REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 161 OF 2016

OKIYA OMTATAH OKOITI.....1ST PETITIONER

NYAKINA WYCLIFE GISEBE.....2ND PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION...2ND RESPONDENT

JUDGMENT

1. Okiya Omtatah Okoiti, the 1st Petitioner, and Nyakina Wycliffe Gisebe, the 2nd Petitioner through their petition dated 21st April, 2016 pray for orders as follows:-

> **"a. A Declaration be and is hereby issued that articles of the Constitution which lie outside the Bill of Rights are absolute and, therefore, cannot be limited.**
>
> **b. A Declaration be and is hereby issued that under the Constitution the only educational eligibility requirements Parliament can impose on candidates for election as Member 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.**
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> **c. A Declaration be and is hereby issued that Articles 137(2)(b), 99(2)(a) and 193(2)(a) of the Constitution and Sections 23(2)(b), 24(2)(a) and 25(2)(a) of Elections Act 2011 are inert and only get activated upon the presentation of nomination papers to IEBC by a public official.**
>
> **d. A Declaration be and is hereby issued that sections 22(1)(b), 22(2), and 43 of the Elections Act 2011 are unconstitutional and, therefore, invalid, null and void and of no consequence in law.**
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> **e. A Declaration be and is hereby issued that the decisions made by the High Court in the case of *John Harun Mwau v Independent Electoral and Boundaries Commission & another [2013] eKLR*, and in the case of *Johnson Muthama v Minister for Justice and Constitutional Affairs & another [2012] eKLR* were made *per incuriam* and, therefore, are of no precedential value in the instant Petition.**
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> **f. The Honourable Court be pleased to issue any other or further remedy that the Honourable Court shall deem fit to grant in the interests of justice in the circumstances of this Petition.**
>
> **g. The Honourable Court be pleased to issue an order ordering the Respondents to bear the costs of this Petition for being the parties directly responsible, through actions and/or omissions, for the violations of the Constitution and the law which necessitated the Petitioners to seek remedy in the Honourable Court."**

2. The petition is opposed through the grounds of opposition dated 20th July, 2016 filed by the Attorney General, the 1st Respondent.

3. The 2nd Respondent, Independent Electoral and Boundaries Commission, opposed the petition through grounds of opposition dated 3rd June, 2016 and a replying affidavit sworn on 14th June, 2016 by its Director of Legal and Public Affairs Department, Praxedes Tororey.

4. The petition and the responses all refer to the decisions in **John Harun Mwau v Independent Electoral and Boundaries Commission & another [2013] eKLR** (hereinafter the John Harun Mwau case) and **Johnson Muthama v Minister for Justice & Constitutional Affairs & another [2012] eKLR** (hereinafter the Johnson Muthama case). According to the petitioners, those decisions were made *per incuriam*. The respondents on the other hand opine that the issues raised in this petition were dealt with in the cited decisions and the petitioners' claim that those decisions were determined *per incuriam* is calculated at re-litigating the issues afresh which amounts to an abuse of the court process.

5. The pleadings therefore raise a jurisdictional issue that needs to be addressed at the outset. Although the petitioners seek various prayers in the petition, a perusal of the petition and the submissions filed in support of the petition clearly shows that this petition simply seeks to declare sections 22(1)(b), 22(2) and 43 of the Elections Act, 2011 unconstitutional.

6. In support of their petition, the petitioners annexed the Elections (Amendment) Bill, 2015 which at Section 7 provided that:-

> **"Section 22 of the principal Act is amended in subsection (1) by deleting paragraph (b) and substituting therefor the following new paragraph-**
>
> **(b) holds-**
>
> **(i) in the case of a member of Parliament, a degree from a university recognised in Kenya; and**
>
> **(ii) in the case of a member of the county assembly, a post-secondary diploma from an institution recognised in Kenya.**
>
> **(iii) the post-secondary diploma qualification for a member of the county assembly shall be upgraded to a degree subsequently after 2017 elections."**

7. Section 22(2) of the Elections Act, 2011 provides on that:-

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

8. Section 43 of the Elections Act, 2011 states that:-

> **"43(1) A public officer shall not—**
>
> **(a) engage in the activities of any political party or candidate or act as an agent of a political party or a candidate in an election;**
>
> **(b) publicly indicate support for or opposition against any party, side or candidate participating in an election;**
>
> **(c) engage in political campaigns or other political activity; or**
>
> **(d) use public resources to initiate new development projects in any constituency or county three months before an election in that constituency or county.**
>
> **(2) A public officer who contravenes subsection (1) commits an offence and is liable on conviction, to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years, or to both.**
>
> **(3) A person who knowingly aids in contravention of subsection (1) commits an offence and is liable, on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years, or to both such fine and imprisonment.**
>
> **(4) A candidate who knowingly aids in contravention of subsection (1) shall not be eligible to contest in the election.**
>
> **(5) A public officer who intends to contest an election under this Act shall resign from public office at least seven months before the date of election.**
>
> **(6) This section shall not apply to-**
>
> **(a) the President;**
>
> **(b) the Prime Minister;**

(c) the Deputy President;

(d) a member of Parliament;

(e) a county governor;

(f) a deputy county governor;

(g) a member of a county assembly."

9. A perusal of the judgment delivered on 1st November, 2013 in the **John Harun Mwau** case shows that among the various orders sought in that petition were:-

> **"(k) A declaration as to whether a candidate for Presidency under Article 137 whose qualifications are those of a person qualified to stand for election as a Member of Parliament, a degree is a pre- requisite requirement for nomination and participation in an election.**
>
> **(l) A declaration whether a candidate for election as a governor under Article 180 of the Constitution whose qualifications is that of a person eligible to be elected as a member of the County Assembly, whether a degree is a pre- requisite qualification for nomination or to participate in that election.**
>
> **(m) A declaration as to whether the educational requirements required to be satisfied by a candidate under Article 99(1)(b) is only that education that is post-secondary or a degree and no other educational qualifications.**
>
> **(n) A declaration that the education requirements under Article 99 (1)(b) is not restrictive to only post-secondary school education or a degree and whether educational requirements achieved through other modes of training and study, i.e. military training, labour and industrial training where there is a curriculum, exams, grading and the issuance of certificates are sufficient educational requirements for the purposes of Article 99 of the Constitution.**
>
> **(o) A declaration that under Article 137(1) (b) of the Constitution, for a Presidential Candidate to qualify to be nominated, must have fulfilled all of the conditions and requirements to stand for a Member of Parliament provided for under Article 99 of the Constitution of Kenya.**
>
> **(p) A declaration that for a Presidential Candidate to qualify for nomination he/she is not required to satisfy any other educational, moral and ethical requirements apart from those required to satisfied by person standing for election as a Member of Parliament.**

10. The decision of Isaac Lenaola, J (as he then was) on the issue of the setting of educational standards for elective offices is found at paragraphs 35 and 36 of the judgment where he held that:-

> **"35. It is against the background of Mumbi J's. judgment that the Petitioner now contends that even the requirement to hold post-secondary education is unreasonable and that any academic qualification would be sufficient. I am unable to accept his argument for two reasons. First, the nature of the duties and functions performed by the National Assembly and the Senate in my view require higher educational qualifications, skills and wide exposure which is gained through higher education. It is important that a representative to either of the House understands the proceedings, nature of business being carried out and most important be in a position to make his/her contribution to the various and many at times complex motions and debates in Parliament. It must also be understood that the elected persons represents the people who appointed them and they should therefore be able to execute that duty without any difficulties.**
>
> **36. Secondly, the sovereign power belongs to the people of Kenya and that power ought to be exercised in accordance with the Constitution. The people may *inter alia* exercise their sovereign power through their democratically elected representatives. It is thus crystal clear that the ultimate will of the people of Kenya is to be found in the Constitution. At Article 99(2)(b), the people of Kenya have envisaged, in passing the Constitution, that a person would not be eligible to run for certain offices if they did not meet the criteria set by Parliament. While the Constitution does not set educational criteria, it imposes a duty on Parliament to enact legislation setting that criteria, and this is what has now been done in the Elections Act. In my view, the provisions of Section 22 of the Election Act were enacted by Parliament pursuant to the provisions of Article 99(1)(b) of the Constitution. This Article envisages a situation where Parliament prescribes an educational threshold for those who seek to be elected as Members of Parliament. In its wisdom, Parliament prescribed the provision of a post-secondary qualification. I do not think this qualification is unreasonable or unattainable by all in Kenya. I am alive to the fact that each year, the tax payer spends billions of shillings in both free primary and secondary education. Every Kenyan from all walks of life there has in my view opportunity to gain this qualification. I therefore find the argument that any other academic qualification would be sufficient to even include Primary education cannot hold water. In any event, it does not reflect the ultimate will of the people of Kenya as can be seen from the requirements of Article 99(1)(b). I therefore find that post-secondary education as enshrined under Section 22 (1) (b) of the Elections Act is attainable, sufficient and constitutional. To hold otherwise would be absurd 50 years after independence."**

11. In the **Johnson Muthama** case, Mumbi Ngugi, J addressed the question of educational standards that were set at Section 24 of the

Elections Act, 2011 for those vying for political offices and held that:-

> **"37. In mandating Parliament to prescribe certain educational, moral and ethical qualifications and making them a prerequisite for election to office, the people of Kenya must have had good and cogent reasons for these requirements, such reasons doubtless informed by the social and historical context in which they enacted the Constitution.**
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> **38. In the Final Report of the Committee of Experts on Constitutional Review dated 11th October 2010, at paragraph 7.5.2, 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. The Committee had included the statement but had not fixed the qualifications. Its position was that '..an Act of Parliament should set the qualifications for senators and Members of Parliament as these could change over time."**
>
> **39. 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.**
>
> **40. 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.**
>
> **41. What is the socio-economic context in which the majority of Kenyans live? The explosion in primary school enrolment at the introduction of free primary education in Kenya, which is common knowledge, is perhaps a pointer to the difficulties encountered by many in society in accessing education. Socio-economic indicators show that more than 46% of the population lives in extreme poverty, with rural populations being worse off than urban populations. According to a report titled '*The State of Kenya Population 2011 Kenya's 41 Million People: Challenges and Possibilities*' prepared by the National Coordinating Agency for Population and Development, (NCAPD), nearly 18 million out of Kenya's population of 40 million are living in poverty. The report notes that '*Poor people are poor because of inadequate access to schools, health services, roads, market opportunities, …and so on. These are in turn typically associated with inadequacies of voice or influence both in the shaping of policies and in its effective implementation…*.**
>
> **70. For the above reasons, I find and hold that Sections 22(1)(b) and Section 24(1)(b) of the Elections Act 2011 which bar persons not holding a post-secondary school qualification from being nominated as candidates for elective office or for nomination to Parliament to be unconstitutional and in violation of the petitioners' rights under the Constitution."**

12. The petitioners submit that those decisions were made *per incuriam*. In their view the decisions are *per incuriam* in that they ignored Article 81(d) of the Constitution which provides for universal suffrage based on aspiration for fair representation and equality of votes; that they ignored the fact that the educational requirements imposed by Parliament subverted the Constitution by blocking 18 year olds, who are registered voters, from vying at elections; that they ignored the fact that under Kenya's 8-4-4 system of education, the only certificate an average 18 year old can have is the Standard 8 Kenya Certificate of Primary Education; that they ignored the fact that the Elections Act does not meet the threshold set in Article 24 of Constitution as it limited the rights to stand for public office under Article 38(3)(b) and the right for the youth to participate in political affairs under Article 55(b); that they ignored the fact that the educational requirements are discriminatory against young adults vis-a-vis other adults; and that they ignored the fact that the doctrine of no taxation without representation is violated by the unreasonable educational requirements.

13. The petitioners relied on the decision in the case of **Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited [2014] eKLR** and urged that they are not asking this court to sit on appeal over those judgments. In the said case, the Court of Appeal held that:-

> **"61. It is our finding that this Court not being the final court has residual jurisdiction to review its decisions to which there is no appeal to correct errors of law that have occasioned real injustice or failure or miscarriage of justice thus eroding public confidence in the administration of justice. This is jurisdiction that has to be exercised cautiously and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice."**

14. It is clear that in the cited case, the Court of Appeal was dealing with a situation where there was no appeal from its decisions. That is not the position in this case and the said authority is therefore not relevant to the circumstances of this case.

15. Responding to the *per incuriam* issue, the 2nd Respondent submitted that the petitioners have failed to illustrate that the decision in the **John Harun Mwau** case was made in ignorance of the law. According to the 2nd Respondent, the mere fact that the petitioners disagree with that decision does not render the decision null and void.

16. This petition was heard on 26th November, 2019. A few days earlier, on 22nd November, 2019, the Court of Appeal had delivered its judgment in **John Harun Mwau v Independent Electoral & Boundaries Commission & Attorney General [2019] eKLR; Civil Appeal No. 112 of 2014,** being an appeal from the decision of Lenaola, J (as he then was) in the **John Harun Mwau** case. The Court of Appeal identified the issues at paragraph 18 of its judgment as follows:-

> **"*[W]*e still discern three issues which in our view cut across the 80 grounds of appeal for our determination; that is, whether the appellant's rights were violated, impaired or limited in the nomination of independent candidates; by the provisions in**

the Elections Act that set out the education qualifications that require post-secondary education as eligibility for one to vie for various political seats and in allowing political mergers and coalitions."

17. The decision of the High Court on the issue of educational qualifications was upheld by the Court of Appeal at paragraphs 23 and 24 of the judgment as follows:-

> **"23. It is indicated elsewhere in this judgment that the appellant's pleadings are not specific on the actual infringements of rights that he is complaining about. It is not clear whether he was complaining that the provisions of *Section 22* of the Elections Act that provide for academic qualifications excluded him from running for a particular office. Nonetheless, what we gather is that the requirement for post-secondary qualifications left out deserving Kenyans who obtained an equivalent qualification by attending courses at the Kenya Police or other institutions and the appellant gave his own example. This is how the learned Judge determined this issue by explaining the reasons why the Legislature found it necessary to set educational standards for elective positions which are positions of power and immense responsibilities to be executed by persons who have some knowledge, skill and training.**
>
> **24. We also agree with the trial Judge that setting standards in regard to education qualifications for leaders seeking positions of power and responsibility cannot be discriminatory, as it cuts across all the parties and those who do not qualify have an opportunity to first of all seek to attain the qualifications before vying for the offices. We therefore agree with the Judge's reasoning and interpretations of both the Constitution and the governing Statutes."**

18. The term *per incuriam* has an unpleasant connotation as it means that a decision has been made without due regard to the law or the facts. The 10th Edition of Black's Law Dictionary at page 1320 defines the term as follows:-

> **"(Of a judicial decision) wrongly decided, usually because the judge or judges were ill-informed about the applicable law."**

19. The doctrine of *per incuriam* was given extensive consideration by the Court of Appeal of England and Wales in **Morelle Ltd v Wakeling [1955] 2 W. L. R. 672** where the Court held that:-

> **"As a general rule the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned; so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive but cases not strictly within it which can properly be held to have been decided *per incuriam* must, in our judgment, consistently with the state decisis rule which is an essential feature of our law, be, in the language of Lord Greene, of the rarest occurrence."**

20. Although the petitioners have pointed out the constitutional provisions that were allegedly not considered by the learned judges in the two judgments, they have not demonstrated how those judgments contradict those provisions in order for it to be said that they were decided in ignorance of the Constitution. I therefore agree with the respondents that the petitioners have failed to demonstrate that the decisions in **John Harun Mwau** and **Johnson Muthama** were made *per incuriam*.

21. I also note that the petitioners appear to imply that they have better legal firepower than the petitioners in the earlier cases. The danger in such a posture is that the courts will be taken in circles by litigious persons if the very useful doctrine of *per incuriam* is not fully enforced. The Court in **Morelle** (supra) foresaw the danger of wrong invocation of the *per incuriam* doctrine and warned that:-

> **"As we have already said, it is, in our judgment, impossible to fasten upon any part of the decision under consideration or upon any step in the reasoning upon which the Judgments were based and to say of it: "Here was a manifest slip or error". In our judgment, acceptance of the Attorney General's argument would necessarily involve the proposition that it is open to this Court to disregard an earlier decision of its own or of a Court of co-ordinate jurisdiction (at least in any case of significance or complexity) whenever it is made to appear that the Court had not upon the earlier occasion had the benefit of the best argument that the researches and industry of Counsel could provide. Such a proposition would, as it seems to us, open the way to numerous and costly attempts to re-open questions now held to be authoritatively decided."**

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.

23. Even though the parties did not address the issue of the applicability of the doctrine of *stare decisis*, the doctrine now strongly comes into play in light of the decision of the Court of Appeal in **John Harun Mwau v Independent Electoral & Boundaries Commission & Attorney General [2019] eKLR**.

24. The 10th Edition of Black's Law Dictionary at page 1626 defines the doctrine of *stare decisis* thus:-

> **"[Latin "to stand by things decided"] The doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation."**

In the same page the dictionary defines vertical *stare decisis* as:-

"The doctrine that a court must strictly follow the decisions handed down by higher courts within the same jurisdiction."

25. Applying the doctrine to the facts of this case, it means I am bound by the decision of the Court of Appeal on the issue.

26. The final submission by the respondents on the issue of educational qualifications was delivered by the 1st Respondent who contended that the petition was premature as it was challenging a Bill whose fate was unknown. The petitioners' response through their further affidavit sworn by the 1st Petitioner on 1st July, 2016 was that the Bill constituted a threat to the Constitution and it could be challenged pursuant to Articles 22(1) and 258(1) of the Constitution.

27. It is indeed correct that a Bill can be challenged if it threatens to violate constitutional rights and fundamental freedoms. However, once the Bill becomes law it is important that the petition be amended so as to reflect the correct position. In its journey through the parliamentary processes a Bill is likely to change its colour and texture. What it was at the beginning may not be what it is at the point it becomes law. Having said what I have already said on the applicability of the principles of *per incuriam* and stare decisis to this case, I no longer need to dwell anymore on this issue and I leave the issue at that.

28. It is only important to note that the issue of educational qualifications for those contesting political offices is no longer an issue available for determination by this court. That leaves me with the issue of the constitutionality of Section 43 of the Elections Act, 2011. Again the 1st Respondent through grounds of opposition dated 22nd February, 2017 filed in opposition to the petitioners' application dated 2nd January, 2017 opposed the petitioners' case on the grounds that Section 43(5) of the Elections Act, 2011 had been upheld as constitutional in **Nairobi High Court Petition No. 281 of 2014 Union of Civil Servants & another v IEBC & Attorney General** and **Nairobi High Court Petition No. 358 of 2014 Evans Gor Semelango v IEBC.**

29. The 1st Respondent also indicated that there was a pending petition on the same issue of Section 43(5) before the Employment and Labour Relations Court being **Kericho ELRC Petition No. 1 of 2017 Eric Cheruiyot v IEBC & 4 others**.

30. In **Union of Civil Servants & 2 others v Independent Electoral and Boundaries Commission (IEBC) & another [2015] eKLR; Petition No. 281 of 2014 as Consolidated with Petition No. 70 of 2015** one of the orders issued by the Court was that:-

"Section 43(5) of the Elections Act is unreasonable in its limitation of the rights of public officers under Article 38(3)(c) of the Constitution to vie in a by-election and to that extent only is hereby declared unconstitutional."

31. Section 43(5) of the Elections Act, 2011 was also addressed in the case of **Evans Gor Semelang'o v Independent Electoral & Boundaries Commission & another [2014] eKLR; Petition No. 358 of 2014** where it was held that the provision was applicable to the petitioner therein.

32. In **Erick Cheruiyot & 7 others v Independent Electoral and Boundaries Commission & 7 others [2017] eKLR; Kericho ELRC Petition No. 1 of 2017** the learned Judge, issued, among other orders, an order declaring Section 43(5) of the Elections Act, 2011 unconstitutional.

33. In light of what I have already stated in this judgment, Section 43(5) of the Elections Act, 2011 is therefore no longer available for the interrogation of this court as to its constitutionality.

34. This court is thus left to consider sub-sections (1), (2), (3), (4) and (6) of Section 43 of the Elections Act, 2011. All the other sub-sections of Section 43 were anchored upon sub-section (1) which bars public officers from openly engaging in partisan political activities. What did the petitioners have to say about the unconstitutionality of the said provisions? Let me reproduce the petitioners' pleadings in respect of the matter. Those pleadings are found at paragraphs 73 – 78 of the petition as follows:-

"73. The Petitioners also fault the constitutional validity of the limitations imposed by Section 43(5) of the Elections Act (No. 24 of 2011) on the participation of public officials in politics. The section requires civil servants to resign at least six months before the date of the election they wish to vie in.

74. The only political limitation on public officials contemplated by the Constitution is in Article 77(2) which provides that an appointed state officer cannot hold office in a political party.

75.While Articles 137(2)(b), 99(2)(a) and 193(2)(a) of the Constitution and Sections 23(2)(b), 24(2)(a) and 25(2)(a) of Elections Act state that public officers, other than a President, a Member of Parliament or a County Ward Representative, are not eligible for election into the stated public offices, they are inert Articles which get activated only by the presentation of nomination papers to the IEBC by a serving public officer.

76. Therefore, Section 43(5) of the Elections Act, which requires a public officer to resign six months before the election date are unreasonable and invalid since one does not need six months to fulfil the constitutional requirement that a candidate should not be a public officer.

77. It is the Petitioners' contention that as long as a public officer resigns before presentation of nomination papers to IEBC, he/she satisfies the constitutional requirement that a candidate shall not be a public officer, and is thus qualified to stand for election as per the Constitution, the supreme law.

78. The impugned six months requirement is also totally unreasonable as it does not distinguish between general elections which have a fixed calendar date and from which the six months can easily be calculated and by-elections which are random, are not possible to anticipate, and must be held within ninety days of the occurrence of the vacancy."

35. It is apparent that the petitioners' firepower was targeted at Section 43(5) of the Elections Act, 2011. This is confirmed by the further affidavit sworn on 1st July, 2016 in which the 1st Petitioner averred that:-

"21.That the limitations imposed by Section 43(5) of the Elections Act on public officers vying at elections for public office, requiring any public officer who intends to contest an election under the Act to resign from public office at least six months before the date of election, do not meet the threshold in Article 24 of the Constitution for limiting rights and fundamental freedoms. The six months requirement is arbitrary and unreasonable and, therefore, unconstitutional, null and void."

36. The fact that the petitioners were only concerned with subsection (5) of Section 43 of the Elections Act, 2011 is confirmed by their submissions dated 15th December, 2016 where at paragraphs 55 and 56 they confine their arguments to the unconstitutionality of Section 43(5) of the Elections Act, 2011.

37. From the pleadings and submissions of the petitioners it cannot be gleaned why the petitioners believed that Section 43(1), (2), (3), (4) and (6) of the Elections Act is unconstitutional. The petition is therefore without merit in respect of those provisions.

38. It is also noted that sub-sections (1), (2), (3) and (4) of the Elections Act, 2011 were deleted by Section 16(a) of Act No. 36 of 2016. The provisions are no longer part of the laws of Kenya and whether they were or they were not unconstitutional is no longer a subject of any legal debate worth judicial consideration.

39. In short, this petition lacks merit in its entirety. It must fail and it is dismissed.

40. The only issue that remains is the question of costs. Ordinarily, those who litigate in the public interest should not be burdened with costs. However, in this particular case, the petitioners commenced litigation on issues which they knew had been settled by the High Court. The respondents are public institutions and taxpayers' money was used to defend the petition. In the circumstances of this case, that money has to be recovered from the petitioners. I therefore award costs of the proceedings to the respondents against the petitioners.

Dated, signed and delivered at Nairobi this 27th day of February, 2020.

W. Korir,

Judge of the High Court