (KLR) - (Distinguished)
19. *Mwau, John Harun v Independent Electoral & Boundaries Commission & another* Civil Appeal 112 of 2014; [2019] KECA 86 (KLR) - (Applied)
20. *Okoiti, Okiya Omtatah & another v Attorney General & another* Application 24 of 2020; [2020] eKLR - (Explained)
21. *Okoiti, Okiya Omtatah v Public Service Commission & 73 others* Petitions No. 33 and 42 of 2018; [2021] eKLR (Consolidated) - (Explained)

Uganda

Tinyefuza v Attorney General [1997] UGCC 3 - (Applied)

South Africa

1. *Doctors for Life International v Speaker of the National Assembly & others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) - (Applied)
2. *Matatiele Municipality & others v President of the Republic of South Africa & others (2)* (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC) - (Explained)

United Kingdom

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 - (Applied)

Texts

Garner, BA., (Ed) (2014), *Black's Law Dictionary* St Paul Minessota: Thomson West 10th Edn

Statutes

Kenya

1. Civil Procedure Act (cap 21) section 7- (Interpreted)
2. Constitution of Kenya articles 1, 2, 10, 19, 20, 21, 22, 24, 27, 28, 38, 55, 57, 81, 82, 83, 88(1); 93 - 96; 106; 156 - (Interpreted)
3. Election Act (cap 7) section 22(1)(b)(i)- (Unconstitutional)
4. Elections (General) Regulations (cap 7 Sub Leg) regulations 16, 18, 19- (Interpreted)
5. Elections Act (cap 7) sections 3(1); 23(1)(b), 24(1)(b); 25(1)(b); 26(1)- (Interpreted)
6. Evidence Act (cap 80) part IV- (Interpreted)
7. Kenya National Qualifications Framework Act (cap 214) In general- (Cited)

Instruments

1. African Charter on Human and Peoples' Rights (Banjul Charter), 1981
2. International Covenant on Civil and Political Rights (ICCPR), 1966 articles 3(a)(b)(c); 26
3. Universal Declaration of Human Rights (UDHR), 1948 articles 1, 2, 7, 8, 21, 29

Advocates

Adrian Kamotho Njenga for the 7th petitioner
Miss Thiong'o for the 8th and 11th petitioners
Miss. Akama for the 1st and 2nd respondents
Mr. Wambulwa for the 3rd and 4th respondents

Miss. Chibole for the 5th and 6th respondents
Mr. Mbogo, Mr Hassan Nura, Mr. Nelson Onyango and *Miss Ogula* for the 7th respondent

JUDGMENT

Introduction:

1. This judgment relates to five petitions. They are Petition No 28 of 2021 jointly instituted by the 1st to 3rd petitioners, Petition No E549 of 2021 instituted by the 4th petitioner, Petition No E037 of 2021 jointly instituted by the 5th and 6th petitioners, Petition No E065 of 2022 instituted by the 7th petitioner and Petition No E077 of 2022 jointly commenced by the 8th to 11th petitioners. I, will, hereinafter collectively refer to the petitions as 'the consolidated petitions'.

2. The above petitions were consolidated and Petition No. 28 of 2021 became the lead petition. The rest of the parties in the consolidated petitions appeared as in the title herein.

3. The consolidated petitions variously challenge the constitutionality of section 22(1)(b)(i) of the *Elections Act* as introduced by an amendment through the Election Laws (Amendment) Act, No 1 of 2017 (hereinafter referred to as 'the impugned provision').

4. The impugned provision provides for a university degree qualification as a pre-condition to nomination for election and/or political party lists for Members of Parliament.

5. The petitions are opposed.

The Parties:

6. The 1st, 2nd and 3rd petitioners are variously described as Kenyans of goodwill who are registered voters and capable of taking part in any election and referenda.

7. The 4th petitioner is a kenyan adult and at the time of filing his petition he was a third year student at the Egerton University undertaking studies leading to the award of a degree in Statistics in the Faculty of Science.

8. The 5th and 6th petitioners are currently serving as Members of the County Assembly of Machakos representing the Ndalani Ward and Kola Ward respectively. They are both desirous of vying for the positions of Members of National Assembly in the forthcoming general elections.

9. The 7th petitioner is a person of many accolades. He is an Advocate of the High Court of Kenya, a public spirited individual, a defender of the Constitution, an ICT expert, a CPA-K holder and a Cyber Security expert. He instituted the Petition in the wider public interest.

10. The 8th petitioner is a Member of the County Assembly of Narok County for Suswa Ward, a student at the Kenyatta University pursuing undergraduate studies leading to the award of a Bachelor of Human Resource Management degree.

11. The 9th petitioner is a Kenyan adult and a person living with disability duly registered with the National Council for Persons with Disabilities (NCPWD) under Registration No NCPWD/P/4357. He aspires to vie for the Senatorial position in Narok County in the next general elections.

12. The 10th petitioner is a Kenyan adult aspiring to vie for the position of a Member of the National Assembly within Narok County in the next general elections.

13. The 11th petitioner is a serving Member of the Narok County Assembly representing the Mara Ward. He aspires to vie for the position of a Member of the National Assembly and is currently a final year student at the Management University of Africa undertaking studies leading to the award of the Bachelor of Management and Leadership degree.

14. The 1st respondent is the Speaker of the National Assembly, a constitutional office created under article 106 of the Constitution. Its mandate is to preside over any sitting of the National Assembly.

15. The 2nd respondent is the National Assembly created under article 93 of the Constitution. Its mandate is to represent the people of Kenya and to enact legislation.

16. The 3rd respondent is the Speaker of the Senate, a constitutional office created under article 106 of the *Constitution*. Its mandate is to preside over any sitting of the Senate.

17. The 4th respondent is the Senate. It is created under article 93 of the Constitution. Its mandate is to represent and protect the interests of the counties and their Governments.

18. The Hon Attorney General of the Republic of Kenya is sued as the 5th respondent. Under article156 of the Constitution, the Office of the Attorney General is the Principal Advisor of the Government and has the mandate to promote, protect and uphold the rule of law and defend public interest.

19. The 6th respondent is the Minister for Justice and Constitutional Affairs. Such an entity appears to be non-existent in the current constitutional governance structure in Kenya.

20. The 7th respondent, Independent Electoral and Boundaries Commission, is an independent Constitutional Commission established under the provision of article 88(1) of the Constitution of Kenya whose responsibility is to conduct and supervise referenda and elections in Kenya.

21. I will now look at the respective parties' cases.

The Petitioners' cases:

22. As stated above, the consolidated petitions variously challenge the impugned provision.

23. In the end, the petitions seek various reliefs. I will reproduce *verbatim* the reliefs sought in the respective petitions, and as follows:

> Petition No 28 of 2021:
>
> a. A declaration that the revised section 22 of the *Elections Act* is void and nullity *ab initio* and contrary to chapter 1(1) & 4 as read with article 38 of the Constitution.
>
> Petition No E549 of 2021:
>
> a. A declaration do issue that the amendment of the Elections Act, 2011 introducing the mandatory requirement for degree for the nomination for election for Member of Parliament and Member of County Assembly was effected via a single amendment Act.
>
> b. A declaration do issue that there was no public participation in the process of the amendment to section 22(1)(b)(i) of the *Elections Act, 2011*.
>
> c. An order to issue declaring section 22(1)(b)(i) null and void, and quashed for violating the Constitution.

d. An order do issue that section 22(1)(b)(i) of the Elections Act, 2011 is inoperational, of no legal effect, null and void ab initio.

e. In the alternative to (b) above an order do issue directing that section 22(1)(b)(i) of the *Elections Act, 2011* be inoperational with respect to the 2022 general elections.

f. Such other order(s) as this honourable court shall deem just.

g. Costs of the petition.

Petition No E037 of 2021:

a) A declaration that the Elections Act, 2011 read as a whole but more particularly sections 3(1), 22, 22(1)(b), 22(2), 23(1)(b), 24(1)(b), 25(1)(b) and 26(1) are inconsistent and in conflict with the Constitution more particularly the preamble to the Constitution, articles 1, 2, 10, 19, 20, 21, 22, 24, 27, 28, 38, 55, 57, 81, 82, 83, 93, 94, 95 and 96 of the *Constitution* and thus null and void.

b) A declaration that the Elections Act, 2011 read as a whole is inconsistent and in conflict with the Constitution more particularly the preamble to the Constitution, articles 1, 2, 10, 19, 20, 21, 22, 24, 27, 28, 38, 55, 57, 81, 82, 83, 93, 94, 95 and 96 of the *Constitution* and thus null and void.

c) A declaration that the *Elections Act, 2011* read as a whole but more particularly sections 3(1), 22, 22(1)(b), 22(2), 23(1)(b), 24(1)(b), 25(1)(b) and 26(1) denies, contravenes, violates, infringes and threatens the petitioners constitutionally protected rights to equality and freedom from discrimination, the political rights as enshrined under article 27 and 28 of the *Constitution of the Republic of Kenya*.

d) A declaration that the *Elections Act, 2011* read as a whole but more particularly sections 3(1), 22, 22(1)(b), 22(2), 23(1)(b), 24(1)(b), 25(1)(b) and 26(1) are inconsistent with article 1, 2, 7, 8, 21 and 29 of the *Universal Declaration of Human Rights, 1948*, articles 3(a), (b), (c) and 26 of the *International Covenant on Civil and Political Rights, 1966*, the *African Charter on Human Rights and Peoples Rights*.

e) A declarationthat the *Elections Act, 2011* read as a whole but more particularly sections 3(1), 22, 22(1)(b), 22(2), 23(1)(b), 24(1)(b), 25(1)(b) and 26(1) are in breach of the doctrine of legitimate expectation, reasonableness, rationality, proportionality and the principles of democracy.

f) Any other further orders, declarations, writs and directions that this honourable court shall deem fit in the circumstances to issue.

Petition No E065 of 2022:

1. That a declaration be and is hereby issued that section 22(1)

   (b) (i) of the *Elections Act, 2011* is unconstitutional and in violation of article 10(2)(a) of the *Constitution* having been enacted without lawful public participation.

2. That a declaration be and is hereby issued that section 22(1)

(b) (i) of the *Elections Act, 2011* is unconstitutional and in violation of articles 24, 27, 38(3) and 56 of the Constitution.

3. an order be and is hereby issued, that section 22 (1)(b)(i) of the *Elections Act, 2011* is inoperational, of no legal effect and void *ab initio*, and the requirement that a person must possess a degree from a university recognized in Kenya to qualify for election as a Member of Parliament be and is hereby nullified.

4. That an order be and is hereby issued, in terms of article 35(3) of the *Constitution*, directing the 1st respondent to issue corrigenda with regard to qualifications for the position of Member of Parliament.

5. That an order be and is hereby issued, directing the 1st respondent to forthwith conduct voter education with regard to qualifications for the position of Member of Parliament as mandated by article 88(4) (g) of the *Constitution*.

6. That the honourable court be at liberty to grant any other orders/reliefs that may be just and expedient.

7. That costs and incidentals be provided for.

Petition No E077 of 2022:

a) A declaration that section 22(1)(b)(i) of the Elections Act is unconstitutional and in violation of the petitioners' rights and fundamental freedoms as guaranteed under articles 24, 27, 38(3), 54 and 56 of the *Constitution*.

b) A declaration section 22(1)(b)(i) of the *Elections Act* is unconstitutional as no public participation towards the enactment of the said provision was conducted and thus violates article 10(2)(a) of the *Constitution*.

c) A declaration that section 22(1)(b)(i) of the *Elections Act* is unconstitutional and in violation of articles 1 and 2 of the *Constitution* to the extent that it unreasonably withdraws the sovereign power of the people.

d) A declaration that section 22(1)(b)(i) of the *Elections Act* violates the rights of citizen for the reasons that it irrationally frustrates the free realization of free for all elections under article 38 of the Constitution.

e) A declaration that section 22(1)(b)(i) of the *Elections Act* is of no legal effect and void ab initio.

f) A declaration that section 22(1)(b)(i) of the *Elections Act* is in breach of the petitioners' right to legitimate expectation, reasonableness, rationality and the principles of democracy.

g) An order that a requirement that the petitioners must possess a degree from recognized university to qualify to vie as a Member of Parliament be nullified.

h) An order be issued directing the 2nd respondent to clear the petitioners to vie as Members of Parliament even though they do not possess a degree from a recognized university.

i) In the alternative, an order of judicial review do issue prohibiting the respondents from restricting the petitioners from participating in the nominations and/or general elections form the positions of Member of Parliament in the forthcoming general elections scheduled on August 9, 2022.

j) Costs of this petition.

k) Or that such other order as this honourable court shall deem just.

24. The 1st, 2nd, 3rd, 4th, 5th and 6th petitioners did not participate in the hearing of the petitions. Their respective petitions are, therefore, deemed to be abandoned.

25. The 7th to 11th petitioners' cases are primarily premised on the arguments that the impugned provision violates articles 10(2)(a) of the *Constitution* for lack of public participation, articles 24, 25 and 27 of the *Constitution* for discriminatorily restricting democracy, article 54 of the Constitution for violating the rights of persons living with disabilities, article 56 of the Constitution for violating the rights of minorities and marginalized groups, article 35(3) of the Constitution for failure by the 7th respondent to publish the educational requirements for the position of Member of Parliament in the Gazette Notices, article 38(3) of the *Constitution* for infringing on the political rights and article 47 of the Constitution for failure to accord an administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

26 . The 7th to 11th petitioners relied on both the written submissions, oral submissions, Lists of Authorities and judicial decisions in buttressing their respective cases.

27. Given the urgency of this matter and the time constraints on the part of the court, I will not reproduce the respective petitioners' and respondents' submissions *verbatim*, but will for sure consider them in the discussion herein. Needless to say, the said submissions are not only well researched, but also deal with the issues in dispute in great detail thereby lightening the work of this court. I congratulate all counsel who took part in this matter thus far.

The Respondents' cases:

28. The respondents variously opposed the consolidated petitions.

29. The 1st and 2nd respondents filed a replying affidavit whereas the 3rd and 4th respondents filed a replying affidavit in Petition No E077 of 2022 and E065 of 2022. They also filed written submissions. The Hon Attorney General filed grounds of opposition to the consolidated Petitions and written submissions.

30. The 7th respondent, the IEBC, filed a replying affidavit in Petition No E077 of 2022 and another replying affidavit in the consolidated petitions. It also filed written submissions ad a List of Authorities.

31. In sum, the respondents argued that the consolidated petitions were *res judicata*, that the impugned provision enjoyed the presumption of constitutionality and that there was no evidence to show that the impugned provision was unconstitutional.

32 . It was further argued that should this court find the impugned provision as unconstitutional, then the declaration of unconstitutionality should be suspended to the next general election as the current electioneering process is on and there is need for certainty in law more so given that some public officers who intended to vie, but did not possess the university degrees did not resign pursuant to section 43(5) of the *Elections Act*.

33. The court was then urged to find the consolidated petitions untenable and to dismiss them.

Issues for Determination:

34. This court must affirm the position that it has previously dealt with some petitions challenging the constitutionality of section 22(1)(b)(ii) of the Elections Act. The said provision was on the educational

requirements for persons vying for the positions of Members of County Assembly. That was in *County Assembly Forum & 6 others v Attorney General & 2 others; Senate of the Republic of Kenya (Interested Party)* (Constitutional Petition E229, E225, S226, & 14 of 2021) (Consolidated)(2021)KEHC 304 (KLR)(Constitutional and Human Rights)(15 October 2021)(Judgment).

35. It further turns out that the issues raised in the *County Assembly Forum & 6 others v Attorney General & 2 others* case (*supra*) are similar to the ones in the current proceedings.

36. Having appreciated the pleadings of the respective petitioners, the responses thereto, the submissions and decisions referred to, the following issues arise for determination: -

    i. Whether the consolidated petitions are res-judicata.

    ii. Whether the consolidated petitions are caught up by the ripeness doctrine.

    iii. Depending on the outcome in (i) and (ii) above, the settled principles in constitutional and statutory interpretation.

    iv. Whether section 22(1)(b)(i) of the Elections Act offends articles 24, 27, 38(2), 55 and 56 of the Constitution.

    v. Whether there was adequate public participation in the enactment of section 22(1)(b)(i) of the Elections Act.

    vi. Disposition.

37. I will deal with each issue in seriatim.

Analysis and Determinations:

(i) Whether the consolidated petitions are res-judicata:

38. As I dealt with this issue before and I have not changed my position on the same, I will reiterate what I previously stated.

39. The doctrine of res-judicata is a jurisdictional issue. It goes to the root of a dispute and must be considered at the earliest opportunity.

40. The *Black's Law Dictionary*, Thomson Reuters, 10th Edition defines res judicata as in the following way:

> " A thing adjudicated
>
> 1. An issue that has been definitively settled by judicial decision.
> 2. An affirmative defence barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been - but was not -raised in the first suit.
>
> The three essential elements are (1) an earlier decision on the issue,(2) a final judgment on the merits, (3) the involvement of the same parties, or parties in privity with the original parties"

41. In our municipal laws, the doctrine of res-judicata is codified in section 7 the *Civil Procedure Act*, cap 21 of the Laws of Kenya. It provides as follows: -

> No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

42. The doctrine of res judicata is not novel in our courts. It is a subject which Superior Courts have sufficiently expressed themselves on. For instance, the Supreme Court in Petition 14, 14A, 14B & 14C of 2014 (Consolidated) *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR delimited the operation of the doctrine of res-judicata in the following terms;

> (317) The concept of *res judicata* operates to prevent causes of action, or issues from being relitigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings. In this case, the High Court relied on "issue estoppel", to bar the 1st, 2nd and 3rd respondents' claims. Issue estoppel prevents a party who previously litigated a claim (and lost), from taking a second bite at the cherry. This is a long-standing common law doctrine for bringing finality to the process of litigation; for avoiding multiplicities of proceedings; and for the protection of the integrity of the administration of justice? all in the cause of fairness in the settlement of disputes.
>
> (318) This concept is incorporated in section 7 of the *Civil Procedure Act* (cap 21, Laws of Kenya) which prohibits a court from trying any issue which has been substantially in issue in an earlier suit. It thus provides:
>
> > No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.
>
> (319) There are conditions to the application of the doctrine of *res judicata*: (i) the issue in the first suit must have been decided by a competent court; (ii) the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and (iii) the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title *Karia & another v Attorney General & others*, [2005] 1 EA 83, 89.
>
> (320) So, in the instant case, the argument concerning *res judicata* can only succeed when it is established that the issue brought before a court is essentially the same as another one already satisfactorily decided, before a competent court.
>
> (333) We find that the petition at the High Court had sought to relitigate an issue already determined by the Public Procurement Administrative Review Tribunal. Instead of contesting the Tribunal's decision through the prescribed route of judicial review at the High Court, the 1st, 2nd and 3rd respondents instituted fresh proceedings, two years

later, to challenge a decision on facts and issues finally determined. This strategy, we would observe, constitutes the very mischief that the common law doctrine of "issue estoppel" is meant to forestall. Issue estoppel "prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route" (Workers' Compensation Board v Figliola [2011] 3 SCR 422, 438 (paragraph 28)).

(334) Whatever mode the 1st, 2nd and 3rd respondents adopted in couching their prayers, it is plain to us, they were challenging the decision of the Tribunal, in the High Court. It is a typical case that puts the courts on guard, against litigants attempting to sidestep the doctrine of "issue estoppel", by appending new causes of action to their grievance, while pursuing the very same case they lost previously. In *Omondi v National Bank of Kenya Ltd & others*, [2001] EA 177 the Court held that "parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit."

(352) The Judicial Committee of the Privy Council, in *Thomas v The Attorney-General of Trinidad and Tobago,* [1991] LRC (Const) 1001 held that "when a plaintiff seeks to litigate the same issue a second time relying on fresh propositions in law he can only do so if he can demonstrate that special circumstances exist for displacing the normal rules." That court relied on a case decided by the Supreme Court of India, *Daryao & others v The State of UP & others*, (1961) 1 SCR 574 to find that the existence of a constitutional remedy does not affect the application of the principle of *res judicata*. The Indian court also rejected the notion that *res judicata* could not apply to petitions seeking redress with respect to an infringement of fundamental rights. Gajendragadkar J stated:

> But is the rule of *res judicata* merely a technical rule or is it based on high public policy? If the rule of *res judicata* itself embodies a principle of public policy which in turn is an essential part of the rule of law, then the objection that the rule cannot be invoked where fundamental rights are in question may lose much of its validity. Now the rule of *res judicata*...has no doubt some technical aspects... but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of res judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under article 32.

(353) Kenya's High Court recently pronounced itself on the issue of the applicability of res judicata in constitutional claims. In *Okiya Omtatah Okoiti & another v Attorney General & 6 others*, High Court Const. and Human Rights Division, Petition No 593 of 2013 [2014] eKLR, Lenaola J (at paragraph 64) thus stated:

> Whereas these principles have generally been applied liberally in civil suits, the same cannot be said of their application in constitutional matters. I say so because, in my view, the principle of res judicata can and should only be invoked in constitutional matters in the clearest of cases and where a party is relitigating the same matter before the Constitutional Court and where the court is called upon to redetermine an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of wide application,

therefore it must be sparingly invoked in rights-based litigation and the reason is obvious.

354. On the basis of such principles evolved in case law, it is plain to us that the 1st, 2nd and 3rd respondents were relitigating the denial to them of a BSD licence, and were asking the High Court to redetermine this issue.

355. However, notwithstanding our findings based on the common law principles of estoppel and *res- judicata*, we remain keenly aware that the Constitution of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law. By clothing their grievance as a constitutional question, the 1st, 2nd and 3rd respondents were seeking the intervention of the High Court in the firm belief that, their fundamental right had been violated by a state organ.

Indeed, this is what must have informed the Court of Appeal's view to the effect that the appellants (respondents herein) were entitled to approach the Court and have their grievance resolved on the basis of articles 22 and 23 of the Constitution.

43. The Court of Appeal in *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR also discussed the doctrine of *res judicata* at length. The Court stated in part as follows:

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"The rationale behind *res judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that *res judicata* being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process under rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of res judicata. However, we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions.

We also resist the invitation by the appellants to hold that all constitutional petitions must be heard and disposed of on merit and that parties should not be barred from the citadel of justice on the basis of technicalities and rules of procedure which have no place in the new constitutional dispensation. The doctrine is not a technicality. It goes to the root of the

jurisdiction of the court to entertain a dispute. If it is successfully ventilated, the doctrine will deny the court entertaining the dispute jurisdiction to take any further steps in the matter with the consequence that the suit will be struck out for being res judicata. That will close the chapter on the dispute. If the doctrine has such end result, how can it be said that it is a mere technicality" If a constitutional petition is bad in law from the onset, nothing stops the court from dealing with it peremptorily and having it immediately disposed of. There is no legal requirement that such litigation must be heard and determined on merit.

From our expose of the doctrine above, we are now able to formally answer the issues isolated for determination in this appeal earlier as follows: -

i) The doctrine of *res judicata* is applicable to constitutional litigation just as in other civil litigation as it is a doctrine of general application with a rider, however, that it should be invoked in constitutional litigation in rarest and in the clearest of cases.

ii) There is no legal requirement or factual basis for the submission that the doctrine must only be invoked and or ventilated through a formal application. It can be raised through pleadings as well as by way of preliminary objection.

iii) The ingredients of *res judicata* must be given a wider interpretation; the issue in dispute in the two cases must be the same or substantially the same as in the previous case, parties to the two suits should be the same or parties under whom they or any of them is claiming or litigating under the same title and lastly, the earlier claim must have been determined by a competent court."

44. Further, the Court of Appeal in Nairobi Civil Appeal No 107 of 2010, *Kenya Commercial Bank Limited v Benjoh Amalgamated Limited*, broke down the elements to be considered in application of the doctrine of *res-judicata*. The learned judges observed as follows:

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"...The elements of *res judicata* have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed *res judicata* on account of a former suit;

(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

45. In the *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR, the appellate court spoke to the doctrine of *res- judicata* in the following manner: -

"The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed

as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

46. In *William Koros (Legal Personal Representative of Elijah, CA Koros v Hezekiah Kiptoo Komen & 4 others* (2015) eKLR, the principles set out in section 7 of the Civil Procedure Act were expounded in the following terms: -

> " Cognizant of the above principles, the courts called upon to decide suits or issues previously canvassed or which ought to have been raised and canvassed in the previous suits have not shied away from invoking the doctrine as a bar to further suits. As was stated in *Henderson v Henderson* (1843) 67 ER 313, res judicata applies not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. In the case of *Mburu Kinyua v Gachini Tutu* (1978) KLR 69 Madan, J Quoting with approval Wilgram VC in *Henderson v Henderson* (*supra*) stated:
>
> > Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except in special circumstances) permit the same parties to open the same subject of ligation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident omitted part of their case. The plea of res judicata applies except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation, and which parties exercising reasonable diligence, might have brought forward at the time.

47. The respondents challenge on the basis of the doctrine of *res judicata* is in respect to three decisions. They are *Johnson Muthama v Minister for Justice and Constitutional Affairs & another* (2012) eKLR, *John Harun Mwau v Independent Electoral and Boundaries Commission & Another* (2013) eKLR and *Okiya Omtatah Okoiti & another v Attorney General & another* (2020) eKLR.

48. I will in turn consider the substratum of each of the said decisions and their ratio decidendi and pitch them against principles as set out by superior courts for the operation of the bar of *res-judicata*.

49. The first decision *Johnson Muthama v Minister for Justice and Constitutional Affairs & another* (2012) eKLR. The case was presided over by Ngugi LJ (as she then was).

50. At the centre of the dispute was the petitioners' contention that sections 3(1), 22(1)(b), 22(2), 23(1)(b), 24(1)(b), 25(1)(b) and 26(1) of the *Elections Act* were unconstitutional for limiting the number of people who can vie for leadership positions to those who have post-secondary qualifications, ethical and moral attributes introducing being discriminatory and promoting inequity

51. The petitioners in the said case submitted that the set out various provisions of the *Elections Act* violated the provisions of article 10, 27 and 38 by providing that only persons with post-secondary qualifications can vie for elective office.

52. The respondents opposed the petition on the basis that the provisions of The *Elections Act* derived their legitimacy and validity from articles 99(1)(b), 180(2), 193(1)(b), 193(2)(g) and chapter 6 of the *Constitution* and as such the court had no jurisdiction to interfere with the constitutional discretion conferred on the legislature to enact legislation and stipulate the educational threshold to be met by persons seeking to be elected to various offices under the Constitution.

53. The Learned Judge, in appreciating the sovereign power of the people and the exercise of such power by the legislature in making laws, gave socio-economic context in which *Elections Act* was enacted and within which it is to operate. The learned judge made reference to the Final Report of the Committee of Experts on Constitutional Review dated October 11, 2010, at paragraph 7.5.2, where the Committee noted that the people of Kenya had expressed the desire for there to be a statement on the educational qualifications of Members of Parliament. She the observed as follows;

> Thus, the people of Kenya were clear that they needed to have people with some level of education. What this level of education would be was left to Parliament, and as expressed by the Committee of Experts, such educational qualifications would change over time. It was left to Parliament, to whom the people of Kenya had vested power to make legislation, to set the educational level required for elective office

54. The learned judge, however, gave a rider on the exercise of legislative authority and made the following remarks: -

> ... No direct guidance was given on how such educational qualifications would be arrived at. In my view, however, in setting the educational qualifications for those aspiring to be people's representatives, Parliament needed to bear in mind the socio-economic circumstances prevailing in Kenya and the extent to which opportunities for education were available for the majority of citizens.

55. In making a finding on constitutionality of section 22(1)(b), which qualifies a person for nomination as a candidate if that person holds a post-secondary school qualification recognized in Kenya, the learned judge made comprehensive comparative analysis on what constitutes discrimination and stated as follows:

> Applying the test set out above, this provision of the Elections Act is, in my view, discriminatory and offends the provisions of article 27 of the Constitution which provides that.....
>
> By excluding everyone who does not have a 'post-secondary qualification,' a term which is not defined in the Act, from running for any elective office established under the Constitution, the Act discriminates directly on the basis of status and social origin, for almost invariably, and as noted from the analysis of the socio-economic context above, it is the poor in society, those 18 million Kenyans living in poverty, who will not get an opportunity to acquire an education, let alone a post-secondary education

56. On whether section 22(1)(b) bears a rational connection to a legitimate purpose, and, whether it can be justified under limitations provision of the Constitution, the Learned Judge opined that the section fails on both accounts. She observed that:

> ... it is common knowledge that the problem that bedevils elections in Kenya and which elections law needed to address as the bane of the citizenry has been, not uneducated elected leaders, but corrupt and unethical leaders.
>
> By requiring post-secondary educational qualifications and omitting to make more explicit provisions with regard to moral and ethical qualifications required under the Constitution, the legislature missed what has for long been the real case of the problem in Kenya's governance. I agree with the petitioners that the harm that the legislature seeks to address in enacting legislation as required under the Constitution is lack of leaders with integrity. That is why the Constitution requires the legislature to enact legislation that sets moral, ethical and educational qualifications. A requirement for a post-secondary qualification does not address the real concern of the citizenry; indeed, it violates the provisions of the Constitution by excluding many who may not, through no fault of their own, have been able to achieve post-secondary education.
>
> The provisions of section 22(1)(b) also fail the test of constitutionality as they do not accord with the national values and principles, and usurp the sovereign powers of the people of Kenya. They cannot also meet the provisions of article 24 as being' reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom....

57. In the end, the court allowed the petition and declared the then section 22(1) unconstitutional. The decision was rendered on 29th June 2012. That decision was not appealed against.

58. The above decision can only be in support of the consolidated petitions herein. It cannot aid the argument favoured by the respondents. The contention that the consolidated petitions are *res judicata* *Johnson Muthama v Minister for Justice and Constitutional Affairs & Another* (2012) eKLR, be and is hereby, dismissed.

59. The next decision relied in furtherance of the onslaught on *res judicata* is *John Harun Mwau v Independent Electoral and Boundaries Commission & another* [2013] eKLR. The matter was handled by Lenaola, J (as he then was).

60. At the heart of the dispute was the allegation that the Independent Electoral and Boundaries Commission (hereinafter referred to as 'the IEBC') had violated the fundamental rights and freedoms of candidates who were desirous of contesting presidential, parliamentary or county elections as independent candidates on account of the nomination requirements it set, which the petitioner claimed were unconstitutional and violated articles 27 and 38 of the *Constitution*.

61. There were two main issues which were deciphered by the learned judge for consideration. They were the educational qualifications for nomination as Members of Parliament and the constitutionality of section 24(1) of the *Elections Act* and *regulations* 16, 18 and 19 thereof.

62. In making an assessment of the constitutionality of section 24(1) of the *Elections Act*, the provision that sets qualification for nomination as a Member of Parliament as against the provisions of articles 27 and 38 of the *Constitution* on the right to equality and political rights, the learned judge, with particular

reference to article 81 of the *Constitution* that establishes the general principles of an electoral system observed as follows: -

> "…. It is obvious from the above that one of the tenets of the Kenyan electoral system is the freedom of the citizens to exercise their political rights as provided for by article 38 based on universal suffrage on the aspiration for fair representation and equality to vote. The argument that section 24(1) of the Elections Act is unconstitutional for limiting or inhibiting the rights of the citizens to choose their leaders cannot therefore be true. I say so because again a casual reading of article 82(1) of the Constitution would show that the same Constitution has mandated parliament with powers to enact legislation on elections. Sub-article (1)(b) has empowered parliament to specifically enact legislation to provide for nomination of candidates. Pursuant to this article, Parliament enacted the Elections Act No 11 of 2011 and the preamble to that Act states that; it is; 'An Act of Parliament to provide for the conduct of elections to the office of the President, the National Assembly, the Senate, County Governor and County Assembly; to provide for the conduct of referenda; to provide for election dispute resolution and for connected purposes"

63. The learned judge went further to compare the wording of section 24(1) of the *Elections Act* to that of article 99(1) of the *Constitution* and found that the former was a replica of the Constitution. As such, a declaration of its unconstitutionality would essentially be a declaration that the *Constitution* itself was unconstitutional, a finding that cannot be made by any court of law. He observed as follows: -

> "desirous of contesting for election as Member of Parliament. I am of the view therefore that section 24(1) can neither be challenged nor can it be said to be unconstitutional because article 2(3) of the Constitution has barred this court or anyone else for that matter from challenging the validity or legality of the Constitution. The Constitution articulates the collective will, aspiration and values of its people. It is the supreme law and lays the framework for a democratic society. The people of Kenya went to the referendum in August 2010 and passed the Constitution with overwhelming majority and they have therein stated and set the qualifications of persons they desired to be their representatives to the National Assembly. Those qualifications having been so well anchored in the Constitution the same cannot now be challenged as being unconstitutional, or being in violation of another article of the same Constitution (articles 27 and 38) as argued by the petitioner. I know no law or power that may allow this court to declare a provision anchored in the Constitution to be unconstitutional when weighed against another constitutional provision. To do so would be absurd, dramatic and chaotic. In any event, there is no single provision that has more power or authority over another.

64. The court eventually dismissed the petition. It sustained the amendment. For clarity, the impugned amendment had been enacted by Parliament in 2012 after the declaration of the unconstitutionality of section 22(1) of the *Elections Act* in J*ohnson Muthama -vs- Minister for Justice and Constitutional Affairs & Another* (2012) eKLR.

65. The decision was appealed against to the Court of Appeal. In dismissing the appeal, the learned judges of Appeal held that "…the standards in regards to education qualifications for leaders seeking positions of power and responsibility cannot be discriminatory as it cuts across parties and those who do not qualify have an opportunity to seek first of all to attain the qualifications before vying for the offices.' The appellate decision was delivered on 22nd day of November, 2019.

66. Later, on January 30, 2017, section 22 of the Elections Act was further amended through Elections Laws (Amendment) Act No 1 of 2017 to provide for university degree qualification as a precondition to nomination for election and for political party lists for Members of Parliament and Members of County Assembly.

67. That amendment resulted in the challenge in *Okiya Omtatah Okoiti & Another -vs- Attorney General & Another case* (supra).

68. In the case, the petitioners sought to have the court declare that under the Constitution, the only educational eligibility requirements which Parliament can impose on candidates for election as Members of County Assembly, Member of Parliament, Governor, or President is the Kenya Certificate of Primary Education or its equivalent, and/or proficiency in spoken and written English or Kiswahili.

69. Based on the foregoing, the petitioner sought to declare unconstitutional section 22(1)(b), 22(2) and 43 of the Elections Act and by the same token, a declaration that decisions made by the High Court in the case of *John Harun Mwau v Independent Electoral and Boundaries Commission & another* [2013] eKLR and in *Johnson Muthama v Minister for Justice and Constitutional Affairs & another* [2012] eKLR were made per incuriam.

70. Upon comparing the factual matrix of the two decisions, the learned judge, (Korir J) found that the two earlier decisions of Lenaola J (as he then was) and Ngugi LJ (as she then was), were centrally on constitutionality of section 22(1)(b) of the Elections Act regarding educational qualifications of candidates for elective political offices. He observed that the issue had been considered and determined previously by courts of coordinate jurisdiction and could not be reopened. For certainty, this what the court remarked in declining jurisdiction: -

> 22. I, therefore, hold and find that the issue of educational qualifications in regard to the candidates for elective political offices has been put to rest by courts of co-ordinate jurisdiction. The matter has also been settled by the Court of Appeal. The issue cannot be reopened again before this court.
>
> 28. It is only important to note that the issue of educational qualifications for those contesting political offices is no longer an issue available for determination by this court. That leaves me with the issue of the constitutionality of section 43 of the Elections Act, 2011.

71. The learned judge further stated that the Court of Appeal in *John Harun Mwau v Independent Electoral & Boundaries Commission & Attorney General* [2019] eKLR had dealt with the issue on educational qualifications and as such was bound by operation of the doctrine of *stare-decisis*.

72. From the foregoing analysis, what comes out clearly is the fact that the decisions in *John Harun Mwau v Independent Electoral and Boundaries Commission & another* [2013] eKLR and *Johnson Muthama v Minister for Justice and Constitutional Affairs & another* [2012] eKLR did not deal with section 22(1)(b)(i) of the Elections Act which is the subject of the consolidated petitions. I say so because the consolidated petitions challenge an amendment passed in 2017 whereas the earlier decisions dealt with some other amendments passed earlier on.

73. The issues raised in the consolidated petitions relate to the university degree qualifications for those intending to vie for the positions of Members of Parliament. The issue arose in 2017 when Parliament passed a legislation amending the then prevailing law. By then, there was no university degree requirement for those seeking to vie for the position of Members of Parliament. As such, the issue now raised in the consolidated petitions could not have been litigated in *John Harun Mwau v Independent*

Electoral and Boundaries Commission & another [2013] eKLR and in *Johnson Muthama v Minister for Justice and Constitutional Affairs & another* [2012] eKLR.

74. The now issues in the consolidated petitions were non-existent before 2017. It can only be illogical to sustain an argument that the non-existent matter was settled way before it arose. The only forum which presented itself for a possible adjudication of the issues raised in the consolidated Petitions was the case in *Okiya Omtatah Okoiti & another v Attorney General & Another case* (*supra*). However, the court declined jurisdiction and the matter was not fully and finally determined.

75. Having found so, by juxtaposing the legal and decisional jurisprudence on *res judicata* against the consolidated petitions, it is the finding of this court that the consolidated petitions are not *res judicata*.

76. The first issue is, hence, answered in the negative. I will now turn to the second issue.

ii. Whether the consolidated petitions are caught up by the ripeness doctrine:

77. This court also discussed this issue at length in *County Assembly Forum & 6 others v Attorney General & 2 others; Senate of the Republic of Kenya (Interested Party)* case (*supra*). A replica discussion follows under.

78. The Ripeness doctrine is one facet of the larger principle of non-justiciability. It is a jurisdictional issue that bars a court from considering a dispute whose resolution has not crystallized enough as to warrant court's intervention. Its operation is informed by the idea that there exist other fora with the capacity to resolve the dispute other than court process.

79. The operation of the doctrine was discussed by a multi-judge bench of the High Court in Nairobi Constitutional Petition No 254 of 2019, *Kiriro wa Ngugi & 19 others v Attorney General & 2 others* [2020] eKLR in the following manner: -

> 107. The doctrine focuses on the time when a dispute is presented for adjudication. The *Black's Law Dictionary* 10th Edition, [*supra*] at page 1524 defines ripeness as:
>
> > The state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made
>
> 108. Courts should therefore frown upon disputes that are hypothetical, premature or academic which have not fully matured into justiciable controversies.
>
> The Court of Appeal in *National Assembly of Kenya & another v Institute for Social Accountability & 6 others* Nairobi Civil Appeal 92 of 2015 [2017] eKLR, faulted the Constitutional Court for adjudicating upon hypothetical matters. The court held:
>
> > (72) The broad questions which were raised in the consolidated petitions, namely, – division of functions, powers and authority; the equitable sharing of revenue of national government, whether the Amendment Bill concerned county government and the role of the Senate in the legislative process, are questions which relate to inter-governmental relations and which should have been raised by either government in the appropriate forum and in case of a dispute such a dispute should have been resolved by the designated institutions through the prescribed mechanism. This is one peculiar case where the Constitution stipulates that a dispute should be in essence be resolved by other institutions through a prescribed mechanism before the jurisdiction of the High Court can be invoked.

(74) Furthermore, questions such as division of functions, division of revenue, legislative process and budget process are essentially political questions which fall within the political question doctrine; and which the Constitution has assigned to other political institutions for resolution and created institutions and mechanisms for such resolution.

110. In *National Assembly of Kenya & another v The Institute for Social Accountability & 6 others* [*supra*] the Court of Appeal held:

(73) Since there was no actual live dispute between the national and county governments about CDF and if any, the mechanisms for resolving such disputes was not employed, the questions which were brought to High Court for determination had not reached constitutional ripeness for adjudication by the court. In reality, TISA and CEDGG invented a hypothetical dispute which was brought to court in the guise of unconstitutionality of CDFA.

111. In *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* Nairobi Constitutional Petition No 453 of 2015 [2016] eKLR, Onguto J stated:

(27) Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases.....

The court is prevented from determining an issue when it is too early or is simply out of apprehension, hence the principle of ripeness. An issue before court must be ripe, through a factual matrix for determination.

80. It is the respondents' contention that parliament had received the public petitions challenging the constitutionality of section 22(1)(b)(i) of the *Elections Act* and that it was in the process of considering them. The court was informed that the Senate had already passed an amendment repealing the impugned provision and that the matter was pending consideration before the National Assembly. As such, it was not ripe for this court to exercise its jurisdiction during the pendency of the process before Parliament.

81. Mr. Wambulwa, counsel for the 3rd and 4th respondents submitted that there are Election (Amendment Bill) No42 of 2021 and Election (Amendment Bill) No 43 of 2021 both which seek to repeal the impugned provision. He indicated that it was imperative to allow Parliament to discharge its duty and that a court cannot legislate on behalf of Parliament as the Public Petitions seek similar redress as the petitioners in the consolidated petitions.

82. Counsel further submitted that since the High Court has residuary power over the legislations passed by Parliament, then it is imperative that Parliament be allowed to act first.

83. The question that begs for an answer is whether the public petitions presented before Parliament concerning the constitutionality of section 22(1)(b)(i) of the *Elections Act* can competently address the fundamental rights and freedoms of the petitioners herein as to render the consolidated petitions herein not ripe for consideration.

84. In determining this contention, I will first resort to article 119 of the *Constitution* which provision was heavily relied upon by the 3rd respondent in its argument aforesaid. It provides as follows: -

119. Right to petition Parliament

(1) 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 shall make provision for the procedure for the exercise of this right.

85. The National Assembly is part of the Parliament of Kenya. Its primary function is codified in articles 94 and 95 of the Constitution. It largely provides that the National Assembly exercises legislative authority on behalf of the people. Under article 95, its role is to represent the people of the constituencies and special interests in the National Assembly, deliberate on and resolve issues of concern to the people and enacts legislation in accordance with part 4 of chapter 8.

86. There has been judicial discussion as to whether courts have jurisdiction over matters which are subject of pending petitions before Parliament. In Petition 381 & 430 of 2014 (Consolidated) *Council of Governors & 3 others v Senate & 53 others* [2015] eKLR the court dismissed the argument that courts did not have such jurisdiction. The learned judges referred to an earlier decision in The *Council of Governors & others v Senate* Petition No 413 of 2014 and made the following emphatic remarks: -

> .... It is also incumbent on the court to consider its jurisdiction in relation to the present matter, which revolves around the functions and distribution of powers between the national and county governments. This is in light of the argument by the AG that the petitioner should have approached Parliament if it was dissatisfied with the provisions of the CGAA, implying that the court has no jurisdiction to deal with this matter and that any dispute with regard to its provisions should be addressed to Parliament.
>
> This argument, in our view, runs counter to the constitutional provisions with respect to the jurisdiction of this court. At article 165(3)(d)(i), this court is given the jurisdiction to determine the question whether any law is inconsistent with or in contravention of the Constitution. The jurisdiction of the court to invalidate laws that are unconstitutional is in harmony with its duty to be the custodian of the Constitution, which pronounces its supremacy at article 2 by proclaiming, at article 2(4), that "Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid."
>
> Similarly, the general provisions of the Constitution, which are set out in article 258 contain the express right to every person to "... institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention." As this court held in The *Council of Governors & others v The Senate* (*supra*):
>
> > "We are duly guided and this court vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and state organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, the petition before us alleges a violation of the Constitution by the Respondent and in the circumstances, it is our finding that the doctrine of separation of power does not inhibit this court's jurisdiction to address the petitioner's grievances so long as they stem out of alleged violations of the Constitution. In fact the invitation to do so is most welcome as that is one of the core mandates of this court".

87. In *Council of Governors & 3 others v Senate & 53 others* [2015] eKLR the learned judges interpreted the right to petition Parliament under article 119 and whether it takes away the right to approach the High Court as follows: -

> "... The question is whether this provision is intended to take away the right of a party to question the constitutionality of an Act of Parliament, or indeed any action taken by the legislature, guaranteed under articles 22 and 258. Further, whether it can also be taken as ousting the jurisdiction of the court under article 165(3)(d) to determine any question respecting the interpretation of the Constitution, including "the question whether any law is inconsistent with or in contravention of" the Constitution, or under article 165(3)(d)(iii), to determine any matter "...relating to constitutional powers of state organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government"?
>
> In our view, the answer must be in the negative. Doubtless, article 119(i) will serve a useful purpose in allowing citizens to petition Parliament to consider matters of concern to them that are within the purview of Parliament, including the repeal or amendment of legislation. It appears to us, however, that article 119 is not intended to cover situations such as is presently before this court.
>
> It would therefore be, in our view, for the court to abdicate its responsibility under the Constitution to hold that a party who considers that legislation enacted by Parliament in any way violates the Constitution is bound to first petition Parliament with respect to the said legislation. The constitutional mandate to consider the constitutionality of legislation is vested in the High Court, and articles 2(4) and 165(3(d)(i) mandate this Court to invalidate any law, act or omission that is inconsistent with the Constitution. This is in harmony with the mandate of the courts to be the final custodian of the Constitution.
>
> This court appreciates that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Article 3(1) of the Constitution enjoins every person to respect, uphold and defend the Constitution. Similarly, article 258(1) thereof donates the power to every person to institute court proceedings claiming that the Constitution has been contravened, or is threatened with contravention. If this court were to shirk its constitutional duty under article 165(3)(d), it would have failed in carrying out its mandate as the temple of justice and constitutionalism and the last frontier of the rule of law. In the circumstances, the argument that the petitioner should have approached Parliament under article 119(1) is without merit.

88. I am in agreement with the above. I, however, wish to add that the power of Parliament under article 119 of the Constitution to enact, amend or repeal any legislation is not in any way curtailed by the High Court's exercise of its jurisdiction under article 165(3) of the Constitution. Whereas Parliament has the preserve to enact, amend or repeal any legislation, courts have the duty to ensure that Parliament inter alia keeps within the constitutional borders while discharging its mandate. That is where the difference lies. As such, the court's exercise of its jurisdiction in determining whether Parliament acted within the Constitution in coming up with the impugned law cannot be seen as an affront to the doctrine of separation of powers. The two are distinct mandates under the Constitution.

89. In this case, the petitioners contend that the National Assembly in passing the amendment that resulted to the impugned section 22(1)(b)(ii) of the *Elections Act* did not act within the Constitution. That is very different from the Parliament's power to reconsider and possibly amend or repeal the impugned provision. In any event, there is no proposition that the decision of Parliament on the Public

Petitions is binding on this court. Needless to say, courts must remain vigilant and cautious when wading through such waters and ensure that the courts do not infringe upon the doctrine of separation of powers.

90. Having said so, this court finds that the contention that the consolidated petitions are caught up by the doctrine of ripeness fails and is hereby dismissed.

90. I will now proceed on to consider the third issue.

iii. The principles of constitutional and statutory interpretation:

91. The nature of the dispute presented in the consolidated petitions invite this court to interpret various provisions of Constitution primarily against section 22(1)(b)(ii) of the *Elections Act*.

92. The Constitution is a document sui generis. It is the ultimate source of law in the land. It commands superiority and dominance in every aspect and its interpretation as of necessity must be in a manner that all other laws bow to.

93. In Nairobi High Court Constitutional Petitions No 33 and 42 of 2018 (Consolidated) *Okiya Omtatah Okoiti vs. Public Service Commission & 73 others* (2021) eKLR, this court discussed the principles of constitutional interpretation at length. It observed as follows: -

> 54. As regards the interpretation of the Constitution, suffice to say that the Constitution itself gives guidelines on how it ought to be interpreted. That is in articles 20(4) and 259(1).
>
> 55. Article 20(4) requires Courts while interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and the objects of the Bill of Rights. Article 259(1) command courts to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.
>
> 56. Courts have also rendered how the Constitution ought to be interpreted. The Supreme Court in a ruling rendered on December 21, 2011 in *In the Matter of Interim Independent Electoral Commission* [2011] eKLR discussed the need for courts, while interpreting the Constitution, to favour a purposive approach as opposed to formalism. The court stated as under: -
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> (86) .... The rules of constitutional interpretation do not favour formalistic or positivistic approaches (articles 20
>
> (4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in article 10, in chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the courts.
>
> (87) In article 259(1) the Constitution lays down the rule of interpretation as follows: "This Constitution shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and human rights and fundamental

freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance." Article 20 requires the courts, in interpreting the Bill of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.

(88) ..... Article 10 states clearly the values and principles of the Constitution, and these include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.

(89) It is for these reasons that the Supreme Court, while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. Interpreting the Constitution, is a task distinct from interpreting the ordinary law. The very style of the Constitution compels a broad and flexible approach to interpretation.

57. On the principle of holistic interpretation of the Constitution, the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2015] eKLR affirmed the holistic interpretation principle by stating that:

> This court has in the past set out guidelines for such matters of interpretation. Of particular relevance in this regard, is our observation that the Constitution should be interpreted in a holistic manner, within its context, and in its spirit.

58. The meaning of holistic interpretation of the Constitution was addressed by the Supreme Court in *In the Matter of the Kenya National Human Rights Commission,* Sup Ct Advisory Opinion Reference No 1 of 2012; [2014] eKLR. The court at paragraph 26 stated as follows: -

> ...But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.

94. In a Ugandan case in *Tinyefuza v Attorney General*, [1997] UGCC 3 (25 April 1997) the court was of the firm position that the Constitution should be read as an integrated whole. The court observed as follows: -

.... the entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution.....

95. In *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] eKLR, the Court of Appeal summarized the various principles of constitutional interpretation as follows:

(21) .... Before the High Court embarked on the interpretation of the contentious provisions of the Constitution, it restated the relevant principles of interpretation of the Constitution as extracted from case law thus: -that as provided by article 259 the Constitution should

be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance.that the spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion.that the Constitution must be interpreted broadly, liberally and purposively so as to avoid "the austerity of tabulated legalism.that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).

These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statues which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise. Lastly, although the question of the election date of the first elections has evoked overwhelming public opinion, public opinion as the High Court correctly appreciated, has minimal role to play. The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution.

96. In Advisory Opinion Application No 2 of 2012, *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR, the Supreme Court spoke to purposive interpretation of the Constitution. It had the following to say: -

> ...The approach is to be purposive, promoting the dreams and aspirations of the Kenyan people, and yet not in such a manner as to stray from the letter of the Constitution.

64. The court went ahead and gave further meaning of the term purposive by making reference to the decision in the Supreme Court of Canada in *R v Drug Mart* (1985) when it made the following remarks: -

> The proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect...to recall the Charter was not enacted in a vacuum, and must therefore... be placed in its proper linguistic, philosophic and historical contexts.

65. The Supreme Court, while referring to the South African Constitutional decision in *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 (PC), went further and stated that a purposive approach is 'a generous interpretation... suitable to give individuals the full measure of the fundamental rights and freedoms referred to.'

66. The Learned Judges of the Supreme Court further agreed with the South African Constitutional Court in *S v Zuma* (CCT5/94) 1995 when it stated that in taking a purposive

approach in interpretation, regard must be paid to the legal history, traditions and usages of the country concerned.

67. The Supreme Court embellished the need to pay attention to legal history while interpreting not only the Constitution but also statutes. It observed as follows: -

> 8. 11 This background is, in my opinion, a sufficient statement on the approach to be taken in interpreting the Constitution, so as to breathe life into all its provisions. It is an approach that should be adopted in interpreting statutes and all decided cases that are to be followed, distinguished and for the purposes of the Supreme Court when it reverses itself.

68. The Court of Appeal while dealing with holistic interpretation of the Constitution in Civil Appeal 74 & 82 of 2012, *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] eKLR stated that the entire Constitution must be read as an integrated whole and no one particular provision destroying the other so as to effectuate harmonization principle.

97. In discussing how constitutionality of impugned Acts of Parliament ought to be interpreted against the constitutional muster, the High Court in Petition No 71 of 2014, *Institute of Social Accountability & another v National Assembly & 4 others* [2015] eKLR remarked as follows: -

> " [I]n determining whether a statute is constitutional, the court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself (see *Murang'a Bar Operators and another v Minister of State for Provincial Administration and Internal Security and others* Nairobi Petition No 3 of 2011 [2011]eKLR, *Samuel G Momanyi v Attorney General & another* (*supra*)). Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect. The Canadian Supreme Court in the *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 enunciated this principle as follows: -
>
> > Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity.

[59.] Fourth, the Constitution should be given a purposive, liberal interpretation. The Supreme Court *In re the Matter of the Interim Independent Electoral Commission* Constitutional Application (*supra*) at para 51 adopted the words of Mohamed A J in the Namibian case of *State v Acheson* 1991(20 SA 805, 813) where he stated that;

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

Lastly and fundamentally, it is the principle that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other (see *Tinyefuza v Attorney General of Uganda* Constitutional Petition No 1 of 1997 (1997 UGCC 3)).

We are duly guided by the principles we have outlined and we accept that while interpreting the impugned legislation alongside the Constitution, we must bear in mind our peculiar circumstances. Ours must be a liberal approach that promotes the rule of law and has jurisprudential value that must take into account the spirit of the Constitution. "As this is a matter that concerns devolution, we recall what the Supreme Court stated in The *Speaker of the Senate & another v Attorney-General & another & 3 others* - Advisory Reference No 2 of 2013 [2013] eKLR.

98. Recently, in Nairobi High Court Constitutional Petition No E327 of 2020 *Law Society of Kenya v Attorney General & another* (2021) eKLR this Court in furthering the discussion on the constitutionality of a statute expressed itself as follows: -

> 110. I will also look at the decision in *R v Oakes*. The brief facts are that the respondent, David Edwin Oakes, was charged with unlawful possession of a narcotic for the purpose of trafficking, contrary to s 4(2) of the Narcotic Control Act, but was convicted only of unlawful possession. After the trial judge made a finding that it was beyond a reasonable doubt that the respondent was in possession of a narcotic, the respondent brought a motion challenging the constitutional validity of s 8 of the Narcotic Control Act. That section provides that if the court finds the accused in possession of a narcotic, the accused is presumed to be in possession for the purpose of trafficking and that, absent the accused's establishing the contrary, he or she must be convicted of trafficking. The Ontario Court of Appeal, on an appeal brought by the Crown, found that this provision constituted a "reverse onus" clause and held it to be unconstitutional because it violated the presumption of innocence now entrenched in s 11(d) of the Canadian Charter of Rights and Freedoms. The Crown appealed and a constitutional question was stated as to whether s 8 of the Narcotic Control Act violated s 11(d) of the Charter and was therefore of no force and effect. Inherent in this question, given a finding that s 11(d) of the Charter had been violated, was the issue of whether or not s 8 of the Narcotic Control Act was a reasonable limit prescribed by law and demonstrably justified in a free and democratic society for the purpose of s 1 of the Charter.
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> 111. The appeal was dismissed and the constitutional question answered in the affirmative. In so holding, the Supreme Court of Canada, then presided by the Chief Justice in a Seven-Judge bench discussed the criteria in ascertaining the manner in which a limitation to a right or fundamental freedom may be justified. The court came up with a three-pronged criteria. First, the objective which the limitation is designed to serve. Second, the means chosen to attain the objective must be reasonable and demonstrably justified. This is the proportionality test. Third, the effect of the limitation.
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> 112. On the objective test, the Supreme Court stated as follows: -
>
> > 67. To establish that a limit is reasonable and demonstrably justified in a free and democratic society, ... the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R v Big M Drug Mart Ltd*, *supra*, at p 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic

society do not gain s 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

113. On the proportionality test, the Supreme Court stated that: -

> 70. Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R v Big M Drug Mart Ltd*, supra, at p 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R v Big M Drug Mart Ltd*, supra, at p 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

114. On the third test, that is the effect of the limitation, the Supreme Court stated that: -

> 71. With respect to the third component, it is clear that the general effect of any measure impugned under s 1 will be the infringement of a right or freedom guaranteed by the Charter; this is the reason why resort to s 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

100. Lastly, the Court of Appeal in *John Harun Mwau v Independent Electoral & Boundaries Commission & Attorney General* [2019] eKLR had the following to say on the constitutionality of statutes: -

> 27. Here the question we have to answer is whether the learned Judge erred by not declaring section 10 of the Political Parties Act unconstitutional? The cardinal rule in interpretation of statute is to check whether it complies with the constitutional mandate. This is a rule that has gained traction in several jurisdictions as stated in the case of, *US v Butler*, (*supra*) which was relied on by the appellant. It was held that a duty of a court in determining the constitutionality of a provision of a statute should take the following as a guidance: -
>
> > When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the

> statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.

Also in *The Queen v Big M Drug Mart Ltd,* 1986 LRC (Const) 332, the Supreme Court of Canada stated that;

> Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of the legislation's object and ultimate impact, are clearly limited, but indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation's object and thus validity.

28. Bearing in mind the above principles we are of the view that although the Constitution does not make any provisions for political mergers or coalitions, Parliament is mandated under article 92 to make Legislation to provide *inter alia* for the regulation of political parties, the roles and functions of political parties and other matters necessary for their management thereto. We are cognisant of the fact that enactment of legislation involves a lengthy process that involves people's representative as well as public participation. A party seeking to strike a provision of a statute must demonstrate how the particular enactment is unfair, irrational and patently against the values or the spirit of the Constitution.....

101. The foregoing general discussion on the manner in which courts ought to deal with the constitutionality of statutes suffices as a basis of the consideration of the next issue.

iv. Whether section 22(1)(b)(i) of the Elections Act offends articles 24, 27, 38(2), 55 and 56 of the Constitution:

102. At the heart of the consolidated petitions is the impugned provision. The entire section 22 provides as follows: -

> Nominations and Elections Generally
>
> 22. Qualifications for nomination of candidates
>
> (1) A person may be nominated as a candidate for an election under this Act only if that person—
>
> (a) is qualified to be elected to that office under the Constitution and this Act; and
>
> (b) holds––
>
> (i) in the case of a Member of Parliament, a degree from a university recognized in Kenya; or

(ii) in the case of member of a county assembly, a degree from a university recognized in Kenya.

(1A) Notwithstanding sub section (1), this section shall come into force and shall apply to qualifications for candidates in the general elections to be held after the 2017 general elections.

(1B) The provisions of this section apply to qualifications to nomination for a party list member under section 34.

(2) Notwithstanding subsection (1)(b), a person may be nominated as a candidate for election as President, Deputy President, County Governor or Deputy County Governor only if the person is a holder of a degree from a university recognised in Kenya.

(2A) For the purposes of the first elections under the Constitution, section 22(1)(b) and section 24(1)(b), save for the position of the President, the Deputy President the Governor and the Deputy Governor, shall not apply for the elections of the offices of Parliament and county assembly representatives.

103. It was vehemently submitted that the effect of the impugned provision is to limit several rights and fundamental freedoms in ways which are not in tandem with the limitations in article 24 of the *Constitution*.

104. A careful consideration of the impugned provision against the various constitutional provisions as argued by the petitioners, reveal that the impugned provision is a limitation to the political rights under article 38(3) of the *Constitution*. As a result, such a limitation must, in the first instance, pass the constitutional muster in article 24 of the *Constitution*.

105. In the course of the legal discourse, I will not lose sight of the principles of constitutional and statutory interpretation discussed in the preceding issue and to the words of the Supreme Court in *In the Matter of the Speaker of the Senate & another* case (*supra*) that the dominant perception at the time of constitution-making was that such the deconcentration of powers would open up the scope for political self-fulfilment, through an enlarged scheme of actual participation in governance mechanisms by the people – thus giving more fulfilment to the concept of democracy. I will also be guided by the three tests discussed in *R v Oakes* as captured in Petition No. E327 of 2020 *Law Society of Kenya v Attorney General & another* (2021) eKLR.

106. Turning back to article 24 of the *Constitution* and due to its centrality in this discussion, I will reproduce it verbatim and as follows: -

Limitation of rights and fundamental freedoms

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including: -

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom: -

(a) in the case of a provision enacted or amended on or after the limitation of rights and fundamental freedoms, effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this article have been satisfied.

(4) The provisions of this chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

(5) Despite clause (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service: -

(a) Article 31—Privacy;

(b) Article 36—Freedom of association;

(c) Article 37—Assembly, demonstration, picketing and petition;

(d) Article 41—Labour relations;

(e) Article 43—Economic and social rights; and

(f) Article 49—Rights of arrested persons.

107. According to the *Constitution*, it is not wrong for a statute to limit a right or fundamental freedom. However, what stands out is the requirement that the limitation must pass the test in article 24. In other words, a permissible limitation must be reasonable and justifiable in an open and democratic society

based on human dignity, equality and freedom. In determining whether a statute passes such a test, the Constitution provides several factors to be considered. Some of them are captured in article 24(1).

108. The petitioners variously argued that the limitation imposed by the impugned provision fail the tests in article 24 of the Constitution since it is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In doing so, they gave some examples. I will only recap some of them. There was the issue that according to the 2019 Kenya Population and Housing Census Report (hereinafter referred to as 'the Report') only 1.2 Million Kenyans held university degrees. That translated to 3.5% of the entire Kenyan population. Out of the 1.2Million university graduates, 25% of them are in Nairobi County. The balance is shared between the rest of the 46 counties.

109. The Report also pointed out there were no university graduates in the entire Mt Elgon sub-county as well as Kakamega Forest sub-county; which sub-counties under the current political governance structure are constituencies to be represented in Parliament.

110. The Report is part of the evidence in the consolidated Petitions. That Report is not in any way controverted neither is there any other contradictory evidence. Since the Report is a public document and which remain uncontested, I will, in accordance with Part IV of the *Evidence Act*, cap 80 of the Laws of Kenya adopt it as admissible evidence.

111. With such uncontroverted evidence, it is clear that the impugned provision will have adverse effects on the representation of the people at the constituency level. Indeed, unless the contrary is proved, which at the moment is not, the impugned provision has the effect of rendering some sub-counties without representation in Parliament.

112. There was also the issue of the failure to recognise other relevant qualifications and experiences which can be equated to convectional degrees. It was argued that the *Kenya National Qualifications Framework Act*, No 22 of 2014 (hereinafter referred to as 'the National Qualifications Act') is aimed at recognising and awarding qualifications otherwise gained from the convectional formal training.

113. The respondents did not, once again, make any responses to the argument. That notwithstanding, I will, nevertheless, deal with the matter.

114. The *National Qualifications Act* defines 'National Qualifications Framework', 'qualifications' and 'training' as follows: -

> "National Qualifications Framework" means the national system for the articulation, classification, registration, quality assurance, and the monitoring and evaluation of national qualifications as developed in accordance with this Act;
>
> "qualifications" means qualification in education and training as recognized by the Authority in accordance with this Act;
>
> "training" means any activity aimed at imparting skills, knowledge, competences, values, attitudes and information towards assisting the recipient improve their performance;

115. Section 3 thereof gives the guiding principles of the national framework as follows: -

> The guiding principles for the framework shall be, among others, to promote access to and equity in education, quality and relevance of qualifications, evidence based competence, and flexibility of access to and affordability of education, training assessment and qualifications.

116. The objects of the National Qualifications Act are stated in section 4 thereof as follows: -

(a) establish the Kenya National Qualifications Authority;

(b) establish standards for recognising qualifications obtained in Kenya and outside Kenya;

(c) develop a system of competence, life-long learning and attainment of national qualifications;

(d) align the qualifications obtained in Kenya with the global benchmarks in order to promote national and trans-national mobility of workers;

(e) strengthen the national quality assurance systems for national qualifications; and

(f) facilitate mobility and progression within education, training and career paths.

117. Section 6 of the National Qualifications Act establishes the Kenya National Qualifications Authority (hereinafter referred to as 'the Authority'). Its functions are provided for in section 8 as follows:

(a) co-ordinate and supervise the development of policies on national qualifications;

(b) develop a framework for the development of an accreditation system on qualifications;

(c) develop a system for assessment of national qualifications;

(d) develop and review interrelationships and linkages across national qualifications in consultation with stakeholders, relevant institutions and agencies;

(e) maintain a national database of national qualifications;

(f) publish manuals, codes and guidelines on national qualifications;

(g) advise and support any person, body or institution which is responsible for the award of national qualifications;

(h) publish an annual report on the status of national qualifications;

(i) set standards and benchmarks for qualifications and competencies including skills, knowledge, attitudes and values;

(j) define the levels of qualifications and competencies;

(k) provide for the recognition of attainment or competencies including skills, knowledge, attitudes and values;

(l) facilitate linkages, credit transfers and exemptions and a vertical and horizontal mobility at all levels to enable entry, re-entry and exit; and

(m) conduct research on equalization of qualifications;

(n) establish standards for harmonization and recognition of national and foreign qualifications;

(o) build confidence in the national qualifications system that contributes to the national economy;

(p) provide pathways that support the development and maintenance of flexible access to qualifications;

(q) promote the recognition of national qualifications internationally; and

(r) perform such other functions as may be provided under this Act.

118. The above provisions reveal the position that the law recognises other modes of qualifications further to the convectional ones. The law establishes the manner in which relevant qualifications may be awarded to a person. There is no doubt that such qualifications may, in appropriate instances, be equated to convectional degrees. There is, therefore, a law which attains the same purpose as the impugned provision.

119. The danger posed by the impugned provision is that it tends to disregard any other qualification, but for a university degree. It, therefore, renders the provisions of the National Qualifications Act inapplicable in the election of Members of Parliament.

120. To me, the National Qualifications Act accords a less restrictive means to achieve the very purpose aimed at by the impugned provision. The National Qualifications Act does not constrict the number of those who may contest for the positions of Members of Parliament to convectional degrees' holders, but widens the cage to a holder of any other relevant qualification. The National Qualifications Act recognises the truism that a person may, through other qualifications, attain an equivalent of a university degree.

121. In that case, therefore, the impugned provision is irrational, unreasonable and unjustifiable in an open and democratic society. The principle of irrationality was discussed in the famous case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948]1 KB 223.

122. Closely related to the above discussion is the cost of attaining university degrees. It was posited that apart from free primary education, the cost of the rest of the educational pursuits in Kenya are borne by the parties undertaking such pursuits. It was further posited that since it costs a considerable amount of money to acquire a degree qualification in Kenya, such costs are way beyond the ability of many Kenyans.

123. It was further argued that the State is yet to have a 100% transition from secondary schools to the universities. According to the Report, it was argued that only 16% of the students who sit for the Kenya Certificate of Secondary Examination (KCSE), transit to the university. The rest, 84%, have to find other forms of training and qualifications.

124. The petitioners, therefore, view the impugned provision as an unfair means of securing the positions of Members of Parliament to a smaller clique of wealthy people.

125. Once again, the respondents did not make any response to the said argument.

126. Although the petitioners did not state the average cost of obtaining a degree qualification in Kenya, there is no doubt that there is such a cost and that the cost is not within the reach of the majority of Kenyans. The prevailing situation which this court takes judicial notice of is that most Kenyans are literary surviving from hand to mouth with the wealthy few increasing their insatiable appetite for more by the day.

127. Subjecting all the candidates for the positions of Members of Parliament to a minimum of university degrees at once, therefore, highly prejudices the rights and fundamental freedoms of those who are not able to directly acquire the university degrees.

128. There was a further argument on the effects of the Covid-19 pandemic on the university education. It was submitted that the said pandemic interfered with the university academic programmes such that there are those students who were graduate before 2022, but for the pandemic. If such a group of persons is to be left out on account of the impugned provision, then they stand unfairly discriminated against and yet the effects of the pandemic were way far beyond the world's control. A case at hand was the 1st petitioner who was to graduate, but for the disruption caused by the Covid-19 pandemic.

129. Again, there was no response to the contestation.

130. There is no doubt that such a class of university students will stand discriminated if the impugned provision stands.

131. I believe I have so far captured the heart of the rival positions. At this point, I must echo the words of the Learned Judge in *Johnson Muthama v Minister for Justice and Constitutional Affairs & another case* (*supra*) to the effect that as Parliament discharges its legislative responsibility its focus must also be on the ethical standards of those seeking public offices and not only on educational pursuits.

132. Having said so, it, therefore, comes out that the impugned provision does not augur well with several constitutional provisions. For instance, it does not pass the test of limitation in article 24 of the Constitution. The impugned provision is, hence, an affront to the Constitution.

133. Further, the impugned provision offends article 27 of the *Constitution* to the extent that it, unfairly and without justification, discriminates on the basis of educational qualifications. It also fails to treat every person equal before the law. I say so in view of the position that whereas the law recognises equivalent qualifications, the impugned provision outrightly disregards that and firmly settles for only convectional university degrees. The impugned provision also fails to take into account the category of the people who, while already admitted into the university, cannot graduate before 2022 as a result of the effects of the global COVID-19 pandemic.

134. Article 38(3) of the Constitution is also infringed to the extent that the impugned provision places unreasonable restrictions to the exercise of political rights. I have already demonstrated that there exists legislation that accords a less restrictive means to achieve the very purpose aimed at by the impugned provision.

135. The impugned provision likewise failed to take into account the dictates in article 56 of the Constitution regarding the rights of the minority and marginalised groups.

136. In sum, therefore, the impugned provision contravenes articles 24, 27, 38(3) and 56 of the Constitution.

137. As I come to the end of this issue, it must be clear that I am not fronting the position that university educational qualifications or their equivalent are not necessary for those seeking the candidature of Members of Parliament, not at all!

138. The reality is that Kenya is a member of the international community and has so far taken several steps and programmes in attaining some of the globally agreed standards. Such include the effort in attaining the Sustainable Development Goals (SDGs) as well as political rights through various initiatives including, but not limited to, execution of international covenants. Therefore, a time is soon catching up with us when the dictates of global demands and trends will make a university degree qualification or its equivalent an inevitable necessity in every elective position.

139. However, at the moment, I do not think that the impugned provision was well thought out. To equate the academic qualifications of all elective positions in Kenya at par, without any differentiation, without regard to the different attending responsibilities and by disregarding the different remuneration and benefits, the impugned provision runs contra several provisions of the Constitution.

140. There is, therefore, the need for the impugned provision to be relooked at, at least with a view of taking into account the need for differentiated qualifications and in keeping with the prevailing and targeted social, economic and educational realities in Kenya.

v. Whether there was adequate public participation in the enactment of section 22(1)(b)(i) of the Elections Act:

141. Participation of the people is a national value and principle of governance that was introduced in Kenya by article 10 of the Constitution. The said article provides as follows: -

(1) The national values and principles of governance in this article bind all state organs, State officers, public officers and all persons whenever any of them––

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include––

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality,

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

142. In Petitions 210 & 214 of 2019 (Consolidated), *Simon Mbugua & another v Central Bank of Kenya & 2 others* [2019] eKLR a three-judge bench defined public participation, and in reference to a South African decision, spoke to its significance in the new constitutional dispensation in the following manner: -

> 128. The *Black's Law Dictionary* 10th Edition, Thomas Reuters, at page 1294 defines participation as "the act of taking part in something, such as partnership....". The South African Constitutional Court in *Doctors for Life International v Speaker of the National Assembly and others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) defined public participation as follows:
>
> > The active involvement of members of a community or organization in decisions which affect them.... According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something.....
>
> 129. The centrality of public participation was underscored in *Matatiele Municipality v President of the Republic of South Africa (2)* (CCT73/05A) quoted with approval by the Court of Appeals of Quebec, Canada, in *Caron v R* 20 QAC 45 [1988] RJQ 2333 thus:
>
> > A commitment to a right to...public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect....
>
> 130. Locally, the High Court in *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* Machakos, High Court Constitutional Petition 305 of 2012, 34 of 2013 & 12 of 2014 [2015] eKLR developed the following six principles to be

taken into account whenever the application of the doctrine of public participation comes into issue:

> First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or public official who is to craft the modalities of public participation but in so doing the government agency or public official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.
>
> Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the courts will not use any litmus test to determine if public participation has been achieved or not. The only test the courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.
>
> Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See *Republic v Attorney General & another ex parte Hon Francis Chachu Ganya* (JR Misc App No 374 of 2012). In relevant portion, the court stated:
>
> Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them....
>
> Fourth, public participation does not dictate that everyone must give their views on the issue at hand. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out *bona fide* stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or public official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.
>
> Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or public official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or public official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.
>
> Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.

143. In *Doctors for Life International -vs- Speaker of the National Assembly and others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC), Ngcobo, J who delivered the leading

majority judgment spoke to participation of the public in law making process and the importance thereof as follows: -

> The international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and/or be elected into public office. The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation.....The international law right to political participation reflects a shared notion that a nation's sovereign authority is one that belongs to its citizens, who 'themselves should participate in government – though their participation may vary in degree.'.....This notion is expressed in the preamble of the Constitution, which states that the Constitution lays "the foundations for a democratic and open society in which government is based on the will of the people." It is also expressed in constitutional provisions that require national and provincial legislatures to facilitate public involvement in their processes. Through these provisions, the people of South Africa reserved for themselves part of the sovereign legislative authority that they otherwise delegated to the representative bodies they created.....The very first provision of our Constitution, which establishes the founding values of our constitutional democracy, includes as part of those values "a multi-party system of democratic government, to ensure accountability, responsiveness and openness." Commitment to principles of accountability, responsiveness and openness shows that our constitutional democracy is not only representative but also contains participatory elements. This is a defining feature of the democracy that is contemplated. It is apparent from the preamble of the Constitution that one of the basic objectives of our constitutional enterprise is the establishment of a democratic and open government in which the people shall participate to some degree in the law-making process.....

144. In Petition 532 of 2013 & 12, 35, 36, 42, & 72 of 2014 & Judicial Review Miscellaneous Application 61 of 2014 (consolidated) the adequacy of public participation was discussed as follows: -

> .... In my view to huddle a few people in a 5 star hotel on one day cannot by any stretch of imagination be termed as public participation for the purposes of meeting constitutional and legislative threshold. Whereas the magnitude of the publicity required may depend from one action to another a one day newspaper advertisement in a country such as ours where a majority of the populace survive on less than a dollar per day and to whom newspapers are a luxury leave alone the level of illiteracy in some parts of this country may not suffice for the purposes of seeking public views and public participation. As was held in *Doctors for Life International v Speaker of the National Assembly and others* (*supra*):
>
> > "Merely to allow public participation in the law-making process is, in the prevailing circumstances, not enough. More is required. Measures need to be taken to facilitate public participation in the law-making process. Thus, Parliament and the provincial legislatures must provide notice of and information about the legislation under consideration and the opportunities for participation that are available. To achieve this, it may be desirable to provide public education that builds capacity for such participation. Public involvement in the legislative process requires access to information and the facilitation of learning and understanding in order to achieve meaningful involvement by

> ordinary citizens....[the Assembly] should create conditions that are conducive to the effective exercise of the right to participate in the law-making process. This can be realised in various ways, including through road shows, regional workshops, radio programs and publications aimed at educating and informing the public about ways to influence Parliament, to mention a few.....It is implicit, if not explicit, from the duty to facilitate public participation in the law-making process that the Constitution values public participation in the lawmaking process. The duty to facilitate public participation in the law-making process would be meaningless unless it sought to ensure that the public participates in that process. The very purpose in facilitating public participation in legislative and other processes is to ensure that the public participates in the law-making process consistent with our democracy. Indeed, it is apparent from the powers and duties of the legislative organs of state that the Constitution contemplates that the public will participate in the law-making process.....In determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances. And factors relevant to determining reasonableness would include rules, if any, adopted by Parliament to facilitate public participation, the nature of the legislation under consideration, and whether the legislation needed to be enacted urgently. Ultimately, what Parliament must determine in each case is what methods of facilitating public participation would be appropriate. In determining whether what Parliament has done is reasonable, this court will pay respect to what Parliament has assessed as being the appropriate method. In determining the appropriate level of scrutiny of Parliament's duty to facilitate public involvement, the court must balance, on the one hand, the need to respect parliamentary institutional autonomy, and on the other, the right of the public to participate in public affairs. In my view, this balance is best struck by this court considering whether what Parliament does in each case is reasonable."

145. In *Matatiele Municipality and others v President of the Republic of South Africa and others (2)* (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC), Ngcobo, J discussed at length the modalities of public participation and held that: -

> .... the provincial legislatures have broad discretion to choose the mechanisms that, in their view, would best facilitate public involvement in their processes. This may include providing transportation to and from hearings or hosting radio programs in multiple languages on an important bill, and may well go beyond any formulaic requirement of notice or hearing. In addition, the nature of the legislation and its effect on the provinces undoubtedly plays a role in determining the degree of facilitation that is reasonable and the mechanisms that are most appropriate to achieve public involvement. Thus, contrary to the submission by the government, it is not enough to point to standing rules of the legislature that provide generally for public involvement as evidence that public involvement took place; what matters is that the legislature acted reasonably in the manner that it facilitated public involvement in the particular circumstances of a given case. The nature and the degree of public participation that is reasonable in a given case will depend on a number of factors. These include the nature and the importance of the legislation and the intensity of its impact on the public. The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable

> it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say. In addition, in evaluating the reasonableness of the conduct of the provincial legislatures, the court will have regard to what the legislatures themselves considered to be appropriate in fulfilling the obligation to facilitate public participation in the light of the content, importance and urgency of the legislation.....The purpose of permitting public participation in the law making process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning."

146. In the consolidated petitions, all the respondents as well as the interested party did not seriously contest the claim that there was no public participation in the process towards the enactment of section 22(1)(b)(ii) of the *Elections Act*. However, the 3rd and 4th respondents contended that on receipt of the Bill, the same was committed to the Committee on Justice and Legal Affairs and that the Committee called for and received memoranda from the National Gender and Equality Commission, Kenya National Commission on Human Rights, Kenya Law Reform Commission and Centre for Multi-Party Democracy.

147. As comprehensively set out in the decisions referred to above and as provided for under article 10 of the *Constitution*, public participation is an irreducible minimum in the process of enacting any legislation. Parliament must always strictly adhere to the requirement of and carry out adequate public participation for any of its legislations to gain legitimacy.

148. I must add that for Parliament to have come up with an enactment in the nature of the impugned provision, there was need for elaborate and comprehensive public participation and stakeholder engagement. There was need for Parliament to consider national statistics, to consult with experts in devolution and educational matters and to generally be alive to the truism that the impugned provision must always be in tandem with the various realities in Kenya. Parliament was then to balance all that with the right to representation. Unfortunately, Parliament chose to ignore all that and the Senate only received presentations from some few entities which in any case the manner of invitation was not disclosed.

149. Given the appalling state of affairs, I find and hold that there was no meaningful public participation towards the enactment of section 22(1)(b)(i) of the *Elections Act*.

150. In sum, the impugned provision falls short of the constitutional requirement under article 10(2)(a) of the *Constitution*.

Disposition:

151. Flowing from the foregoing, the consolidated petitions are, to a great extent, successful.

152. There was also the prayer for the issuance of the corrigendum with regard to the qualifications for persons intending to vie for the positions of Members of Parliament. I have carefully perused the Gazette Notices. They contain the provisions of the Constitution and the law on the eligibility of candidates for various positions.

153. I have noted that section 22 of the Elections Act was omitted and it must have been for good reason. It is likely to have been on the basis of the fact that the then law was unsettled since the provision was

still being challenged in court and before Parliament and as such there was need to avoid confusion in the qualifications, at least pending the resolution of the issue.

154. As the impugned provision has now been rendered unconstitutional and the rest of the provisions cited in the Gazette Notices rightly so captures the qualifications, the need for issuance of a corrigendum does not, therefore, arise.

155. As such, and in the end, the following final orders hereby issue: -

(a) A declaration be and is hereby issued that section 22(1)(b)(i) of the Elections Act is unconstitutional and in violation of article 10(2)(a) of the Constitution for failure to undertake adequate public participation.

(b) A declaration be and is hereby issued that section 22(1)(b)(i) of the Elections Act is unconstitutional and in violation of articles 24, 27, 38(3) and 56 of the Constitution.

(c) An order hereby issues that section 22(1)(b)(i) of the Elections Act is inoperational, of no legal effect and void ab initio. For clarity, the requirement that a person must possess a degree from a university recognized in Kenya to qualify to be a Member of Parliament in Kenya is hereby nullified.

(d) There shall be no order as to costs as the matter is a public interest litigation.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF APRIL, 2022.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Adrian Kamotho Njenga, Learned Counsel for the 7th Petitioner.

Miss Thiong'o, Learned Counsel for the 8th to 11th Petitioners.

Miss. Akama, Learned Counsel for the 1st and 2nd Respondents.

Mr. Wambulwa, Learned Counsel for the 3rd and 4th Respondents.

Miss. Chibole, Learned Counsel instructed by the Honourable Attorney General for the 5th and 6th Respondents.

Mr. Mbogo, Mr. Hassan Nura, Mr. Nelson Onyango and Miss. Ogula, Learned Counsel for the 7th Respondent.

Elizabeth Wanjohi – Court Assistant.