County Assembly Forum & 6 others v Attorney General & 2 others; Senate of the Republic of Kenya (Interested Party) (Constitutional Petition E229, E225, E226, E249 & 14 of 2021 (Consolidated)) [2021] KEHC 304 (KLR) (Constitutional and Human Rights) (15 October 2021) (Judgment)

County Assembly Forum & 6 others v Attorney General & 2 others; Senate of the Republic of Kenya(Interested Party) [2021] eKLR

Neutral citation: [2021] KEHC 304 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E229, E225, E226, E249 & 14 OF 2021 (CONSOLIDATED)

AC MRIMA, J

OCTOBER 15, 2021

PETITION NO. 14 OF 2021 (FORMERLY MACHAKOS HIGH COURT CONSTITUTIONAL PETITION NO. E008 OF 2021)

BETWEEN

COUNTY ASSEMBLY FORUM ..... 1ST PETITIONER

NDEGWA WAHOME JAMES ..... 2ND PETITIONER

NICHOLAS KIPRUTO KIMOSOP ..... 3RD PETITIONER

SHERIA MTAANI NA SHADRACK WAMBUI ..... 4TH PETITIONER

GLORIA ORWOBA ..... 5TH PETITIONER

DANIEL NDAMBUKI MUTUA ..... 6TH PETITIONER

AMIN EKIRAM ..... 7TH PETITIONER

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 2ND RESPONDENT

SPEAKER OF THE NATIONAL ASSEMBLY ..... 3RD RESPONDENT

AND

SENATE OF THE REPUBLIC OF KENYA ..... INTERESTED PARTY

Subjecting all the candidates for the positions of Member of County Assembly (MCA) to a minimum academic qualification of university degree prejudiced the rights and fundamental freedoms of those who were not able to directly acquire/afford university degrees.

Reported by Ribia John

Constitutional Law *– fundamental rights and freedoms – enforcement of the bill of rights - right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights had been denied, violated or infringed, or was threatened - whether the right to petition Parliament to consider any matter within its authority took away the right of a party to question the constitutionality of an Act of Parliament, or any action taken by the legislature – whether the power of Parliament to enact, amend or repeal any legislation was curtailed by the High Court's exercise in the exercise of its jurisdiction to question whether any law was inconsistent with or in contravention of the Constitution - Constitution of Kenya, 2010 articles 3, 22, 94, 95, 119(1), 165(3) and 258; Elections Act, Act no 24. Of 2011, section 22(1)(b)(ii).*

Constitutional Law *– fundamental rights and freedoms – political rights - limitation of political rights – the right to be a candidate for public office, or office within a political party where the citizen was a member and, if elected, to hold office - whether the required eligibility criteria that limited the persons that could vie for the post members of county assembly to degree holders was a limitation of the right to be a candidate for public office or office within a political party of which the citizen was a member and, if elected, to hold office of Kenyans without a university degree – whether such a limitation was justifiable – Constitution of Kenya, 2010, articles 24 and 38(3); Elections Act, No.24 of 2011, section 22(1)(b)(ii).*

Constitutional Law *– fundamental rights and freedoms – freedom against discrimination – rights of minorities and marginalized groups - whether subjecting all the candidates for the position of Member of County Assembly (MCA) to a minimum of university degrees prejudiced the rights and fundamental freedoms of those who were not able to directly acquire/afford university degrees – whether the section 22(1)(b)(ii) of the Elections Act failed to take into account the rights of the minority and marginalized groups – Constitution of Kenya, 2010, articles 27 and 56; Elections Act, No. 24 of 2011, section 22(1)(b)(ii).*

Statutes *– interpretation of statutes – interpretation of section 22(1)(b)(ii) of the Elections Act (requirement that a person had to possess a degree from a university recognized in Kenya to qualify to be a Member of a County Assembly) – constitutionality of the impugned provision - whether the section 22(1)(b)(ii) of the Elections Act disregarded any other qualification applicable in the election of an MCA other than the qualification for a university degree - whether the section 22(1)(b)(ii) of the Elections Act had the effect of subjecting all elective positions in Kenya to the same academic qualifications without due regard to the different attending responsibilities bestowed by the various elective offices - Elections Act, No. 24 of 2011, section 22(1)(b)(ii); National Qualification Act.*

Words and Phrases *– res judicata – definition of – a thing adjudicated - an issue that had been definitively settled by judicial decision - 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 - The Black's Law Dictionary, Thomson Reuters, 10th Edition.*

Brief facts

The instant petitions variously challenged the constitutionality of the requirement of a degree qualification for a person to be nominated as a candidate for election to the office of a Member of a County Assembly in Kenya as set out in section 22(1)(b)(ii) of the Elections Act (the impugned provision). The petitioners variously argued that the limitation imposed by the impugned provision failed the tests in article 24 of the Constitution of Kenya, 2010 (the Constitution) on the limitation of fundamental rights and freedoms since it was not

reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The petitioners also contended that the impugned provision was discriminatory.

The respondents and interested party challenged the petition on the basis of the doctrine of *res judicata* in respect to three decisions. They were *Johnson Muthama -vs- Minister for Justice and Constitutional Affairs & Another* (2012) eKLR, *John Harun Mwau -vs- Independent Electoral and Boundaries Commission & Another* (2013) eKLR and *Okiya Omtatah Okoiti & Another -vs- Attorney General & Another* (2020) eKLR. The respondents also contended that the court did not have the jurisdiction to determine the matter on accord to the doctrine of ripeness. In particular, the respondents contended that the petitioners had not exhausted the right to petition Parliament to consider any matter within its authority) and as such the matter was not ripe for the High Court to question the constitutionality of the impugned provision.

Issues

i. Whether the instant petition was *res judicata* having been based on the educational qualifications for election as a post of members of county assembly, with the same having been allegedly dealt with in *Johnson Muthama v Minister for Justice and Constitutional Affairs & another* [2012] eKLR.

ii. Whether article 119 of the Constitution (that granted every person the right to petition Parliament to consider any matter within its authority) took away the right of a party to question the constitutionality of an Act of Parliament, or any action taken by the legislature.

iii. Whether the power of Parliament to enact, amend or repeal any legislation was curtailed by the High Court's exercise in the exercise of its jurisdiction to question whether any law was inconsistent with or in contravention of the Constitution.

iv. Whether the required eligibility criteria that limited the persons that could vie for the post of members of county assembly to degree holders was a limitation of the right to be a candidate for public office or office within a political party of which the citizen was a member and, if elected, to hold office of Kenyans without a university degree. If yes, whether the limitation was justifiable.

v. Whether section 22(1)(b)(ii) of the Elections Act disregarded any other qualification applicable in the election of a Member of County Assembly (MCA) other than the qualification for a university degree.

vi. Whether subjecting all the candidates for the positions of MCA to a minimum of university degrees prejudiced the rights and fundamental freedoms of those who were not able to directly acquire/afford university degrees.

vii. Whether section 22(1)(b)(ii) of the Elections Act had the effect of subjecting all elective positions in Kenya to the same academic qualifications without due regard to the different attending responsibilities bestowed by the various elective offices.

viii. Whether section 22(1)(b)(ii) of the Elections Act failed to take into account the rights of the minority and marginalized groups.

ix. What principles were to be considered in the application of the doctrine of public participation?

Relevant provisions of the Law

Elections Act, Act No. 24 of 2011

Section 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.

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 decision of *Johnson Muthama -vs- Minister for Justice and Constitutional Affairs & Another* (2012) eKLR, could only be in support of the consolidated petitions. The contention that the consolidated Petitions were *res judicata* was dismissed. 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 & anothe*r [2012] eKLR did not deal with section 22(1)(b)(ii) of the Elections Act which was the subject of the instant 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 raised in the consolidated petitions related to the university degree qualifications for those intending to vie for the positions of Members of County Assembly. The issue arose in 2017 when Parliament passed legislation amending the prevailing law. By then, there was no university degree requirement for those seeking to vie for the position of Members of County Assembly. As such, the issue 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.
3. 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 -vs- Attorney General & Another case* (2020) eKLR. However, the court declined jurisdiction and the matter was not fully and finally determined. The consolidated petitions were therefore not *res judicata*.
4. 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 the court's intervention. Its operation was informed by the idea that there existed other fora with the capacity to resolve the dispute other than a court process.
5. The primary functions of the National Assembly were codified in articles 94 and 95 of the Constitution of Kenya, 2010 (Constitution). Article 119 did not 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. Article 119(1) served a useful purpose in allowing citizens to petition Parliament to consider matters of concern to them that were within the purview of Parliament, including the repeal or amendment of legislation.
6. Where there was 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 enjoined every person to respect, uphold and defend the Constitution. Similarly, article 258(1) donated the power to every person to institute court proceedings claiming that the Constitution had been contravened, or was threatened with contravention. If the 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. The argument that the petitioner should have approached Parliament under article 119(1) was without merit.
7. 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. As such, 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 affront to the doctrine of separation of powers. The two were distinct mandates under the Constitution.

8. A claim 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 was very different from Parliament's power to reconsider and possibly amend or repeal the impugned provision. There was no proposition that the decision of Parliament on the public petitions was binding on the court. The contention that the consolidated petitions were caught up by the doctrine of ripeness was dismissed.

9. 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. The entire Constitution had to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. That was the rule of harmony, the rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution

10. The post of a Member of County Assembly (MCA) was primarily informed by the concept of devolution. There was a need to decentralize power and government services by having a political representative of the people at the lowest cadre of the political spectrum. As a result, the Constitution created county governments under article 176. Being the lowest cadre of representation of the people, a County Assembly was created for each county. Article 177 of the Constitution created the smallest unit of political representation called the ward.

11. The impugned provision was a limitation to the political rights under article 38(3) of the Constitution. As a result, such a limitation had to pass the constitutional muster in article 24 of the Constitution.

12. The creation of the elective position of MCA served two main purposes. First, the position was constitutionally entrenched for the purpose of enhancing service delivery to the people. Second, the position was created in order to open up democracy through the enlargement of people's participation in governance. A permissible limitation had to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

13. 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 1.2 Million university graduates, 25% of them were in Nairobi County. The balance was shared between the rest of the 46 counties. The report gave the statistics at Ward levels. For instance, in Mau Forest sub-county which has 5 wards there were only 2 university graduates. It, hence, meant that some of the Wards would not have representatives, that was if the two graduates successfully offered themselves for the positions of MCAs. More appalling was the fact that there were no university graduates in the entire Mt. Elgon sub-county as well as Kakamega Forest sub-county.

    The Report was part of the evidence in the consolidated petitions. The impugned provision would have adverse effects on the representation of the people at the ward level. The impugned provision had the effect of rendering some wards without representation at the county assemblies.

14. The law recognized other modes of qualifications further to the convectional ones. It established the manner in which relevant qualifications could be awarded to a person. Such qualifications could, in appropriate instances, be equated to convectional degrees. There was a law which attained the same purpose as the impugned provision. 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 MCAs.

15. 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 MCAs to convectional degrees' holders, but widened the cage to a holder of any other relevant qualification. The National Qualifications Act recognised 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.

16. Although the petitioners did not state the average cost of obtaining a degree qualification in Kenya, there was no doubt that there was such a cost and that the cost was not within the reach of the majority of Kenyans. Most Kenyans were 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 MCA 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 university degrees.

17. The Covid-19 pandemic interfered with the university academic programmes such that there were those students who were graduates 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 stood unfairly discriminated against and yet the effects of the pandemic were way far beyond the world's control. There was no response to the contestation. The 6th petitioner was a student at the Kenyatta University School of Security, Diplomacy and Peace Studies. He hoped to graduate before 2022, but as a result of the effects of the pandemic, he would not have graduated by the year 2022. Such a class of university students would stand discriminated if the impugned provision stood.

18. The impugned provision had the effect of making all elective positions in Kenya attract similar academic qualifications. All those who aspired to vie for the position of the President, Deputy President, Governor, Member of Parliament and MCA in Kenya had to possess a minimum of a university degree academic qualification. The responsibilities bestowed upon the offices of the President, the Deputy President, Governor, Member of Parliament and MCA differed. The President, bore the greatest and overall responsibility as the Head of State and Government in Kenya whereas the MCA was a representative of the smallest representative unit in Kenya known as a Ward. Whereas on one hand there was only one President in Kenya, there were, on the other hand, over 2000 MCAs in the country.

19. The need for differentiated qualifications, whether academic or otherwise, became apparent. The dominant perception at the time of constitution-making was that 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, it could only be logical to have different academic qualifications, at least for the lowest cadre of the representatives of the people being the MCAs.

20. The court was not fronting the position that university educational qualifications or their equivalent were not necessary for those that sought the candidature of MCAs. The reality was that Kenya was a member of the international community and had so far taken several steps and programmes in attaining some of the globally agreed standards. Such included 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. A time was soon catching up with Kenya when the dictates of global demands and trends would make a university degree qualification or its equivalent an inevitable necessity in every elective position. However, at the moment, 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 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. As Parliament discharged its legislative responsibility it had to focus and had to also be on the ethical standards of those seeking public offices and not only on educational pursuits.

21. The impugned provisions did not augur well with several constitutional provisions. It did not pass the test of limitation in article 24 of the Constitution. The impugned provision was an affront to the Constitution. The impugned provision offended article 27 of the Constitution to the extent that it, unfairly and without justification, discriminated on the basis of educational qualifications. It also failed to treat every person equal before the law. Whereas the law recognised equivalent qualifications, the impugned provision out-rightly disregarded that and firmly settled for only convectional 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.
22. Article 38(3) of the Constitution was also infringed to the extent that the impugned provision placed unreasonable restrictions to the exercise of political rights. The impugned provision failed to take into account the dictates in article 56 of the Constitution regarding the rights of the minority and marginalised groups.
23. A commitment to a right to public participation in governmental decision-making was derived not only from the belief that we improve the accuracy of decisions when we allowed people to present their side of the story, but also from our sense that participation was necessary to preserve human dignity and self-respect.
24. The following principles were to be applied whenever the application of the doctrine of public participation came into issue:
    1. It was incumbent upon the government agency or public official involved to fashion a programme of public participation that accorded with the nature of the subject matter. It was the government agency or public official who was to craft the modalities of public participation but in so doing the government agency or public official had to take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoyed some considerable measure of discretion in fashioning those modalities.
    2. Public participation called for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. No single regime or programme of public participation could be prescribed and the courts would not use any litmus test to determine if public participation had been achieved or not. The only test the courts used was one of effectiveness. A variety of mechanisms could be used to achieve public participation.
    3. Whatever programme of public participation was fashioned, it had to include access to and dissemination of relevant information. Participation of the people necessarily required that the information be availed to the members of the public whenever public policy decisions were intended and the public were to be afforded a forum in which they could adequately ventilate them.
    4. Public participation did not dictate that everyone had to give their views on the issue at hand. To have such a standard would be to give virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, had to, 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 had to take into account the subsidiarity principle: those most affected by a policy, legislation or action had to have a bigger say in that policy, legislation or action and their views had to be more deliberately sought and taken into account.
    5. The right of public participation did not guarantee that each individual's views would be taken as controlling; the right was one to represent one's views – not a duty of the agency to accept

the view given as dispositive. However, there was 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 could not merely be going through the motions or engaging in democratic theatre so as to tick the constitutional box.

6. The right of public participation was not meant to usurp the technical or democratic role of the officeholders 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.

25. 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.

26. Parliament had to come up with 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 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, the National Assembly chose to ignore all that. There was no public participation towards the enactment of section 22(1)(b)(ii) of the Elections Act. The impugned provision fell short of the constitutional requirement under article 10(2)(a) of the Constitution.

Petition allowed.

Orders

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

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

iii. *An order was issued that section 22(1)(b)(ii) of the Elections Act was inoperational, of no legal effect and void ab initio. The requirement that a person had to possess a degree from a university recognized in Kenya to qualify to be a Member of a County Assembly was nullified.*

iv. *No order as to costs as the matter was public interest litigation.*

Citations

Cases

Kenya

1. *Center for Rights Education and Awareness & anothers v John Harun Mwau & 6 others* Civil Appeals 74 & 82 of 2012; [2012] eKLR (Consolidated) - (Explained)
2. *Communication Commission of Kenya & 5 others v Royal Media Services & 5 others* Petitions 14, 14A, 14B & 14C of 2014; [2014] eKLR (Consolidated) - (Explained)
3. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petitions 14, 14A, 14B & 14C of 2014; [2015] eKLR (Consolidated) - (Explained)
4. *Council of Governors & 3 others v Senate & 53 others* Petitions 381 & 430 of 2014; [2015] eKLR (Consolidated) - (Explained)
5. *Dida, Mohammed Abduba v Debate Media Limited & another* Civil Appeal 238 of 2017; [2018] eKLR - (Explained)
6. *In the Matter of the Interim Independent Electoral Commission* [2011] 2 KLR 32 - (Explained)
7. *In the Matter of the Kenya National Commission on Human Rights* Reference 1 of 2012; [2014] eKLR - (Explained)
8. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] 3 KLR 718 - (Explained)

9. *In the Matter of the Speaker of the Senate & another* [2013] 3 KLR 278 - (Explained)
10. *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* Civil Appeal 105 of 2017; [2017] eKLR - (Explained)
11. *Institute of Social Accountability & another v National Assembly & 4 others* Petition No 71 of 2014; [2015] eKLR - (Explained)
12. *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* Civil Appeal 42 of 2014; [2015] eKLR - (Explained)
13. *Karia and Another v Attorney General and Others* [2005] 1 EA 83 - (Applied)
14. *Kenya Commercial Bank Limited v Benjoh Amalgamated Limited* Civil Appeal 107, 137 & 174 of 2010; [2017] eKLR - (Explained)
15. *Koross, William (Legal personal Representative of Elijah CA Koross) v Hezekiah Kiptoo Komen & 4 others* Civil Appeal 223 of 2013; [2015] eKLR - (Explained)
16. *Law Society of Kenya v Attorney General & another* Constitutional Petition E327 of 2020; [2021] eKLR - (Explained)
17. *Mate, Justus Kariuki & another v Martin Nyaga Wambora & another* Petition No 32 of 2014; [2017] eKLR - (Explained)
18. *Mbugua, Simon & another v Central Bank of Kenya & 2 others* Petitions 210 & 214 of 2019; [2019] eKLR (Consolidated) - (Explained)
19. *Mburu Kinyua v Gachini Tutu* [1978] KLR 69 - (Mentioned)
20. *Momanyi v Attorney General & another* [2012] 1 KLR 661 - (Mentioned)
21. *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* Constitutional Petitions 305 of 2012; 34 of 2013 & 12 of 2014; [2015] eKLR (Consolidated)
22. *Murang'a Bar Operators and another v Minister of State for Provincial Administration and Internal Security and others* Petition No 3 of 2011; [2011] eKLR - (Mentioned)
23. *Muthama v Minister for Justice and Constitutional Affairs & another* [2012] 1 KLR 832 - (Explained)
24. *Mwau v Independent Electoral and Boundaries Commission & another* [2013] 3 KLR 402 - (Explained)
25. *Mwau, John Harun v Independent Electoral and Boundaries Commission & another* Civil Appeal 112 of 2014; [2019] eKLR - (Explained)
26. *National Assembly of Kenya & another v Institute for Social Accountability & 6 others* Civil Appeal 92 of 2015; [2017] eKLR - (Explained)
27. *Ngugi, Kiriro Wa & 19 others v Attorney General & 2 others* Petition 254 of 2019; [2020] eKLR - (Explained)
28. *Okiya Omtatah Okoiti & Another v. Attorney General & 6 Others* Petition No 593 of 2013; [2014] eKLR - (Explained)
29. *Okoiti & another v Public Service Commission & 73 others; Law Society of Kenya & another (Interested Party)* Petitions 33 & 42 of 2018; [2021] KEHC 464 (KLR) (Consolidated) - (Explained)
30. *Okoiti, Okiya Omtatah v Attorney General & another* Civil Appeals 13 & 10 of 2015; [2020] eKLR (Consolidated) - (Explained)
31. *Omondi & another v National Bank of Kenya Ltd & others* [2001] KLR 579; [2001] 1 EA 177 - (Applied)
32. *Republic v Attorney General & Another ex parte Francis Chachu Ganya* JR Misc App No 374 of 2012) - (Explained)
33. *Wanjiru, Gikonyo & 2 others vs National Assembly of Kenya & 4 others* Petition 453 of 2015; [2016] eKLR - (Explained)

Uganda

Tinyefuza v Attorney General of Uganda [1997] UGCC 3 - (Mentioned)

South Africa

1. *Doctors for Life International v Speaker of the National Assembly and Others* (CCT 12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) - (Explained)
2. *Hoffman v South African Airways* (CCT17/00) [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1211 ; [2000] 12 BLLR 1365 (CC) - (Explained)
3. *Matatiele Municipality and Others v President of the Republic of South Africa and Others (2)* (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47; 2006 (5) SA 47 (CC) - (Explained)
4. *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 - (Explained)
5. *S v Zuma* (CCT5/94) [1995] ZACC 1; 1995 (2) SA 642; 1995 (4) BCLR 401 (SA); 1995 (1) SACR 568 - (Explained)
6. *State v Acheson* 1991 (2) SA 805 - (Explained)

United Kingdom

1. *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 - (Explained)
2. *Henderson v Henderson* (1843) 67 ER 313; (1843) 3 Hare 100 - (Mentioned)
3. *Thomas v Attorney-General of Trinidad and Tobago* [1982] AC 113; (1981) 32 WIR 375; [1981] 3 WLR 601 - (Applied)

India

Daryao & Others v State of UP & Others (1961) 1 SCR 574 - (Applied)

United States

United States v Butler 297 US 1 (1936) - (Mentioned)

Canada

1. *British Columbia (Workers' Compensation Board) v Figliola* [2011] 3 SCR 422 - (Mentioned)
2. *Caron v R* 20 QAC 45 [1988] RJQ 2333 - (Explained)
3. *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 - (Explained)
4. *R v Oakes* [1986] 1 SCR 103 - (Explained)

Texts

1. Garner, BA., Black, HC., (Ed) (2014), *Black's Law Dictionary* St Paul, Minnesota: Thomson Reuters 10th Edn
2. Garner, BA., Black, HC., (Eds) (2004), *Black's Law Dictionary* St Paul Minessota: Thomson Reuters 8th Edn p 484

Statutes

Kenya

1. Civil Procedure Act (cap 21) section 7- (Interpreted)
2. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya, 2010 Sub Leg) rule 3(8)- (Interpreted)
3. Constitution of Kenya, 2010 articles 1(1)(2)(3)(4); 10(2); 20(4); 22; 24; 27(1); 28; 31; 32; 36; 37; 38(3)(c); 41; 43; 49; 55; 81; 82(1)(b); 83; 88(1); 93(1); 94; 95; 96; 99; 100; 106; 119; 137; 148; 156; 165(3)(d); 177; 180; 193; 258; 259(1)- (Interpreted)
4. County Governments Act, 2012 (Act No 17 of 2012) section 8(1)(b)- (Interpreted)
5. Election Laws (Amendment) Act, 2017 (Act No 1 of 2017) In general- (Cited)
6. Elections Act, 2011 (Act No 24 of 2011) sections 3(1); 22(1)(b)(ii); 22(1A); 22(1B); 24(1)(b); 26(1)- (Interpreted)
7. Evidence Act (cap 80) part 4- (Interpreted)
8. Kenya National Qualifications Framework Act, 2014 (Act No 22 of 2014) In general- (Cited)
9. Petitions to Parliament (Procedure) Act, 2012 (Act No 22 of 2012) section 5- (Interpreted)
10. Political Parties Act, 2011 (Act No 11 of 2011) section 10- (Interpreted)
11. Societies Act (cap 108) In general- (Cited)

12. Statute Law (Miscellaneous Amendments) Act, 2012 (Act No 12 of 2012) In general- (Cited)

Instruments

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

Advocates

Prof. Tom Ojienda, SC, Mr. Njenga and Mr. Awuor, for for the 1st, 2nd & 3rd Petitioners
Mr. Dunstan Omari, Mr. Mwendwa, and Mr. Abel Asuma for for the 4th Petitioner
Mr. Kariuki Karanja for for the 5th Petitioner
Mr. Muli for for the 6th Petitioner
Mr. Wambugu for for the 7th Petitioner
Miss. Omuom instructed by the Honourable Attorney General for for the 1st Respondent
Mr. Malonza for for the 2nd Respondent
Miss. Thanji holding brief for Mr. Mbarak for for the 3rd Respondent
Miss. Thanji for for the Interested Party

JUDGMENT

Introduction:

1. Five Petitions are the subject of this judgment. They are Petition No E229 of 2021 instituted by County Assembly Forum, Petition No E226 of 2021 instituted by Gloria Orwoba, Petition No E225 of 2021 instituted by Sheria Mtaani na Shadrack Wambui, Petition No. 14 of 2021(formerly Machakos High Court Constitutional Petition No. E008 of 2021) instituted by Daniel Ndambuki Mutua and Petition No E249 of 2021 commenced by Amin Ekiram. I, will, hereinafter collectively refer to the Petitions as 'the consolidated Petitions'.

2. By an Order of this Court made on July 14, 2021, the said Petitions were consolidated and Petition No E229 of 2021 became the lead Petition. The rest of the Petitioners respectively appeared as in the title herein.

3. The 1st petitioner, County Assembly Forum, is a society registered under the *Societies Act*. Its principal objective is to coordinate the 47 Counties of Kenya, institutionalize law making, exercise oversight capacity and form linkages with other arms of Government.

4. The 2nd petitioner, Hon. Ndegwa Wahome James, is the Speaker of the County Assembly of Nyandarua. He is also the Chairman of the 1st Petitioner.

5. The 3rd petitioner, Hon. Nicholas Kipruto Kimosop, is the Member of County Assembly for Mochingoi Ward within Baringo County. He is also an Executive Committee Member of the 1st Petitioner.

6. The 4th petitioner, Sheria Mtaani Na Shadrack Wambui, is a non-governmental organization based in Mathare whose purpose is the protection of the marginalized and the less privileged members of society. It also protects constitutionalism and advocates for the rule of law.

7. The 5th petitioner, Gloria Orwoba, describes herself as a Youth Analyst with experience in Global Strategy, Policy and Business Operation within the corporate and Non-Governmental Organization sector.

8. The 6th petitioner, Daniel Ndambuki Mutua, is a Kenya citizen residing within Machakos County. He has the political ambition of vying for an elective seat in the future.

9. The 7th petitioner, Amin Ekiram, is a Student leader in Kenyatta University where she is undertaking studies leading to the award of a Bachelor's Degree in Economics and Finance.

10. The 1st respondent is the Attorney General of the Republic of Kenya. 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.

11. The 2nd 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.

12. The 3rd respondent is the Speaker of the National Assembly, a constitutional office created under Article 106 of the. Its mandate is to preside over any sitting of the Senate.

13. The 1st interested party, the Senate of the Republic of Kenya, is created under article 93 of the *Constitution*. Its mandate is to represent and protect the interests of the counties and their Governments.

14. The petitionsvariously challenge the constitutionality of the requirement of a degree qualification for a person to be nominated as a candidate for election to the office of a Member of a County Assembly in Kenya.

15. The petitionsare opposed by the respondentsand the Interested Party.

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

The 1st, 2nd & 3rd Petitioners' Case:

17. The 1st, 2nd & 3rd petitioners' Petition is dated 22nd June, 2021. It is supported by two affidavits. Both are sworn on 22nd June, 2021 by Hon. Ndegwa Wahome James and by Hon. Nicholas Kipruto Kimosop respectively.

18. Contemporaneously filed with the main Petition was the 1st, 2nd and 3rd petitioners' notice of motion application (hereinafter referred to as 'the application') filed under certificate of urgency. The application was supported by the twin affidavits of Hon. Ndegwa Wahome James and Hon. Nicholas Kipruto Kimosop sworn on 22nd June, 2021 in support of the Petition as well.

19. The application sought interim orders of stay of the implementation of section 22(1)(b)(ii) of the *Elections Act*, No 24 of 2011 pending the hearing and determination of the application and the main Petition.

20. At the core of the 1st, 2nd & 3rd petitioners' case is the introduction of section 22(1)(b)(ii) in the *Elections Act* that made it a requirement that, in order to be nominated as a candidate for election as a Member of County Assembly, a person must hold a degree from a recognized University.

21. The amendment was introduced to the *Elections Act* through *Election Laws (Amendment) Act* No. 1 of 2017, passed and assented to on January 9, 2017, published on January 16, 2021 and became operational on 30th January 2017.

22. The said petitioners, in reference to section22(1A) of the *Elections Act* contended that the operation of the degree requirement was suspended and would apply for candidates in the general elections to be held after the 2017 general elections.

23. It is the petitioners' case that out of the two thousand two hundred and fifty (2250) Members of County Assembly presently serving, only 30% are University degree holders and as such, the introduction of section22(1)(b)(ii), would lock out 70% for re-election for ineligibility.

24. To demonstrate the effect, Petitioners pointed out that the 3rd petitioner who is two-term member of the Baringo County Assembly would be excluded from nomination and registration as a candidate for the same position in the year 2022 due to introduction of 22(1)(b)(ii) to the *Elections Act*.

25. While impugning the amendment, the 1st petitioner posited that Kenya's unique socio-economic factors considered amongst other demographics makes it unfair and untenable that the additional requirement of a university degree is imposed on potential candidates and the wider public.

26. To lay emphasis on the unfairness in the amendment, the Petitioners made reference to 2019 National Census Report which indicated that only 3.5% of Kenyans hold university degrees and as such implementation of the amendment would be the preserve of elite cabal citizens locking out persons who did not get access to education.

27. The petitionersstated that procuring university degree is an expensive venture that is out of reach to majority of Kenyans and the amendment would handicap over 40 million of Kenyans from qualifying for leadership as Members of County Assemblies.

28. Reference was further made to the 2017-2018 Commission for University Education Report which indicated that out of a population of over 50 million, only 454,826 persons enrolled for university education. It was stated that both public and private University education was inaccessible and unavailable to vast majority of Kenyans and Section 22(1)(ii)(b) would limit the peoples' rights to exercise their sovereignty through their democratically elected leaders.

29. The petitionerstated that no scientific evidence demonstrated that university degree holders made better Members of County Assemblies.

30. It was further argued that whereas a person can become eligible to vie for the position of a Member of a County Assembly upon attaining the age of 18 years, the education system in Kenya was such that one could obtain a university degree earliest at the age of 21 years.

31. The petitionersfurther stated that the COVID-19 pandemic had resulted in massive disruption of academic calendar to the extent that people who would have graduated in the year 2022 and thereby become eligible for elections will not have qualified as such.

32. It was the 1st, 2nd & 3rd petitioners' case that the deficit in effective leadership in Kenya was attributable to lack of moral and ethical probity among leaders as opposed to academic qualification.

33. On the foregoing basis, the petitionersaverred that the tenor of section22(1)(b)(ii) of the *Elections Act* considered against the Constitution were legally untenable and patently invalid to the extent that it limits and compromises the people's rights to exercise their sovereignty through their democratically elected representatives to persons holding university degree in violation of article 1(1), (2), (3) and (4) of the Constitution.

34. It was averred that the offending amendment was enacted against the subsisting declaration in Nairobi High Court Constitutional Petition No. 198 of 2011, Hon. *Johnson Muthama -vs- Minister for Justice and Constitutional Affairs & Another* (2012) eKLR that excluding a person from running an elective seat on account of not having post-secondary education was discriminatory and in violation of article 10(2)(a) of the Constitution.

35. The 1st, 2nd & 3rd petitioners stated that the amendment was against the spirit and letter of International Convention on Civil and Political Rights to which Kenya is signatory which prohibits undue restrictions against the exercise of political rights.

36. It was stated that to the extent that section22(1)(b)(ii) of the *Elections Act* only allows degree holders to participate in elections for Members of County Assembly, the same was discriminatory and against the right to contest and be elected to the office of Member of County assembly in violation of article 27(1), (2), (3), (4) and 38(3)(c) of the Constitution respectively.

37. The 1st, 2nd & 3rd petitioners posited that there was no objective and rational connection between section 22(1)(b)(ii) and the constitutional and statutory roles of Members of a County Assembly.

38. The petitionersfurther stated that there was no rationale or corresponding facilitation in terms of resources that would enable persons desirous of contesting general elections for the year 2022 to access education.

39. It was also the petitioners' case that section22(1)(b)(ii) of the *Elections Act* was enacted without sufficient and substantial public participation and as such are unconstitutional.

40. Based on the foregoing averments, the 1st, 2nd & 3rd petitioners prayed for the following reliefs;

    i. That this honourable courtbe pleased to declare that sections 22(1)(b)(ii) and 1(A) of *Elections Act* 2011 are unconstitutional to the extent that they provide that a person cannot be nominated, registered as a candidate or elected to hold the office of a member of a county assembly in the Republic of Kenya in the General elections after 2017, if he/she is not a holder of a university degree and which construes a violation of Article 27 of the Constitution.

    ii. That this honourable courtbe pleased to declare that sections22(1)(b)(ii) and 1(A) of *Elections Act* 2011 are unconstitutional to the extent that they impose unreasonable restriction to candidates desirous of contesting for the office of member of a county assembly, contrary to express provisions of article 38(3)(c) of the Constitution of Kenya.

    iii. That this honourable courtbe pleased to grant such other orders and directions that it deems fit in the circumstances.

    iv. That costs be provided for.

41. The petitionersmade extensive submissions and referred to several decisions locally and from afar.

The 4th Petitioner's Case:

42. The 4th petitioner, Sheria Mtaani Na Shadrack Wambui, lodged its Petition dated 18th June 2021. It was supported by the affidavit of Omayio Wycliffe Mogaka deponed to on even date.

43. Simultaneously lodged with the main Petition was the Notice of Motion application dated 18th June 2021, filed under Certificate of Urgency and supported by the Affidavit of Omayio Wycliffe Mogaka sworn to even date.

44. The application sought interim conservatory orders to temporarily suspend the operation and implementation of Section 22(1) of the *Elections Act* pending hearing of the application and the main Petition.

45. In the main, the 4th petitioner was aggrieved by the requirement introduced by section 22(1) of the *Elections Act* to the effect that for one to qualify to vie for the position of Member of County Assembly, one had to have a university degree qualification.

46. The 4th petitioner averred that the requirement was unreasonable and untenable on the grounds that the Government had failed to make post-primary education easily accessible through imposition of school fees.

47. It was its case that the overall effect of implementation of section22(1) has the effect of undermining the sovereignty of the people of Kenya and the right to vote for their candidates of choice during nominations leading up to 2022 general elections contrary to article1, 2 and 38 of the Constitution.

48. The 4th petitioner contended that section 22(1) of the *Elections Act* is discriminatory and in violation of article 27 of the Constitution, unfair and unequal for limiting the rights guaranteed under article 38(3) of the Constitution.

49. It averred that the additional qualification was motivated by irrational considerations, unreasonable and hostile under the current constitutional dispensation because secondary and university education are not easily and freely available to Kenyans. It asserted that university degree qualification would make leadership a preserve for the wealthy.

50. It was its case further that the introduction of the requirement was based on the flawed assumption that persons in possession of degree would make better leaders, a fact that does not pass the threshold under article24 of the Constitution.

51. The 4th petitioner posited that in the event an elected leader fails in their leadership, the Constitution has clauses for recall of such leaders and to choose persons of their liking regardless of their academic qualifications.

52. It was further urged that academic progression of many Kenyans who had hoped to have graduated by the year 2022 had been hampered and frustrated by the COVID -19 pandemic, a factor that was not contemplated by the legislature at the time of enactment of the impugned amendment.

53. On the foregoing arguments the 4th petitioner prayed for the following orders;

    i. A declaration does hereby issue that the section 22(1) of the *Elections Act* No. 24 of 2011 Laws of Kenya is a threat to the Constitution as it contravenes the limitation parameter/test set under article 24 of the Constitution to the extent that the overboard and indiscriminate limitation is not specifically captured under the impugned section of law and further as it is unreasonable, unjust and unfair in our open and democratic society.

    ii. A declaration does hereby issue that the degree requirement for all election aspirants o the 2022 general elections is unconstitutional for failing the reasonable test under article 24 of the *Constitution* to the extent that post primary school education in Kenya is not free fro all and or accessible to all.

    iii. A declaration does hereby issue that section 22(1) of the *Elections Act* No. 24 of 2011 Laws of Kenya contravenes and therefore is unconstitutional for violating section 1, 2 and 38 of the *Constitution* to the extent that it unreasonably withdraws the sovereign power of the people to choose for themselves their desired leaders irrespective of their academic qualifications, to wit, the elections of the member of County Assembly and further for the reasons that it irrationally frustrates the free realization of free for all elections under article 38(3)(c).

iv. A declaration does hereby issue that section 22(1) of the *Elections Act* No. 24 of 2011 is unconstitutional for contravening Article 27 of the constitution as it discriminates aspirants with degree certificates and gives them an advantage over aspirants without degree certificates in election of Member of County Assembly.

v. A judicial review order of Prohibition does hereby issue permanently prohibiting the 3rd Respondent from unreasonably restricting aspirants from election of position of Member of County Assembly who lack degree certificates from participating in nomination and or the general elections constitutionally set of the second Tuesday of August 2022.

vi. Costs of this Petition.

vii. Any other relief that this Court may be pleased to issue.

The 5th Petitioner's Case:

54. The 5th petitioner, Gloria Orwoba, instituted her Petition under certificate of urgency but did not accompany it with an application. The Petition is dated 18th June, 2021 and is supported by the Affidavit of Gloria Orwoba sworn on even date.

55. The 5th petitioner took issue with section 22 of the *Elections Act* on the basis that its implementation would lock out many otherwise eligible Kenyans including the Youth, women, the elderly, persons living with disabilities and the marginalized communities for not possessing a degree from a recognized university in violation of article 24, 99, 180 and 193 of the Constitution.

56. She averred that, legislators, through section22 failed to recognize any other form of training and or competence other than degree qualification and have perpetuated discrimination against many Kenyans who may qualify as good leaders by failing to equate various academic qualifications.

57. In reference to the Kenya National Qualification Framework of 2014 that define levels of education, competencies, skills, knowledge, attitude and values, the 5th Petitioner averred that there was evidence showing that there are alternative means of acquiring education equivalent to conventional degrees.

58. The 5th respondent further stated that the introduction of Competency Based Curriculum was for the purpose of confirming that skills trainings and other knowledge is applicable in real life situations which included leadership and as such, the introduction of conventional degree as the only qualification was discriminatory against a constituency of Kenyans already recognized by the *Kenya National Qualification Framework Act*.

59. The 5th respondent made reference to the 2019 Population Census which indicated that less than 2% of Kenyans had attained education to university level and as such implementation of the amendment would lock out 98% of Kenya population from vying in both the National Assembly and County positions.

60. Reliance was also placed on statistics provided by Kenya Universities and Colleges Central Placement Service (KUCCPS) that indicated that only 16.4% percent of the candidates had the privilege of getting admission to university thereby locking out 83.6% from leadership.

61. The 5th petitioner averred that it was not reasonable to lock out Kenyans specifically the youth and the marginalized persons from vying and the amendment was in violation of article 55 of the Constitution which obligates states to stake affirmative action to ensure youths have opportunities to be represented and participate in political social. Economic and other spheres of life.

62. Based on the foregoing grievances, the 5th respondent prayed for the following: -

i. A declaration that Section 22 of the *Elections Act* is unconstitutional, illegal for violation of articles 27, 38, 99, 100, 137, 180 and 193 of the Constitution.

ii. A declaration that section 22 of the *Elections Act* violates, infringes and threatens fundamental freedoms in the bill of rights specifically article 38 of the Constitution.

iii. A declaration that section 22 of the *Elections Act* specifically section 22 in requiring for a qualification for a degree at the contestants in all levels of elective posts are not justified in an open democratic society based on human dignity, equality and freedom, have no rational connection with the objective and extent of the limitation, are unconstitutional illegal and a nullity.

iv. A declaration that the provisions of section 22 of the *Elections Act* are inconsistent with constitution of Kenya and therefore null and void to the extent of the inconsistency.

v. Any other just and expedient order that the Court may deem fit to make.

vi. Costs of this Petition.

The 6th Petitioner's Case:

63. The 6th petitioner's Petition is dated 30th April 2021. It was filed by Daniel Ndambuki Mutua. The Petition is supported by an affidavit deponed to by the said Daniel Ndambuki Mutua on even date.

64. It is his case that the introduction of university degree qualification by Section 22 of the *Elections Act* has curtailed his political ambition to vie for an elective post in the general elections of the year 2022, despite having held different leadership positions during his service in The Kenya Prisons Service.

65. He averred that he is currently a student at Kenyatta University School of Security, Diplomacy & Peace Studies but due to COVID -19 pandemic, he will not have graduated by the year 2022.

66. The 6th respondent contended that section 22(1)(b), 22(1A), 24(1)(b) and 26(1) of the *Elections Act* is discriminatory, promotes inequity and inequality and is inconsistent with the Constitution and as such should be declared unconstitutional.

67. He further posited that the Election Act violate the sovereign will of the people contained in article1 as they tend to limit the peoples' exercise of such power through democratically elected representatives, thereby curtailing their right to choose their leaders.

68. The 6th petitioner is further aggrieved that the degree certificate qualification violates Article 10 of the Constitution on national values and principles of governance.

69. It further averred that sections 22(1)(b) and 24(1)(b) were declared unconstitutional by the Court in Constitutional Petition No 198 f 2011, *Johnson Muthama -vs- Minster for Justice and Constitutional Affairs & Others.*

70. The amendment was further impugned on the ground that it was not subjected to adequate public participation, a requirement under article 10(2)(a) of the *Constitution*.

71. The 6th petitioner prayed for the following Orders: -

i. A declaration that the *Elections Act, 2011* read as a whole but more particularly sections 3(1), 22(1)(b), 22(1A), 22(1B), 24(1)(b) and 26(1) are inconsistent and in conflict with

Constitution more particularly the preamble to the Constitution, articles 1,2, 10, 19, 20,21, 22, 23, 24, 27 28, 32, 36, 37, 38, 81,82, 83, 94, 95, 96 and 99 of the *Constitution* and thus null and void.

ii. A declaration that the *Elections Act, 2011* read as a whole is inconsistent and in conflict with Constitution more particularly the preamble to the constitution, articles 1,2, 10, 19, 20,21, 22, 23, 24, 27 28, 32, 36, 37, 38, 81,82, 83, 94, 95, 96 and 99 of the *Constitution* and thus null and void.

iii. A declaration that the *Elections Act, 2011* read as a whole but more particularly sections 3(1), 22(1)(b), 22(1A), 22(1B), 24(1)(b) and 26(1) denies, contravenes, violates, infringes and threatens the petitioner's constitutionally protected rights to equality and freedom from discrimination, the Political rights as enshrined under Article 27 and 38 respectively of the Constitution of the Republic of Kenya.

iv. A declaration that the *Elections Act, 2011* read as a whole but more particularly sections 3(1), 22(1)(b), 22(1A), 22(1B), 24(1)(b) and 26(1) are inconsistent with article 1,2,7,8, 21 and 29 of the *Universal Declarations of Human Rights*,1948 articles 3(a), (b), (c) and 26 of *International Covenant on Civil and Political Rights, 1966*, The African Charter on Human and People's rights.

v. A declaration that the *Elections Act, 2011* read as a whole but more particularly sections 3(1), 22(1)(b), 22(1A), 22(1B), 24(1)(b) offends, violate and derogate from international law, principles of international law and emerging constitutional international law.

vi. A declaration that the *Elections Act, 2011* read as a whole but more particularly sections 3(1), 22(1)(b), 22(1A), 22(1B), 24(1)(b) are in breach of the doctrines of legitimate expectation, reasonableness, rationality, proportionality and principles of democracy.

vii. Costs of this Petition.

viii. Any other further orders, declarations, writs and directions that this Honourable Court shall deem fit in the circumstances to the issue.

The 7th Petitioner's Case:

72. The 7th Petitioner's Petition is dated 29th June, 2021. It is commenced by Amin Ekiram. The Petition is supported by the Affidavit of Amin Ekiram sworn to on even date.

73. Based on the provisions of article99(1), 193(1), 137 and 148 of the Constitution, the 7th Petitioner averred that a person is qualified to run for office as a Member of Parliament, Member of County Assembly, Presidential candidate and as Deputy President respectively if they satisfy any educational, moral and ethical requirement prescribed by the Constitution or by an Act of Parliament.

74. The 7th petitioner is aggrieved by the amendment brought about by *Election Laws (Amendment) Act 2017*, which amended section 22(1)(b) of the Act by deleting paragraph (b) and substituting it with paragraph 22(1)(b)(i) and (ii) which made it a requirement that a person must have a degree from a recognized university in order to vie for the position of Member of County Assembly.

75. The Petitioner averred that the application of the foregoing amendment in the 2022 general elections and future elections would deny, violate, infringe and threaten and unjustifiably limit the rights and fundamental freedoms of Kenyans guaranteed under Article 38(3) of the Constitution.

76. In expounding on the nature of violation of article38(3)(c), the 7th petitioner posited that the amendment is oppressive, imposes unreasonable restrictions and is discriminatory on political candidature, a derogation of article 27 of the Constitution that entitles everyone to equality before the law, equal protection and benefit of the law.

77. In reference to the 2019 population census, the 7th petitioner stated that only 2.733% of the entire Kenya's population of had attained the qualification of university degree and as such, section 22 of the *Elections Act* limited the political rights of more than 97% of Kenyans without just cause in violation of article 24 of the Constitution.

78. The 7th petitioner was further aggrieved that the blanket application of section 22 of the Election Act was in violation of article 55(a) & (b) of the Constitution which obligates the State to take measures including affirmative action to ensure youth, women and he marginalized have opportunities to associate, be represented and participate in political, governance, social, economic and other sphere of life.

79. Based on the foregoing alleged constitutional violations, the 7th Petitioner prayed for: -

    a. A declaration that section 22 of the *Elections Act* (No. 24 of 2011) limits the political rights of Kenyans which are provided for in the Bill of Rights at article 38(2) (a) and Article 38(3)(c).

    b. A declaration that section 22 of the *Elections Act* (No. 24 of 2011) is discriminatory on women and marginalized groups contrary to article 27(1) and (2), 55(b) and 56(a) of the Constitution of Kenya 2010.

    c. A declaration that section 22 of the *Elections Act* (No. 24 of 2011) in so far as it disqualifies persons without a degree certificate from a university recognized in Kenya form contesting for elections as, president, deputy president, county governor, deputy County Governor, member of parliament and a member of a County Assembly is unconstitutional.

    d. A declaration that section 22 of the *Elections Act* (No 24 of 2011) in so far as it disqualifies persons without a degree certificate from a university recognized in Kenya for nomination by a political party to the party lists specified under article 97(1)(c) and 98(1)(b)(c) and (d) and article 177(b) and (c) of the Constitution is unconstitutional.

    e. Costs of the Petition; and

    f. Any other relief this honourable courtmay deem fit and just to grant the Petitioner.

The 1st Respondent's Case:

80. The 1st respondent filed Grounds of Opposition to the consolidated Petitions. Mr Mbarak, Counsel held brief for Miss Omuom Counsel instructed to appear for the 1st Respondent.

81. Although the 1st respondent did not file any written submissions, Mr Mbarak argued the 1st and 2nd respondents' cases together. I will, therefore, deal with the substantive submissions under the 3rd respondent's case.

The 2nd Respondent's Case:

82. The 2nd respondent, Independent Electoral and Boundaries Commission, opposed the consolidated Petitions through the Replying Affidavit of Michael Goa, the Director Legal Affairs. It was deponed to on 29th July, 2021.

83. The 2nd respondent deposed that the *Elections Act*, 2011 was enacted pursuant to articles 99(1)(b) and 193(1)(b) of the Constitution that sets the eligibility criteria of Members of Parliament and Members of County Assembly.

84. In giving a chronology of litigation revolving around Section 22(1)(b) of the *Elections Act*, Mr. Goa deposed that the requirement that persons may be nominated as candidates for an election if they hold a post-secondary school qualification was challenged and declared unconstitutional in the case of *Johnson Muthama -vs- Minister for Justice and Constitutional Affairs & Another* (2012) eKLR.

85. Following the foregoing decision, he deposed that Parliament amended section22(1)(b) vide *Statute Law Miscellaneous Amendments) Act, 2012* which made the requirement that any person seeking nomination for any elective post to hold a certificate, diploma or other post-secondary school qualification acquired after a period of at least three months' study, recognized by the relevant Ministry and in such manner as may be prescribed by the Commission under this Act.

86. He deposed further that the changes introduced by section 22(1)(b) were once again challenged in the case of *John Harun Mwau -vs- Independent Electoral and Boundaries Commission & Another* (2013) eKLR where Lenaola J. as he then was found that "...post-secondary education as was enshrined under the said section 22(1)(b) of the *Elections Act* is attainable, sufficient and constitutional. To hold otherwise would be absurd after 50 years of independence.

87. It is his case further that on appeal to the Court of Appeal in *John Harun Mwau -vs- Independent Electoral and Boundaries Commission & Another* (2019) eKLR, the appellate Court found that "...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.

88. He deposed further that on 30th January, 2017, Section 22 of the *Elections Act* was 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. He stated that the said changes did not apply for persons seeking nomination for election as President, Deputy President, County Governor and Deputy County Governor who were required to hold a degree.

89. He deposed that the qualifications under section 22(1)(b) affecting Members of Parliament and Members of County Assembly and under section 22 in respect of the President, Deputy President, Governor and Deputy Governor were challenged for their unconstitutionality in the High Court in *Okiya Omtatah Okoiti & Another -vs- Attorney General & Another* (2020) eKLR.

90. In the foregoing case, the Petitioners sought to fault the decision in *John Harun Mwau -vs- Independent Electoral and Boundaries Commission & Another* (*supra*) and the one in *Johnson Muthama -vs- Minister for Justice and Constitutional Affairs & Another* (*supra*) for having been made per incuriam.

91. Mr. Goa deposed that in determining the dispute, Korir J. disagreed with the petitionersand stated that "...the issue of educational qualifications in regard to the candidates for elective political offices has been put to rest by Courts of coordinate jurisdiction. This matter has also been settled by the Court of Appeal. The issue cannot be reopened again before this Court.

92. Based on the foregoing sequence of events and decisions, the 2nd respondent deposed that this Court lacks jurisdiction to hear and determine the issues raised in Petitions E225 of 2021, E229 of 2021 and E249 of 2021 for having been already determined by the High Court and the Court of Appeal and by operation of the doctrine of stare decisis.

93. It was the 2nd respondent's case that even if the consolidated Petitions were to be heard on merit, they could not stand since the impugned limitation introduced by section 22 of the *Elections Act* on access to elected office under article 38(3)(c) were lawfully enacted pursuant to legislative powers of Parliament.

94. It was deposed that it was not correct that Members of County Assembly perform unique roles thereby deserving differentiated qualifications. That by virtue of article185 of the Constitution and section8(1)(b) of the *County Government Act, 2012*, Members of County Assembly perform legislative function just like Members of Parliament.

95. The 2nd respondent deposed that removing the educational qualifications from all elective and nominated positions would run contrary to articles 99(1)(b) and 193(1)(b) of the Constitution that obligates Parliament to legislate on such qualifications.

96. In respect of the applications for the grant of conservatory orders, the 2nd respondent stated that the petitioners had not established the requirements necessary to warrant the grant of such orders.

97. The 2nd respondent prayed that the applications and the Petitions be dismissed with costs.

The 3rd Respondent's Case:

98. The 3rd respondent, Speaker of the National Assembly, opposed the consolidated Petitions and applications for conservatory orders through grounds of opposition dated 4th August 2021, the replying affidavit and supplementary replying affidavit of Michael Sialai sworn on 2nd September 2021 and 21st September 2021 respectively.

99. In the grounds of opposition, the 3rd respondent stated that before the consolidated Petitions were filed, the National Assembly had received public Petitions from Mr. Anthony Manyara and Mr. John Ndwiga regarding constitutionality of sections 22 (1) (b) and 1A of the *Elections Act*, 2011 (hereinafter referred to as 'the Public Petitions') and the same was being considered pursuant to National Assembly Standing Orders and article 119 of the Constitution.

100. It stated further that the Public Petitions were committed to the National Assembly Departmental Committee on Justice and Legal Affairs under National Assembly on 15th June, 2021 for consideration under Standing Order No. 227 and would be determined on or before 16th August, 2021.

101. On the foregoing basis, the 3rd respondent stated that under article 119 of the Constitution and section 5 of the *Petitions to Parliament (Procedure) Act, 2012*, National Assembly had exclusive original jurisdiction to first determine the Public Petitions before this honourable court could intervene.

102. It stated further that under article99 of the Constitution, Parliament had the mandate to enact legislation prescribing educational, moral, and ethical requirements for contesting in an election.

103. In relying on the Supreme Court decision in *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* [2017] eKLR, the 3rd respondent urged this court to uphold the doctrine of separation of powers by exercising restraint and allowing the National Assembly to first exercise its mandate.

104. It was its case that the petitionershad failed to demonstrate how the object, purpose and effect of the impugned provisions violate their fundamental rights and freedoms in the Constitution.

105. It supporting the qualifications provided for under section22 of the *Elections Act*, the 3rd respondent stated that representation, legislation, oversight, and appropriation are duties and functions of a Member of County Assembly, just like those of Members of Parliament, are technical in nature that

require educational qualifications of at least a university degree that would equip a Member of County Assembly with the necessary analytical and decision-making skills.

106. The 3rd respondent stated that overall public benefit of the impugned provisions outweighs the petitioners' narrow private interests.

107. The 3rd respondent prayed that the consolidated Petitions be dismissed with costs.

108. In the replying affidavit, Mr. Michael Sialai, the Clerk National Assembly deposed that the consolidated Petitions were res-judicata and an abuse of process. To that end, he referred to the decision of Justice Lenaola, as he then was, in *John Harun Mwau -vs- Independent Electoral & Boundaries Commission & Another* (2013) eKLR, where it was found that the impugned provisions were constitutional. He deposed further that the said decision was affirmed by the Court of Appeal.

109. To further demonstrate the bar of res-judicata, reference was made to the decision of Korir J. in *Okiya Omtatah Okoiti & Another -vs- Attorney General & Another* (2020) eKLR where the petitioner disputed constitutionality of section 22(1)(b) and 22(2) of the *Elections Act* as well as the propriety of the decision in *John Harun Mwau -vs- Independent Electoral & Boundaries Commission & Another* for having been made *per incuriam*.

110. He deposed that thelearned judge(Korir J.) was of the finding that educational requirements in elective political offices had been put to rest by Courts of co-ordinate jurisdiction and the Court of Appeal and as such could not be opened again.

111. With respect to the Public Petitions before the National Assembly, Mr. Sialai deposed that the Justice and Legal Affairs Committee had kick-started the process of considering the Public Petitions and had advertised for public participation on 29th July, 2021, which received many views given the overwhelming public interest in the matter and is pending determination.

112. In discrediting the assertion that the introduction of the degree qualification was discriminatory, Mr. Sialai deponed that differentiation in the application of legislation is permissible. Reliance was placed on the South African decision in *Jacques Charl Hoffman -vs- South African Airways*, CCT 17 of 2000 where it was stated that challenges to statutory provisions must be considered in the light whether the provision under attack makes a differentiation that bears a rational connection to a legitimate Government; amounts to unfair discrimination; and whether it can be justified under the limitations provisions.

113. It was also deponed that the Court of Appeal in *Mohammed Abduba Dida -vs- Debate Media Limited & Another* (2018 eKLR appreciated the fact that provisions and rules that create differentiation amongst affected persons do not of necessity give rise to unequal or discriminatory treatment prohibited by article 27, unless it can be demonstrated that such selection or differentiation is unreasonable.

114. It was deposed that the rationale for enactment of the impugned provisions was derived from Section 9 of the *County Governments Act* which among other roles provided that, a Member of County Assembly shall extend professional knowledge, experience or specialized knowledge to any issue for discussion in the County Assembly.

115. It was deponed that if the educational qualifications were to be done away with, Members of the County Assemblies, Members of Parliament and other elected leaders would fail to meet their core duty, which is to represent the will of the people they are expected to serve.

116. Mr. Sialai prayed that the consolidated Petitions be dismissed with costs.

The 1st Interested Party's Case:

117. The Senate, 1st interested party herein, opposed the consolidated Petitions through Grounds of Opposition dated 25th August 2021.

118. It was its case that the orders sought in the present Petitions, if granted will result in an infringement of the legislative authority of Parliament derived from article94 of the Constitution.

119. It stated that the consolidated Petitions offended the constitutional doctrine of separation of powers insofar as it seeks court's intervention of that mandate reserved for the Parliament.

120. It stated that according to article82(1)(b) of the Constitution, Parliament had the authority to enact legislation for the nomination of candidates and article73(2)(a) of the Constitution regulates the guiding principles of leadership and integrity to include selection on the basis of integrity, competence and suitability, or election in free and fair elections.

121. The 1st interested party contended that the requirement to have minimum educational standards in order to qualify for election to a State office does not amount to discrimination as the same is a measure prescribed by Parliament to achieve the goals and aspirations set out in article 10 of the Constitution.

122. In urging that the consolidated Petitions and the applications be dismissed, the 1st interested party posited that the overall object and purpose of the *Elections Act* should be considered in light of the need to meet the principles in articles 10, 73 and 82 of the Constitution which aims at promoting and protecting the values in the Constitution.

The Petitioners' Rejoinder:

123. In contesting the argument that the consolidated petitionswere res-judicata, the Petitioners variously submitted that the subject matter in *Johnson Muthama -vs- Minister for Justice & Constitutional Affairs & Another*[2012] eKLR, was constitutionality of section 22(1)(b) and 24(1)(b) which barred persons not holding a post-secondary school qualification from being nominated as candidates for elective office or for nomination as candidates for elective office or for nomination to parliament which were found to be unconstitutional.

124. In *John Harun Mwau -Vs Independent Electoral and Boundaries Commission and Another* [2013] eKLR, it was submitted that the subject matter was section 22(1)(b) of the *Elections Act* which required that any person seeking nomination for any elective post should hold a certificate, diploma or other post-secondary school qualification acquired after a period of at least three months' study, recognized by the relevant ministry. The court upheld the validity of these provisions and found that post-secondary education was attainable, sufficient and constitutional.

125. In *Okiya Omtatah Okoiti & Another -vs- Attorney General and Another* [2020] eKLR it was further submitted that the subject matter was *inter alia* section 22(1)(b) of the *Elections Act* and sought a general declaration that Parliament has no power to impose educational eligibility requirements for purposes of elections. The court dismissed the Petition.

126. In distinguishing the instant consolidated Petitions, it was submitted that the present Petitions are very specific on its basis and subject matter being that it challenges the constitutionality of sections22(1) b) (ii) and (1A) of the *Elections Act*, 2011, which introduced a novel educational threshold requirement for persons seeking to be elected to or nominated for the positions of Member of County Assembly. The requirement for a university degree for persons seeking election and nomination to the position of Member of County Assembly, was not the subject matter in the above stated decisions and the present

Petitions cannot be *res judicata* by dint of decisions that relate to other provisions of law and which are separate and far apart from the subject matter of the Petitions.

127. With respect to the 3rd respondent's contention that the dispute herein was being considered by Parliament, it was submitted that the legislative process at the National Assembly seeking the amendment or the repeal of the impugned provisions of law is still pending for substantive consideration by Parliament has no limitations of time and scope. He further stated that the Petitions herein are precise and concise in its target and there is no bar to judicial consideration hereof on the basis of the process before the Parliament.

128. On the issue of discrimination, it was submitted that since Members of County Assemblies earn less than other constitutional office holders there was no justification for them to have the same educational qualifications as those of Members of Parliament, Senators, Governors and the Presidency.

129. It was also submitted that the alleged complexity of the role of a Member of a County Assembly that could only be discharged vide acquisition of a university degree was not demonstrated.

130. In the end, the Petitioners posited that the consolidated Petitions be allowed as prayed.

Issues for Determination:

131. From the foregoing appreciation of 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 ripeness doctrine.

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

iv. Whether section22(1)(b)(ii) 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 section22(1)(b)(ii) of the *Elections Act*.

vi. Disposition.

132. I will deal with each issue in seriatim.

Analysis and Determinations:

i. Whether the consolidated Petitions are res-judicata:

133. 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.

134. 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"

135. 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 courtshall 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.

136. 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 section7 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 and Another v. The Attorney General and 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 S.C.R. 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.

137. 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: -

> 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.

138. 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: -

> ...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."

139. 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.

140. 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 V.C. 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.

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

142. 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.

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

144. At the centre of the dispute was the petitioners' contention that sections3(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

145. The petitionersin 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.

146. The respondentsopposed 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.

147. 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 11th October, 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

148. 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.

149. In making a finding on constitutionality of section22(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

150. On whether section22(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....

151. In the end, the courtallowed the Petition and declared the then section22(1) unconstitutional. The decision was rendered on 29th day of June 2012. That decision was not appealed against.

152. The above decision can only be in support of the consolidated Petitions. It cannot aid the argument favoured by the respondentsand the interested party.The contention that the consolidated Petitions are *res judicata* J*ohnson Muthama -vs- Minister for Justice and Constitutional Affairs & Another* [2012] eKLR, be and is hereby, dismissed.

153. 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).

154. 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 articles27 and 38 of the Constitution.

155. There were two main issues which were deciphered by the learned judgefor consideration. They were the educational qualifications for nomination as Members of Parliament and the constitutionality of section24(1) of the *Elections Act* and regulations 16, 18 and 19 thereof.

156. In making an assessment of the constitutionality of section24(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 article38 based on universal suffrage on the aspiration for fair representation and equality to vote. The argument that section24(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'.

157. The Learned Judge went further to compare the wording of section24(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: -

> Looking at section 24(1) of the *Elections Act*, it in fact is a replica of article 99(1) of the Constitution and that Article as well as section 24(1) itself have set out the qualifications for persons 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.

158. 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 section22(1) of the *Elections Act* in *Johnson Muthama -vs- Minister for Justice and Constitutional Affairs & Another* (2012) eKLR.

159. 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.

160. Later, on 30th January, 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.

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

162. In the case, the petitionerssought 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.

163. Based on the foregoing, the petitionersought 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*.

164. Upon comparing the factual matrix of the two decisions, thelearned 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 section43 of the *Elections Act*, 2011.

165. The learned judgefurther 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.

166. 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)(ii) 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.

167. The issues raised in the consolidated Petitions relate to the university degree qualifications for those intending to vie for the positions of Members of County Assembly. 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 County Assembly. 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.

168. 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 -vs- Attorney General & Another case* (*supra*). However, the Court declined jurisdiction and the matter was not fully and finally determined.

169. 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.

170. 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:

171. 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.

172. 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.

173. It is the respondentsand interested party'scontention that Parliament had received the Public Petitions challenging the constitutionality of section 22(1)(b)(ii) of the *Elections Act* and that it was in the process

of considering them. As such, it was not ripe for this Court to exercise its jurisdiction during the pendency of the process before Parliament.

174. Mr Mbarak, Counsel for the 3rd respondent and who also held brief for Miss Omuom for the Hon Attorney General, submitted that there are Election (Amendment Bill) No 42 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.

175. 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.

176. In opposition to Mr Mbarak's position, Counsel for the 1st 2nd and 3rd petitioners herein, Mr Njenga, submitted that no law was cited by Counsel for the 3rd respondent to support the argument that Court's jurisdiction was ousted since Parliament is dealing with the matter.

177. The question that begs for an answer is whether the Public Petitions presented before Parliament concerning the constitutionality of section 22(1)(b)(ii) 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.

178. In determining this contention, I will first resort to article119 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.

179. 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.

180. 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 and Others vs The Senate Petition No 413 of 2014 and made the following emphatic remarks: -

> .... It is also incumbent on the courtto 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 and Others vs 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".

181. In Council of Governors & 3 others v Senate & 53 others [2015] eKLR the Learned Judges interpreted the right to Petition Parliament under article119 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 article165(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 articles2(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.

182. I am in agreement with the above. I, however, wish to add that the power of Parliament under article119 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.

183. In this case, the Petitioners contend that the National Assembly in passing the amendment that resulted to the impugned section22(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.

184. As a result, this Court finds that the contention that the consolidated Petitions are caught up by the doctrine of ripeness fails and is hereby dismissed.

185. Having so found, I will now proceed on to consider the third issue.

iii. The principles of constitutional and statutory interpretation:

186. 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*.

187. 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.

188. 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 21st December, 2011in *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: -

> [86] .... The rules of constitutional interpretation do not favour formalistic or positivistic approaches (articles20(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 article10, 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] ..... article10 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.

59. 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.....

60. 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 article259 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.

63. 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 -vs- 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 judgesof the Supreme Court further agreed with the South African Constitutional Court in *S -vs- 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.

189. 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 vs 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 and 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 S.C.R. 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.

190. Recently, in Nairobi High Court Constitutional Petition No E327 of 2020 *Law Society of Kenya vs The Attorney General and 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 vs 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.

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.

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.

191. 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 section10 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, *U.S 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 courtdoes, 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 courtneither 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 article92 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.....

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

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

193. At the heart of the consolidated Petitions is section 22(1)(b)(ii) of the *Elections Act* (hereinafter referred to as '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 subsection (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 .....

(2) Notwithstanding .....

(2A) For the purposes ....

194. It was vehemently submitted that the effect of the impugned provision is to limit political rights in ways which are not in tandem with the limitations in article 24 of the Constitution. The petitioners also pointed out that the impugned provision contravenes other articlesof the Constitution.

195. Before I address the main issue being the constitutionality of the impugned provision, I will, in the first instance, have a brief look at the constitutional provisions on the elective position of Member of County Assembly.

196. The post of a Member of County Assembly was primarily informed by the concept of devolution. There was need to decentralize power and Government services by having a political representative of the people at the lowest cadre of the political spectrum.

197. As a result, the Constitution created County Governments under article 176, and, as follows: -

176. County governments

(1) There shall be a county government for each county, consisting of a county assembly and a county executive.

(2) Every county government shall decentralise its functions and the provision of its services to the extent that it is efficient and practicable to do so.

198. Being the lowest cadre of representation of the people, a County Assembly was created for each county.

199. In article 177, the *Constitution* provides for the membership of the County Assembly in the following manner: -

177. Membership of County Assembly

(1) A county assembly consists of—

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

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

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

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

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

(3) The filling of special seats under clause (1)(b) shall be determined after declaration of elected members from each ward.

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

200. Article 177, therefore, created the smallest unit of political representation called the Ward.

201. In order to contest for the seat of Member of County Assembly, the Constitution set the qualifications in Article 193 as follows: -

202. Qualifications for election as member of county assembly

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

(a) is registered as a voter;

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

(c) is either—

(i) nominated by a political party; or

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

(2) A person is disqualified from being elected a member of a county assembly if the person—

a) is a State officer or other public officer, other than a member of the county assembly;

b) has, at any time within the five years immediately before the date of election, held office as a member of the Independent Electoral and Boundaries Commission;

c) has not been a citizen of Kenya for at least the ten years immediately preceding the date of election;

d) is of unsound mind;

e) is an undischarged bankrupt;

f) is serving a sentence of imprisonment of at least six months; or

g) has been found, in accordance with any law, to have misused or abused a State office or public office or to have contravened Chapter Six.

(3) A person is not disqualified under clause (2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted

203. Juxtaposed with the foregoing are the political rights in Article 38 of the Constitution which provides as follows: -

(1)Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.

(2) A person shall not be compelled to join an association of any kind.

(3) Any legislation that requires registration of an association of any kind shall provide that—

(a) a) registration may not be withheld or withdrawn unreasonably; and

(b) there shall be a right to have a fair hearing before a registration is cancelled.

204. The above are the various constitutional provisions which have a bearing on the position of a Member of a County Assembly (hereinafter referred to as 'MCA').

205. To spruce up the discussion on devolution, I will make reference to a decision of the Supreme Court in Kenya. It is Advisory Opinion Reference 2 of 2013, *In the Matter of the Speaker of the Senate & another* [2013] eKLR. In the matter, the Supreme Court discussed at length the concept of devolution, the mandate of devolved Government units and more importantly, for purposes of this judgment, the historical foundation of creation the position of Member of County Assembly. The judges of the apex court observed as follows: -

> (136) The mandate of governance established by the people is defined by particular concepts, principles and values. One of these is devolution, which is defined in *Black's Law Dictionary*, 8th ed (2004) [p.484] as:
>
> The act or an instance of transferring ... rights, duties, or powers to another; the passing of such rights, duties, or powers by transfer or succession ...
>
> The Kenyan people, by the Constitution of Kenya, 2010 chose to de-concentrate State power, rights, duties, competences – shifting substantial aspects to county government, to be exercised in the county units, for better and more equitable delivery of the goods of the political order. The dominant perception at the time of constitution-making was that such a deconcentration of powers would not only give greater access to the social goods previously regulated centrally, but would also 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. (emphasis added)

(137) By article 1 of the Constitution, the people's sovereign power is delegated to Parliament and the legislative assemblies in the county units, the national and county executives, the judiciary and independent tribunals.

(138) Devolution as a required constitutional practice runs in parallel with an attendant set of values, declared in article 10 of the Constitution: the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, the protection of the marginalized.

206. Having said as much, I will now look at the impugned provision against the foregoing constitutional provisions.

207. A careful consideration of the impugned provision against the various constitutional provisions cited above, reveal that the impugned provision is a limitation to the political rights under article38(3) of the Constitution. As a result, such a limitation must, in the first instance, pass the constitutional muster in article24 of the Constitution.

208. 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 vs. Oakes* as captured in Petition No. E327 of 2020 *Law Society of Kenya vs. The Attorney General and Another* (2021) eKLR.

209. The creation of the elective position of MCA, therefore, serves two main purposes. First, the position was fronted for by Kenyans and got constitutionally entrenched for the purpose of enhancing service delivery to the people. Second, the position was created in order to open up democracy through the enlargement of people participation in governance.

210. . 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.

211. . 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).

212. 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. The Report went further to give the statistics at Ward levels. For instance, in Mau Forest sub-county which has 5 wards there were only 2 university graduates. It, hence, means that some of the Wards will not have representatives, that is if the two graduates successfully offer themselves for the positions of MCAs. More appalling is the fact that there are no university graduates in the entire Mt. Elgon sub-county as well as Kakamega Forest sub-county.

213. 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 partIV of the *Evidence Act*, Cap 80 of the Laws of Kenya adopt it as admissible evidence.

214. With such uncontroverted evidence, it is clear that the impugned provision will have adverse effects on the representation of the people at the ward level. Indeed, unless the contrary is proved, which at the moment is not, the impugned provision has the effect of rendering some wards without representation at the County assemblies.

215. 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.

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

217. 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;

218. 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.

220. 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.

221. 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;

(1) 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.

222. 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.

223. 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 MCAs.

224. 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 MCAs 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.

225. 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 vs Wednesbury Corporation* [1948]1 KB 223.

226. 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.

227. 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.

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

229. Once again, the respondents and the Interested Party did not make any response to the said argument.

230. 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.

231. Subjecting all the candidates for the positions of MCA 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.

232. 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.

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

234. One of the petitioners fall within that cadre. It is the 6th petitioner, Daniel Ndambuki Mutua, who is student at the Kenyatta University School of Security, Diplomacy & Peace Studies. He hoped to graduate before 2022, but as a result of the effects of the pandemic, he will not have graduated by the year 2022.

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

236. The Petitioners also raised the issue of the need to have different qualifications for different positions. According to the Petitioners, as a result of the impugned provision, all elective positions in Kenya attract similar qualifications, but surprisingly the positions have different remunerations and benefits. They argued that there is need for differentiated qualifications just like the differentiated income.

237. The respondentsand Interested Party took the position that part of the work of an MCA is legislative and as such there is need for one to be able to at least have some basic understanding of such processes thereby attracting the requirement of a university degree.

238. In a rejoinder, the petitionersposited that the respondentsand Interested Party did not, through evidence, demonstrate how the county assemblies have so far failed to discharge their mandates as a result of the lack of the university degree qualifications by some of the MCAs.

239. It is a fact that the impugned provision has the effect of making all elective positions in Kenya attract similar academic qualifications. In other words, all those who aspire to vie for the position of the President, the Deputy President, Governor, Member of Parliament and MCA in Kenya must possess a minimum of a university degree academic qualification.

240. There is no doubt that the responsibilities bestowed upon the offices of the President, the Deputy President, Governor, Member of Parliament and MCA differ. The President, no doubt, bears the greatest and overall responsibility as the Head of State and Government in Kenya in accordance with Article 131 of the Constitution whereas the MCA is a representative of the smallest representative unit in Kenya known as a Ward. Whereas on one hand there is only one President in Kenya, there are, on the other hand, over 2000 MCAs in the country.

241. As a result of the foregoing, the need for differentiated qualifications, whether academic or otherwise, becomes apparent. I say so partly on the basis of the early discussion on the national status of those holding university degrees. Further to the prevailing education status in Kenya and the law, and in keeping with the Supreme Court's guidance 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, it can only be logical to have different academic qualifications, at least for the lowest cadre of the representatives of the people being the MCAs.

242. As I make this statement, 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 MCAs, 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.

243. 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. 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.

244. 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 -vs- 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.

245. Having said so, it, therefore, comes out that the impugned provisions does not augur well with several constitutional provisions. For instance, it does not pass the test of limitation in article24 of the Constitution. The impugned provision is, hence, an affront to the Constitution.

246. Further, the impugned provision offends article27 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.

247. 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.

248. The impugned provision likewise failed to take into account the dictates in article56 of the Constitution regarding the rights of the minority and marginalised groups.

249. In sum, therefore, the impugned provision contravenes articles24, 27, 38(3) and 56 of the Constitution.

v. Whether there was adequate public participation in the enactment of section22(1)(b)(ii) of the *Elections Act*:

250. Participation of the people is a national value and principle of governance that was introduced in Kenya by article10 of the Constitution. The said articleprovides as follows: -

> (1) The national values and principles of governance in this articlebind 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.

251. 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 Q.A.C. 45 [1988] R.J.Q. 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 courtswill not use any litmus test to determine if public participation has been achieved or not. The only test the courtsuse 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 vs The 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.

252. 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.....

253. 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 vs. 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 courtwill 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 courtmust 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 courtconsidering whether what Parliament does in each case is reasonable."

254. In *Matatiele Municipality and Others vs. 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 courtwill 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."

255. In the consolidated Petitions, all the respondentsas well as the interested partydid not 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*.

256. As a result of the said positions, the petitionerscontestations that the 3rd respondent never conducted any public participation remain uncontroverted. In other words, there is no evidence to rebut the petitioners' contention that the 1st respondent's failed to carry out any public participation or at all.

257. As comprehensively set out in the decisions referred to above and as provided for under article10 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.

258. 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, the National Assembly chose to ignore all that.

259. Given the appalling state of affairs and the uncontested nature of this issue, I find and hold that there was no public participation towards the enactment of section 22(1)(b)(ii) of the *Elections Act*. In sum, the impugned provision falls short of the constitutional requirement under article 10(2)(a) of the *Constitution*.

Disposition

260. As I come to the end of this judgment, I remain most grateful to counselappearing before me for their industry in assembling jurisprudence from within the jurisdiction and further afield and for their cogent and incisive submissions which were of great assistance. If there is any authority I have not referred to, it is not for my non-consideration of it, but out of the satisfaction that the point is otherwise already amply made.

261. In the end the consolidated Petitions succeed and the following final orders hereby issue: -

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

b. A declaration be and is hereby issued that section 22(1)(b)(ii) 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)(ii) 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 a County Assembly 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 15TH DAY OF OCTOBER, 2021

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:__

Prof. Tom Ojienda, SC, Mr. Njenga and Mr. Awuor, Learned Counsel for the 1st, 2nd and 3rd Petitioners.

Mr Dunstan Omari, Mr Mwendwa, and Mr Abel Asuma, Learned Counsel for the 4th petitioner.

Mr Kariuki Karanja, Learned Counsel for the 5th Petitioner.

Mr Muli, Learned Counsel for the 6th Petitioner.

Mr Wambugu, Learned Counsel for the 7th Petitioner.

No appearance for Miss Omuom, Learned Counsel instructed by the Honourable Attorney General for the 1st Respondent.

Mr Malonza, Learned Counsel for the 2nd Respondent.

Miss Thanji, Learned Counsel for the Interested Party and holding brief for Mr Mbarak, Learned Counsel for the 3rd Respondent.

Elizabeth Wanjohi – Court Assistant.