



**James v Independent Electoral and Boundaries Commission (Petition E313 of 2022)
[2022] KEHC 12726 (KLR) (Constitutional and Human Rights) (23 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 12726 (KLR)

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

PETITION E313 OF 2022

M THANDE, J

AUGUST 23, 2022

BETWEEN

LOSIKANY JAMES PETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION RESPONDENT**

Persons who would cease being youths during the term of Parliament are disqualified from being nominated as youth representatives in the County and National Assembly

Reported by John Ribia

***Electoral Law** – special interests groups – nomination of special interests groups to the National and County Assembly – youths – definition of a youth – requirement that to be eligible for nomination as a youth to a County Assembly or to the National Assembly, one had to be between the ages of 18 to 34 years through out the term of the assembly - what was the rationale behind reserving seats for special interests group such as the youth, women and persons with disabilities for nomination into the County and National Assembly - whether a person would be eligible for nomination as a youth representative in the County or National Assembly if such person ceased being a youth (attained the age of 35 years) before the end of the term of Parliament or of the County Assembly - whether in issuing the gazette notice that disqualified persons who would cease being youths (attained the age of 35 years) during the term of parliament from being nominated as youth representatives in the County and National Assembly, the Independent Electoral and Boundaries Commission acted beyond the scope of the power conferred upon it by law - Constitution of Kenya articles 81(d), 88(1), 97(1)(c), 177(1)(b)(c), 259(1) and 260; Statutory Instruments Act (Cap 2A), section 24(2); Elections Act (Cap 7), sections 34(6B), 35, 36(1)(f) and 37; Elections (Party Primary Lists) Regulations, 2017, regulation 15(3)*

***Constitutional Law** – fundamental rights and freedoms – freedom against discrimination - requirement that to be eligible for nomination as a youth to a County Assembly or the National Assembly, one had to be between the ages of 18 to 34 years throughout the term of the assembly - whether the disqualification of persons who would*



cease being youths (attained the age of 35 years) from being nominated as youth representatives in the County and National Assembly was discriminatory - Constitution of Kenya, 2010 article 27; Statutory Instruments Act (Cap 2A) section 24(2); Elections Act (Cap 7), sections 34(6B), 35, 36(1)(f) and 37; Elections (Party Primary Lists) Regulations, 2017, regulation 15(3).

Words and Phrases – *ultra vires* – definition of - *unauthorised; beyond the scope of power allowed or granted by a corporate charter or by law - Black's Law Dictionary Tenth Edition.*

Brief facts

The petitioner aspired to be nominated as a member of the Narok County Assembly, under the United Democratic Alliance party (UDA) aged 32 years old. The petitioner sought for a declaration that paragraph (f) of the general requirements for party lists in Gazette Notice No. 6378 published in the Kenya Gazette Vol. CXXIV No 101 on June 3, 2022 (part (f)) that provided that nominees for Member of County Assembly had to be between 18 to 34 years of age for the term of the next Parliament, was unconstitutional

The petitioner contended that the Independent Electoral and Boundaries Commission (the respondent) arbitrarily amended regulation 15(3) of the Election (Party Primaries and Party Lists) Regulations, 2017 (the Regulations) by introducing an extraneous criterion, which flew in the face of section 24(2) of the Statutory Instruments Act. He contended that there was no requirement that a youth nominee had to be between 18 to 34 years of age for the entire term of the next Parliament. Further, he contended that the requirement in paragraph(f) in that regard, was *ultra vires* those provisions.

The respondent was categorical that the part of paragraph (f) which the petitioner was challenging was neither a disclaimer nor a proviso but an explanation of the substratum of articles 177(1)(c) and 260 of the Constitution of Kenya, 2010 (the Constitution). It affirmed that the party lists requirements as set out in the impugned gazette notice were within the confines of the Constitution and the law and were not *ultra vires*.

Issues

- i. Whether in issuing the gazette notice that disqualified persons who would cease being youths (attained the age of 35 years) during the term of Parliament from being nominated as youth representatives in the County and National Assembly, the Independent Electoral and Boundaries Commission acted beyond the scope of the power conferred upon it by law.
- ii. What was the rationale behind reserving seats for special interests groups such as the youth, women, and persons with disabilities for nomination into the County and National Assembly?
- iii. Whether a person would be eligible for nomination as a youth representative in the County or National Assembly if such person ceased being a youth (attained the age of 35 years) before the end of the term of Parliament or of the County Assembly.
- iv. Whether the disqualification of persons who would cease being youths (attained the age of 35 years) from being nominated as youth representatives in the County and National Assembly was discriminatory.

Held

1. Upon nomination, political parties were required to submit to the respondent a list of candidates so nominated. The impugned gazette notice was issued pursuant to the powers conferred upon the respondent by *inter alia* article 90 of the Constitution and, sections 34, 35, 36, and 37 of the Elections Act (the Act) and section 24(2) of the Statutory Instruments Act. The making of the requirements on the age qualification of the youth was within the powers conferred upon the respondent under the cited constitutional and statutory provisions pursuant to which they were published.
2. The regulations were not *ultra vires* (unauthorized, beyond the scope of power allowed or granted by a corporate charter or by law). The respondent acted within its constitutional and statutory mandate to issue the gazette notice setting out the guidelines to be complied with by political parties, in preparation of party lists.



3. Article 260 of the Constitution defined youth as persons between 18 to 34 years of age. Articles 97, 98(1)(c) and 177(1)(c) of the Constitution were intentional about the representation of the youth in the National Assembly, Senate, and in county assemblies. Recognizing that the youth may not have the resources to successfully run for elective office, the Constitution made provision for their representation through their nomination.
4. The youth age requirement was anchored in the Constitution. Youth as a special interest group were to be represented by one of their own. That meant that a youth would only be eligible for nomination if such youth remained a youth till the end of the term of Parliament or of the county assembly, as the case may be. A youth who would cease to be so during such term would not qualify. Such persons would be treated differently from a person who was a youth at nomination and remained so till the end of the term of Parliament or county assembly. That different treatment did not amount to discrimination.
5. The intention of articles 97(1)(c), 98(1)(b)(c) and (d) and 177(1)(b) and (c) of the Constitution was that special interest groups would be represented by one of their own in the various assemblies. The women were to be represented by their fellow women, people with disabilities by one of their own, and people in cultural minorities by one of their own. A similar intention applied to the youth. They were to be represented by one of their own. Representation was for the entire duration of the term of Parliament or the county assembly, as the case may be.
6. Once a person who had been nominated and then elected, attained the age of 35 years, the person ceased to be a youth, and his tenure as a member of Parliament or county assembly became untenable. Such a state of affairs would result in absurdity and illegality. The youth would be disenfranchised by being represented by a person who had ceased to be one of their own. The principle of universal suffrage based on the aspiration for fair representation and equality of vote stipulated in article 81(d) of the Constitution would be violated.
7. The fact that the petitioner was within the age bracket of 18 to 34 years did not qualify him for nomination if he would not remain within the said age bracket during the entire term of the county assembly to which he aspired to be nominated. While his being excluded amounted to different treatment from youth who remained so for the duration of the term of the county assembly, it did not amount to discrimination.
8. There was a clear and reasonable distinction between the petitioner, who would not remain a youth during the term of the county assembly, and a youth who would remain so during the said term. There was a reasonable explanation for treating the petitioner and other youth differently. That different treatment did not undermine the constitutional guarantee that every person was equal before the law and had the right to equal protection and equal benefit of the law. The different treatment did not also fall within the prohibited categorization under article 27(4), of the Constitution. Paragraph (f) of the general requirements for party lists in the impugned gazette notice simply restated what was provided in article 260 of the Constitution and was not in any way discriminatory.
9. For a legitimate expectation to arise the decision in question had to affect a party by depriving him of the same benefit that others have enjoyed. A legitimate expectation could arise where a party had been assured that a benefit or advantage by the decision maker would not be withdrawn without giving him first an opportunity to be heard.
10. Although the petitioner claimed that he had a legitimate expectation that the requirements for nomination to represent the youth in the 2022 general elections would be the same as they were in 2013 and 2017, he had not placed any material before the court to demonstrate that the respondent had given him assurance that the regulations would remain the same. The petitioner and UDA ought to have awaited the guidelines by the respondent to ensure compliance or in any event, UDA ought to have amended its requirements to be in conformity with those of the respondent.
11. A legitimate expectation could not override the law. Section 34(7) of the Elections Act provided that party lists had to be valid for the term of Parliament. The previous requirements for party lists



did not take that into account. The fact that requirements for nomination for the youth category in past elections did not have the new criterion did not preclude the respondent as a public body from reasserting the correct position in law. The respondent having recognized the previous errors was within its right to correct the same and issue the new criterion which was an explanation as to who a qualifying youth was. The petitioner's alleged legitimate expectation was not anchored with the law and could not override the law.

12. The petitioner would attain the age of 35 years before the end of the term, if he were to be included in UDA's party list for nomination to represent the youth in the county assembly, his nomination would not be valid for the term of Parliament. His nomination would be illegal as it would violate both the Constitution and the law. The contention that the impugned criterion was an arbitrary, irrational, unreasonable, and unjustifiable limitation on the petitioner's political rights did not hold water. Allowing the petitioner and other youth who would cease to be youths during the term would limit the rights of all the youth in Kenya to be represented in the National Assembly, Senate, and county assemblies as the case may be, by one of their own.

Petition dismissed.

Orders

No order for costs.

Citations

Cases

Kenya

1. *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)
2. *Juma, Jared v Kenya Broadcasting Corporation & 3 others* Judicial Review 24 of 2013; [2014] KEELRC 97 (KLR) - (Explained)
3. *Kenya Medical Research Institute v Samson Gwer & 8 others* Civil Appeal 101 of 2015; [2019] KECA 988 (KLR) - (Followed)
4. *Republic v Kenya Revenue Authority ex-parte Aberdare Freight Services Ltd & 2 others* Miscellaneous Civil Application 946 of 2004; [2004] KEHC 1238 (KLR) - (Explained)

United Kingdom

Council of Civil Service Unions v Minister for Civil Service [1984] UKHL 9; [1985] AC 374; [1984] 3 WLR 1174; [1985] ICR 14; [1984] 3 All ER 935 - (Explained)

Texts

1. Garner, BA., (Ed) (2004), *Black's Law Dictionary* St Paul Minessota: Thomson Reuters 10th Edn p 1566
2. Woolf, JW., et al (Eds) (1995), *De Smith Woolf and Jowell Judicial Review of Administrative Action* London: Sweet & Maxwell Ltd 5th Edn pp 567, 568

Statutes

Kenya

1. Constitution of Kenya articles 27, 81(d); 88(1); 90; 97(1)(c); 98(1)(b)(c); 177(1)(b)(c); 259(1); 260 - (Interpreted)
2. Elections (Party Primary Lists) Regulations, 2017 (cap 7 Sub Leg) regulation 15(3) - (Interpreted)
3. Elections Act (cap 7) sections 34(6B)(7); 35; 36(1)(f); 37 - (Interpreted)
4. Statutory Instruments Act (cap 2B) section 24(2) - (Interpreted)

Advocates

None mentioned



JUDGMENT

1. In his petition against June 23, 2022, against the Independent Electoral and Boundaries Commission, the respondent, the petitioner, Losikany James seeks the following orders:
 1. A declaration be issued that the impugned part of paragraph (f), to wit, “For avoidance of doubt the nominee must be between 18-34 years of age for the term of Parliament” under General Requirements for Party Lists, in the said Gazette Notice No. 6378 published in the Kenya Gazette Vol CXXIV No 101 on June 3, 2022 is unconstitutional, null and void *ab initio*.
 2. An order restraining the respondent from rejecting Party Lists for failure to meet the requirement of being between 18-34 years of age for the term of Parliament as contained in the impugned part of paragraph (f) of Gazette Notice No 6378 published in the Kenya Gazette Vol CXXIV No 101 on June 3, 2022.
 3. An order of *certiorari* be issued, calling into this court and quashing the impugned part of paragraph (f), to wit “For avoidance of doubt the nominee must be between 18-34 years of age for the term of Parliament” under General Requirements for Party Lists, in the said Gazette Notice No 6378 published in the Kenya Gazette Vol CXXIV-No 101 on June 3, 2022.
 4. Costs and interests thereof of this petition.
 5. Such further, other and consequential orders as this honourable court may deem fit to make.
2. The respondent is a constitutional commission established under article 88(1) of the [Constitution of Kenya, 2010](#), which has the mandate of conducting and supervising referenda and elections to any elective body as prescribed by the Constitution.
3. In preparation of the general elections to be held on August 9, 2022 (now past), the respondent published in Kenya Gazette Notice No 6378 of 2022, notifying the general public of the law guiding party lists on nomination of members to the national assembly, the senate and county assemblies under articles 97(1)(c), 98(1)(b)(c) and (d) and 177(1)(b) and (c) of the [Constitution](#) respectively, using proportional representation. The notice contained the general rules of submission of party lists and also the formula for allocation of seats from the party lists to be submitted. The notice further required political parties to submit their party lists to the respondent, by June 25, 2022.
4. The petitioner who describes himself a public-spirited youth and a defender of the Constitution is aggrieved by paragraph (f) (paragraph(f)) of the General Requirements for Party Lists contained in the said notice which provides as follows:

An aspiring candidate seeking nomination on the ground that the aspiring candidate is youth the person must have attended (*sic*) the age of eighteen years but has not attained the age of thirty-five years and such person shall provide documentary proof of his or her age. For the avoidance of doubt the nominee must be between 18-34 years of age for the term of Parliament.
5. The petitioner aspires to be nominated as a member of the Narok County Assembly, under the United Democratic Alliance party (UDA). He was born 01.01.90 and is therefore 32 years old. The petitioner stated that prior to the publication of Gazette Notice 6378 by the respondent, UDA had pursuant to the UDA Nominations and Elections Rules, issued a “Party List Nomination Notice” on May 19,



2022, inviting qualified party members to apply for nomination to the various entities. The said notice required that applications be submitted on or before May 24, 2022.

6. In compliance with the requirements and the party notice the petitioner submitted duly filled application via UDA portal (<https://leaders.uda.ke/plist>) before the deadline imposed by the party. The petitioner who is an active member of UDA and involved in youth activities, sought to nomination to the Narok County Assembly, to represent the youth as a special interest group in accordance with article 177(1)(c) of the Constitution. It is only after the lapse of the party's deadline that the Petitioner learnt of Gazette Notice No 6378.
7. It is the petitioner's case that what he refers to as a disclaimer in paragraph(f) will lock him out of the nominations on account of the fact that he will attain the age of 35 in 2025. The disclaimer reads:

For avoidance of doubt the nominee must be between 18-34 years old for the term of Parliament.

8. The petitioner is apprehensive because the respondent is the Gazette Notice is categorical that it "May reject a nominee submitted by a political party for any elective post if not qualified." Further at paragraph (u) of the Gazette Notice, the respondent stated that it "shall within fourteen days of receipt reject any party list that does not comply."
9. The petitioner further contended that Gazette Notice No 5735 of 2017 did not contain the impugned disclaimer. Paragraph (f) of that notice stated:

An aspiring candidate seeking nomination on the ground that the candidate is a youth one must be between the age of 18-34 years and provide documentary proof of his or her age.

10. He further asserted that he has established that neither the Constitution nor the Elections Act has been amended to include the disclaimer. Accordingly, the introduction of the impugned disclaimer, is *ultra vires* the Constitution, the Statutory Instruments Act, the Elections Act and the regulations made thereunder. The petitioner further contended that the impugned disclaimer is arbitrary, unreasonable, discriminatory and irrational as it fails to have due regard to articles 260 and 177(1)(c) of the Constitution, section 36(1) (f) of the Elections Act and regulation 15(3) of the Elections (Party Primary Lists) Regulations, 2017.
11. Additionally, the petitioner contended that he had a legitimate expectation at the time he applied for nomination by UDA that the respondent would strictly comply with the Constitution and regulations.
12. The respondent opposed the petition by means of a preliminary objection (po) and grounds of opposition both dated June 28, 2022 and a replying affidavit sworn on even date by Chrispine O. Owiye, the Director of Legal and Public Affairs of the respondent. The PO which challenged the jurisdiction of this court was dismissed *vide* a ruling on July 19, 2022.
13. The respondent opposed the petition on the grounds that the petition does not state with specificity which constitutional provision has been violated by the requirement of paragraph (f) or how the same is discriminatory. Further that the Gazette Notice is very constitutional and that the requirements of paragraph(f) echoes the Constitution, as article 177(1)(c) prescribes that members of county assemblies shall include youth. The perceived limitation is a question of qualification as stipulated in the law. It was contended that when a person nominated to represent the youth attains 35 years of age, such person constitutionally ceases to be a youth and the seat is to be declared vacant. Accordingly, if this



petition is allowed, it will open a floodgate of petitions by persons who will have attained the age of 35 years before the end of the term of the incoming Parliament.

14. It was further contended that the respondent is empowered by section 34(6B) of the [Elections Act](#) to issue specific guidelines for party lists and so the petitioner's legitimate expectation is unwarranted. Additionally, the respondent stated that the petitioner did not exhibit UDA's nomination rules to ascertain that they were in consonance with the law. Further, that the petitioner and his party ran ahead of the respondent's calendar and relied on outdated regulations which had not taken into account the definition of a youth *vis a vis* the term of Parliament. The respondent also faults the petitioner for not demonstrating that he had applied to UDA for nomination and that he had been included in the party list to be presented to the respondent. The respondent urged that the petition be dismissed with costs.
15. The matter herein involves the interpretation of the [Constitution](#). And the court must be guided by article 259(1) which provides:
 1. This Constitution shall be interpreted in a manner that—
 - a. promotes its purposes, values and principles;
 - b. advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights
 - c. permits the development of the law; and
 - d. contributes to good governance.
16. Additionally, clause (3) of the article requires that the Constitution be construed according to the doctrine of interpretation that the law is always speaking.
17. Parties filed their submissions which I have duly considered. The following are issues that fall for determination are as framed by the petitioner and which were adopted by the respondent:
 - i. Whether the impugned disclaimer is *ultra vires*?
 - ii. Whether the impugned disclaimer is discriminatory?
 - iii. Whether the impugned disclaimer violates the petitioner's right to a legitimate expectation?
 - iv. Whether the impugned disclaimer is an arbitrary, irrational, unreasonable and unjustifiable limitation on the petitioner's political rights?

Whether the impugned disclaimer is *ultra vires*?

18. The petitioner contended that the respondent arbitrarily amended regulation 15(3) of the [Election \(Party Primaries and Party Lists\) Regulations, 2017](#) by introducing an extraneous criterion, which flies in the face of section 24(2) of the [Statutory Instruments Act](#). The petitioner further submitted that a holistic reading of articles 97(1)(c), 98(1)(c) and 177(1)(c) and section 36(1)(f) of the [Election Act](#) demonstrates that there is no requirement that a youth nominee must be between 18-34 years of age for the entire term of the next Parliament. Accordingly, the requirement in paragraph(f) in this regard, is *ultra vires* those provisions.
19. The respondent was categorical that the part of paragraph(f) which the petitioner is challenging is neither a disclaimer nor a proviso but an explanation of the substratum of articles 177(1)(c) and 260 of the [Constitution](#). It affirms that the Party Lists requirements as set out in the Gazette Notice are within the confines of the Constitution and the law and are not *ultra vires*.



20. *Black's Law Dictionary* Tenth Edition defines *ultra vires* as:
- Unauthorised; beyond the scope of power allowed or granted by a corporate charter or by law.
21. The question that is court must determine is whether in issuing the Gazette Notice, the respondent acted beyond the scope of the power conferred upon it by law? Was the respondent authorised by law to issue the Gazette Notice containing the requirements, including the new criterion, to be complied with by parties in submitting their party lists?
22. In order to determine this issue, it is necessary to look at the enabling law. Article 90 provides for the allocation of party seats in the in the national assembly, senate and county assemblies. The article further provides that allocation shall be on the basis of proportional representation by use of party lists. Clause (2) makes it the responsibility of the respondent to conduct and supervise the elections for those seats.
23. The *Elections Act* gives effect to the provisions of article 90. section 34 makes provision for nomination of party lists members while section 35 provides for submission of party lists. Section 36 makes provision for allocation of special seats and re-allocation of special seats is provided for under section 37 of the Act. Section 36(1)(f) relied upon by the petitioner, provides:
- Article 177(1)(c) of the *Constitution* shall include eight candidates, at least two of whom shall be persons with disability, two of whom shall be the youth and two of whom shall be persons representing a marginalized group.
24. Upon nomination of candidates to the national assembly, senate and county assemblies, political parties are required to submit to the respondent a list of candidates so nominated. Section 34(6B) has the conferred upon the IEBC the necessary power to make guidelines in respect of party lists, as follows:
- For purposes of sub section (6A), the Commission may, by notice in the gazette, issue regulations prescribing guidelines to be complied with in preparation of party lists.
25. The Gazette Notice under challenge is expressed to have been issued pursuant to the powers conferred upon the respondent by *inter alia* article 90 of the *Constitution*, sections 34, 35, 36 and 37 of the Act.
26. Further, section 24(2) of the *Statutory Instruments Act* that was relied on by the petitioner, provides:
- A statutory instrument shall not be inconsistent with the provisions of the enabling legislation, or of any Act, and the statutory instrument shall be void to the extent of the inconsistency.
27. As demonstrated above, the making of the requirements set out in paragraph(f) relating to the age qualification of the youth is within the powers conferred upon the respondent under the cited constitutional and statutory provisions pursuant to which they were published.
28. With such clear legal provisions, I find the argument that the regulations are *ultra vires* to be hollow. The respondent acted within its constitutional and statutory mandate to issue the Gazette Notice setting out the guidelines to be complied with by political parties, in preparation of party lists. I find nothing to remotely suggest that the respondent acted *ultra vires* in issuing the Gazette Notice.



Whether the impugned disclaimer is discriminatory

29. It is the petitioner's submissions that the impugned disclaimer is restrictive and grossly violates the petitioner's right to be considered for nomination to the Narok County Assembly, as a youth. Citing article 27 of the *Constitution*, the petitioner contended that the respondent has a constitutional obligation to treat all youth equally and accord them equal protection and benefit of the law. He went on to contend that the impugned disclaimer has the effect of excluding all youth born before August 1993 from nomination for the reason that they will attain the age of 35 years before the expiry of the term of the next Parliament. The result is discrimination against an entire generation of youth including the petitioner, on account of their future age by denying them eligibility for nomination to the various seats, thereby limiting their political rights.
30. The respondent's position on this issue is that the requirements in paragraph(f) are as set out in the *Constitution* and other laws. The respondent argues that the qualifying qualification for nomination of an individual remain applicable for the rest of the term of Parliament. Any disqualifying character attained after election renders an individual disqualified. It is the Constitution and not the respondent that dictates that the future age will disqualify the petitioner. As such, there is nothing discriminatory in the requirements. It is pure practical application of the law and not differential treatment.
31. As I consider the complaint by the petitioner, it is fitting to look at the constitutional definition of youth. Article 260 defines youth as:
- “youth” means the collectivity of all individuals in the Republic who—
- (a) have attained the age of eighteen years; but
 - (b) have not attained the age of thirty-five years.
32. Flowing from this definition, it is not in doubt that youth means a person between 18-34 years of age.
33. Article 97 makes provision for membership of the National Assembly. Clause (1)(c) thereof provides for nomination of representatives of special interest groups including youth, persons with disabilities and workers as follows:
- (c) twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with article 90, to represent special interests including the youth, persons with disabilities and workers;
34. Article 98(1)(c) make provision for nomination of youth to the Senate as follows:
- (1) The Senate consists of-
 - (c) two members, being one man and one woman, representing the youth.
35. Similar provisions regarding the county assemblies are contained in article 177(1)(c):
- (1) A county assembly consists of-
 - (c) the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament;
36. It is clear from the foregoing provisions that when the people of Kenya gave to themselves Constitution of Kenya, 2010, they were very intentional about the representation of the youth in the National Assembly, Senate and in County Assemblies. Recognising that the youth may not have the resources to



successfully run for elective office, the Constitution made provision for their representation through their nomination, in the foregoing provisions.

37. Paragraph(f) of the Gazette Notice which contains the requirements for a candidate seeking nomination as a youth is reproduced below:

An aspiring candidate seeking nomination on the ground that the aspiring candidate is youth the person must have attended (*sic*) the age of eighteen years but has not attained the age of thirty-five years and such person shall provide documentary proof of his or her age. For the avoidance of doubt the nominee must be between 18-34 years of age for the term of Parliament.

38. The petitioner is aggrieved by the part that of paragraph(f) that states:

For avoidance of doubt the nominee must be between 18-34 years of age for the term of Parliament.

39. The petitioner contends that states that the respondent introduced an extraneous criterion which was not in the 2017 regulations. He contended that this criterion was discriminatory and relied on the case of *Jared Juma v Kenya Broadcasting Corporation & 3 others* [2014] eKLR where Nduma, J stated:

69. Given that government public policy envisages any qualified person to hold office in various cadre, including in the various parastatals such as KBC, what informed the decision by Board of KBC to limit the age of the Managing Director to forty five (45) years? Is it a decision in keeping with Public Policy? Is it so restrictive as to be construed as grossly unreasonable and in violation of the right of the Petitioner to apply for the position and others above the age of forty five (45)? Does the decision conform to the minimum core content of equality and non- discrimination under article 27(4)?

71. It is the court's considered view that the Board of KCB, properly directing itself on the relevant law (especially on the retirement age of public servants in Kenya) and acting reasonably could not have reached the decision that a Managing Director of public parastatal should not be more than forty five (45) years old.

72. The decision was therefore grossly unreasonable as to amount to discrimination on grounds of age contrary to article 27(4) of the *Constitution of Kenya 2010*.

40. I have considered the cited case and note that the 1st respondent therein had in an advertisement, placed the age requirement for the position of managing director as being below 45 years. This was not based on any law or public policy. The court found that the requirement was grossly unreasonable as to amount to discrimination on grounds of age contrary to article 27(4) of the *Constitution*.

41. In the present case, however, the age requirement is anchored in article 260 of the *Constitution* which defines youth as a person between the age of 18-34 years. Further youth as special interest group are to be represented by one of their own. This then means that a youth will only be eligible for nomination if such youth remains a youth till the end of the term of Parliament or of the county assembly, as the case may be. A youth who will cease to be so during such term will not qualify. In this regard, such person will be treated differently from a person who is a youth at nomination and remains so till the end of the term of Parliament or county assembly. This different treatment does not amount to discrimination.



42. In this regard, I am duly guided by the holding in the case of *Kenya Medical Research Institute v Samson Gwer & 8 others* [2019] eKLR, where the Court of Appeal stated:

It is erroneous for the doctors to contend, and for the learned Judge to be seen to have accepted, that any differential treatment is *ipso facto* discriminatory. The proper position is that for a differentiation of treatment to be unconstitutional and impermissible it has to be based on any of the prohibited grounds as captured in article 27 of the *Constitution*;

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- (4) The state shall not discriminate directly or indirectly against any person on any ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
- (5) A person shall not discriminate directly or indirectly against another on any of the grounds specified or contemplated in clause (4)".

It would be ingenuous for one to suppose that the equality contemplated by the Constitution leaves no room for difference and seeks absolutism. Rather, as Judge Tanaka famously stated in the *South West Africa Case* [1966] ICJ REP, equality does not mean;

"...absolute equality, namely the equal treatment of men without regard to individual concrete circumstances, but it means – relative equality, namely the principle to treat equally what are equal and unequally what are unequalTo treat unequal matters differently according to the inequality is not only permitted but required."

43. The intention of the people of Kenya as set out in articles 97(1)(c), 98(1)(b)(c) and (d) and 177(1)(b) and (c) of the *Constitution* was that special interest groups would be represented by one of their own in the various assemblies. The women are to be represented by their fellow women, people with disabilities by one of their own and people in cultural minorities by one of their own. A similar intention applied to the youth. They are to be represented by one of their own. Representation is for the entire duration of the term of Parliament or the county assembly, as the case may be. Once a person who has been nominated and then elected, attains the age of 35 years, he ceases to be a youth and his tenure as a member of Parliament or county assembly becomes untenable. The question that would then beg is, if such a person were to remain a member of Parliament or county assembly, which special interest would he be representing? Such a state of affairs would result in an absurdity and an illegality. Indeed, the youth would be disenfranchised by being represented by a person who has ceased to be one of their own. Further, the principle of universal suffrage based on the aspiration for fair representation and equality of vote stipulated in article 81(d) of the *Constitution* would be violated.
44. The fact that the petitioner is at present within the age bracket of 18-34 years does not qualify him for nomination if he will not remain within the said age bracket during the entire term of the county assembly to which he aspires to be nominated. While his being excluded amounts to different treatment from a youth who remains so for the duration of the term of the county assembly, it does not amount to discrimination.
45. In the *Kenya Medical Research Institute* case (*supra*), the court went on to state:

For different treatment to amount to discrimination, it must fall within the definition of the term as found in *Blacks Law Dictionary* 10th Edition at p 1566 namely "differential



treatment; esp a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.”

The court concluded:

Thus where, as in this case, a reasonable explanation is given for differential treatment that is apart and independent of a prohibited basis or categorization, we are of the view that a claim for relief for alleged discrimination has to fail.

46. In the present case, there is a clear and reasonable distinction between the petitioner, who will not remain a youth during the term of the county assembly and a youth who will remain so during the said term. As such, there is a reasonable explanation for treating the petitioner and other youth differently. This different treatment does not undermine the constitutional guarantee that every person is equal before the law and has the right to equal protection and equal benefit of the law. The different treatment does not also fall within the prohibited categorization under article 27(4), of the Constitution which provides:

The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

47. In the end, I find and hold that the paragraph(f) simply restates what is provided in article 260 of the Constitution and is not in any way discriminatory.

Whether the impugned disclaimer violates the petitioner’s right to a legitimate expectation

48. The petitioner submitted that the respondent created a legitimate expectation that he and every other youth would be eligible for nomination for the special seats as long as they were between the age of 18 and 34 years at the time of nomination. This legitimate expectation was created through representation and conduct during the previous general elections in 2013 and 2017. The petitioner contends that it was on the basis of the requirements in Kenya Gazette Notice No. 5735 published on the June 12, 2017 which did not have the new criterion, that he applied for nomination this year with the expectation that the respondent would apply the same criteria it used, in the previous general elections without the impugned criterion regarding age.
49. According to the petitioner, this new criterion is intended to lock him out and other youth who would turn 35 years during the term of the next parliament, which is was a flagrant violation of their legitimate expectation. The petitioner concluded by submitting that the legitimate expectation is grounded on regulation 15(3) of the Election (Party Primaries and Party Lists) Regulations, 2017. Further that there is no law that empowers the respondent to consider the future age of youth nominees in determining their current eligibility.
50. The respondent countered this by arguing that the principle of legitimate expectation is not available to the petitioner. The respondent contended that since 2013, electoral laws and regulations have undergone enormous changes through amendments, revisions and repeals and what was available in 2013 may not be available in 2022. As such, the petitioner and his party UDA were at fault in relying on outdated regulations of 2017.
51. The doctrine of legitimate expectation has been discussed in all superior courts which have addressed the guiding principles on the application of the principle of legitimate expectation. In the case of



Republic v Kenya Revenue Authority ex- parte Aberdare Freight Services Ltd & 2 others [2004] eKLR, Nyamu, J (as he then was) stated:

Legitimate expectation is founded upon a basic principle of fairness that legitimate expectations ought not be thwarted – that in judging a case a judge should achieve justice, weigh the relative “strengths of expectation” of the parties... This principle was considered in the English case of Council of Civil Service Unions v Minister for Civil Service (1995) AC 374 where Lord Diplock defined the principle as follows:

For a legitimate expectation to arise the decision:

“must affect the other person by depriving him of some benefit or advantage which either

- (i) he had in the past been permitted by the decision maker to enjoy and which can legitimately expect to be permitted to continue to do until there has been committed to him some rational grounds for withdrawing it on which he has been given an opportunity to comment or
- (ii) he has received assurance from the decision maker will not be withdrawn without giving him first an opportunity of advance reasons for contending that they should not be withdrawn”

52. Similarly, in the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR the Supreme Court stated:

(265) An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has *locus standi* to make a claim on the basis of legitimate expectation.

53. In the Republic v Kenya Revenue Authority (*supra*) the learned judge stated:

De Smith Woolf and Jowell Judicial Review of Administration Action 5th Edition has brought out the principle very well at pages 567 and 568. In these words

“The general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others. Judicial resort to estoppel in these circumstances may prejudice the interests of third parties”.

In the same authoritative book (*supra*) at page 566 the following principle is also brought out

“Purported authorization, waiver, acquiescence and delay do not preclude a public body from reasserting its legal rights or powers against another party if it has no power to sanction the conduct in question or to endow that party with the legal right or inventory that he claims”

54. For a legitimate expectation to arise the decision in question must affect a party by depriving him of same benefit or advantage that others have enjoyed. A legitimate expectation may arise where a party has been assured that a benefit or advantage by the decision maker will not be withdrawn without giving him first an opportunity to be heard.

55. In the instant case, although the petitioner claims that he had a legitimate expectation that the requirements for nomination to represent the youth in the 2022 general elections would be the same



as they were in 2013 and 2017, he has not placed any material before the court to demonstrate that the respondent had given him assurance that the regulations will remain the same. Further, the petitioner and UDA ought to have awaited the guidelines by the respondent to ensure compliance or in any event, UDA ought to have amended its requirements to be in conformity to those of the respondent.

56. Further, a legitimate expectation cannot override the law. Section 34(7) of the *Elections Act* provides:

The party lists submitted to the Commission shall be valid for the term of Parliament.

57. The law is clear that party lists must be valid for the term of Parliament. The previous requirements for party lists obviously did not take this into account. The fact that requirements for nomination for youth category in past elections did not have the new criterion does not preclude the respondent as a public body from reasserting the correct position in law. The respondent having recognised the previous errors was within its right to correct the same and issue the new criterion which is really an explanation as to who a qualifying youth is.

58. After becoming aware of the new eligibility criterion, the Petitioner ought to have checked the same against the law. Had he done so, he would have seen that his alleged legitimate expectation was not anchored in law and as stated, a legitimate expectation cannot override the law.

Whether the impugned disclaimer is an arbitrary, irrational, unreasonable and unjustifiable limitation on the petitioner's political rights

59. The petitioner contended that the new criterion in paragraph(f) is an arbitrary, irrational, unreasonable and unjustifiable limitation on the petitioner's political rights.

60. As indicated herein, the impugned criterion is anchored in law. The definition of youth in article 260 of the *Constitution* does not include a person who has attained the age of 35 years. Further, section 34(7) of the *Elections Act* requires that party lists submitted to the Commission for purposes of nomination for the special seats shall be valid for the term of Parliament. If the petitioner, who will attain the age of 35 years before the end of term, were to be included in UDA's party list for nomination to represent the youth in the county assembly, his nomination would not be valid for the term of Parliament. Put differently, his nomination would be illegal as it will violate both the Constitution and the law. Accordingly, the contention that the impugned criterion is an arbitrary, irrational, unreasonable and unjustifiable limitation on the petitioner's political rights does not hold water. Indeed, allowing the petitioner and other youth who will cease to be youths during the term will limit the rights of all the youth in Kenya to be represented in the national assembly, senate and the county assemblies as the case may be, by one of their own.

61. In the end I find and hold that the petition dated June 23, 2022 lacks merit and the same is hereby dismissed. There shall be no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF AUGUST 2022

.....

M. THANDE

JUDGE

In the presence of: -

.....for the petitioner

.....for the respondent



.....Court Assistant

