



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL PETITION NO. 368 OF 2018**

**OKIYA OMTATAH OKOITI.....1<sup>ST</sup> PETITIONER**

**NYAKINA WYCLIFFE GISEBE.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

**The Petitioners' Case**

1. Okiya Omtatah Okoiti (1<sup>st</sup> Petitioner) and Nyakina Wycliffe Gisebe (2<sup>nd</sup> Petitioner) through their petition dated 25<sup>th</sup> October, 2018 supported by the affidavit of the 1<sup>st</sup> Petitioner contend that the next general election should be held on 17<sup>th</sup> August, 2021. They aver that 17<sup>th</sup> August, 2021 is the second Tuesday of August in the fifth year as stated in Article 101(1) of the Constitution.

2. It is the petitioners' assertion that by holding and positing that the next general election will be held in 2022, the Attorney General (1<sup>st</sup> Respondent) and the Independent Electoral and Boundaries Commission (2<sup>nd</sup> Respondent) are threatening to violate Articles 1(1); 2(1),(2) & (3); 3 (1); 4(2); 10; 38(2); 47; 73; 101(1); 129; 149(1) &(2); and 259(1) of the Constitution.

3. The petitioners are therefore asking this Court to grant them declarations and orders as follows:

**a. A Declaration be and is hereby issued that the next General Elections after 2017 shall be on August 17, 2021;**

**b. The Honourable Court be pleased to issue an order prohibiting the respondents and their agents from declaring or stating in any way howsoever that the next General Elections after 2017 shall be held in the year 2022;**

**c. The Honourable Court be pleased to issue an order compelling the 1<sup>st</sup> and 2<sup>nd</sup> respondents to bear the costs of this petition;**

**d. The Honourable Court be pleased to issue any other or further remedy or relief that the Honourable Court shall deem fit to grant in the interest of justice in the circumstances of this petition.**

**The 1<sup>st</sup> Respondent's Case**

4. The 1<sup>st</sup> Respondent filed grounds of opposition dated 4<sup>th</sup> February, 2019 opposing the petition on the grounds that the same does not raise any justiciable controversy. Additionally, that in view of the provisions of Article 259(4)(c) of the Constitution, the petitioners' computation of time is erroneous and misinformed.

5. It is further the 1<sup>st</sup> Respondent's contention that although Articles 101(1), 177(1), 180(1) and 136(2) provide for the date of election of Members of Parliament, Members of County Assembly, County Governors and the President to be the second Tuesday in August in every fifth year, Article 177(4) provides that a County Assembly is elected for a term of five years. Therefore, a broad literal and purposive interpretation of the Constitution would denote that the term of office and date of the election for the aforementioned elective positions

would be similar as they are filled on the same date.

### **The 2<sup>nd</sup> Respondent's Case**

6. The 2<sup>nd</sup> Respondent by way of a replying affidavit sworn on 15<sup>th</sup> February, 2019 by its Acting Director of Legal Services, Chrispine Owiye, avers that a purposive and harmonious interpretation of Articles 101(1), 136(2)(a), 180(1) and 177(1)(a) & (4) would mean that the election of the President, Governors, Members of Parliament and Members of County Assemblies shall take place on the same day. Moreover, elections for the various seats are to be held on the second Tuesday in August in every fifth year and the term of office of the elected leaders is five years.

7. The 2<sup>nd</sup> Respondent states that agreeing with the petitioners' interpretation of the cited constitutional provisions would mean that the general election would take place on 10<sup>th</sup> August, 2021, hence reducing the terms of office of the President, Governors and Members of Parliament to four years. It is, however, the 2<sup>nd</sup> Respondent's view that a purposive interpretation of the Constitution means that the terms of office should be similar for all elective positions as all the elections are held on the same date.

8. The 2<sup>nd</sup> Respondent invites the Court to give a harmonised interpretation of the constitutional provisions relating to elections and hold that the next general election will be held on the second Tuesday of August in 2022.

### **The Petitioners' Submissions**

9. The petitioners filed submissions dated 18<sup>th</sup> February, 2019 and urged that the repeat presidential election held on 26<sup>th</sup> October, 2017 did not have any bearing on and did not vary the date of the next general election of Members of Parliament and is therefore immaterial to the computation of the date for the next general election.

10. The petitioners argue that timelines set in the Constitution are absolute or immutable. This argument is supported by several cases including **Chief Doctor Felix Amadi & another v Independent National Electoral Commission (INEC) & others S.C. of Nigeria Appeal No. 476 of 2011**; **Ferdinand Waititu v IEBC & others [2013] eKLR**; and **Okiya Omtatah Okoiti v Attorney General & Independent Electoral and Boundaries Commission [2013] eKLR**.

11. It is submitted that the petitioners have identified a threaten contravention of the Constitution, being the narrative that the next general election will be held on the second Tuesday of August 2022 which will be the sixth year from the general election held on 8<sup>th</sup> August, 2017. It is therefore urged that the Court in exercising its judicial authority should ensure that the purpose and principles of the Constitution are protected and promoted. The petitioners buttress their arguments by citing the decisions of **In Re the Matter of the Interim Independent Electoral Commission (supra)**; and **Dr Christopher Ndarathi Murungaru v A.G. & another, Civil Application No. Nai. 43 of 2006 (24/2006)**.

### **The 1<sup>st</sup> Respondent's Submissions**

12. The 1<sup>st</sup> Respondent by way of submissions dated 28<sup>th</sup> October, 2019 contend that the petitioners' computation of the election years is incorrect and based on a literal arithmetic interpretation of Article 101(1) of the Constitution. Relying on the decisions in **Center for Rights Education and Awareness & 2 others v John Harun Mwau & 6 others [2012] eKLR**; and **The Hon. Attorney General & Anor v Andrew Kiplimo Sang Muge & 2 others [2017] eKLR**, and the provisions of Articles 101(1), 102(1), 136(2)(a), 177(1)(a) and 180(1), the Attorney General submits that the next general election will be held in 2022 being the fifth year since the 2017 general election.

13. It is submitted that in applying the rule on the computation of time provided under Article 259(5)(c) of the Constitution each election year begins on the second Tuesday of August and ends on the eve of the second Tuesday in August of the subsequent year. It is therefore submitted that the fifth year, in this case, would run from 10<sup>th</sup> August, 2021 to 8<sup>th</sup> August, 2022.

### **The 2<sup>nd</sup> Respondent's Submissions**

14. The 2<sup>nd</sup> Respondent filed submissions dated 12<sup>th</sup> June, 2020 asserting that it is the only institution clothed with the constitutional mandate of conducting and supervising referenda and elections to any elective body, and therefore the petitioners are asking this Court to usurp its powers. It is further contended that the petitioners have not demonstrated any violation of or threatened violation of the fundamental rights and freedoms or breach of the law. In that regard, the 2<sup>nd</sup> Respondent relies on the case of the **International Centre for Policy and Conflict & 5 others v Attorney General & 5 others [2013] eKLR**.

15. It is further submitted that the petition does not present any real dispute as the petitioners have not demonstrated any abuse or misuse of power by the respondents to warrant the exercise of the Court's jurisdiction. Reliance is placed on the decision in **Nyando Power Techniques Limited v Nairobi City County & another [2016] eKLR**.

16. The 2<sup>nd</sup> Respondent contends that a literal reading of the Articles 101(1), 136(2)(a), 180(1) and 177(1)(a) of the Constitution would mean that the next general election would be held on 10<sup>th</sup> August, 2021. It is, nevertheless, the 2<sup>nd</sup> Respondent's case that such an interpretation would reduce the term of office of the President, Members of Parliament and Governors to four years. According to the 2<sup>nd</sup> Respondent, a purposive and harmonious interpretation of the Constitution would lead to the conclusion that the election of Members of Parliament, the President, Governors and Members of County Assemblies shall take place on the same day, being the second Tuesday of August of every fifth year. Further, that the term of the holders of these elective offices should be five years. The Court of Appeal decision in **Nderitu Gachagua v Thuo Mathenge & 2 others [2013] eKLR** is relied on to buttress this point.

## **The Analysis**

17. Upon perusal of the pleadings and submissions of the parties, I find that the only issue for the determination of this Court is whether the next general election will be held on 7<sup>th</sup> August, 2021 or 9<sup>th</sup> August, 2022.

18. The petitioners contend that in computing the time between the general election held on 8<sup>th</sup> August, 2017 and the date of the next general election, the respondents have misinterpreted the provisions of the Constitution, particularly Article 101(1).

19. On their part, the respondents contend that by virtue of the provisions of Article 259(4)(c) of the Constitution, the petitioners' computation is erroneous and misinformed, and the petition does not therefore raise any justiciable controversy. The 2<sup>nd</sup> Respondent further argues that Articles 101(1), 136(2)(a), 180(1) and 177(1)(a) & (4) of the Constitution must be interpreted in a purposive and harmonious manner, which would mean that the election of the President, Governors, Members of Parliament, Members of County Assemblies shall take place on the same date. Moreover, that the election is to be held on the second Tuesday in August in every fifth year and the term of office of these elected officials is five years.

20. The provisions of the Constitution concerning elections state as follows:

### **101. Election of members of Parliament**

**(1) A general election of members of Parliament shall be held on the second Tuesday in August in every fifth year.**

### **136. Election of the President**

**(1) The President shall be elected by registered voters in a national election conducted in accordance with this Constitution and any Act of Parliament regulating presidential elections.**

**(2) An election of the President shall be held—**

**(a) on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year; or**

**(b) in the circumstances contemplated in Article 146.**

### **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.**

### **180. Election of county governor and deputy county governor**

**(1) The county governor shall be directly elected by the voters registered in the county, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year.**

21. This case concerns the conflicting interpretation of the above provisions of the Constitution by the petitioners on the one hand and respondents on the other hand. The Court is therefore called upon to engage its interpretive skills in this matter. In interpreting the provisions of the Constitution, this Court is bound by Article 259(1) which states that:

### **259. Construing this Constitution**

**(1) This Constitution shall be interpreted in a manner that—**

**(a) promotes its purposes, values and principles;**

**(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;**

**(c) permits the development of the law; and**

**(d) contributes to good governance.**

22. The respondents' argument is that the interpretation of the petitioners on the date of the next general election does not comply with the requirement that the Constitution should be interpreted in a purposive and harmonious manner. This, they say, is because the petitioners' literal reading of the constitutional requirement for a general election to be held on the second Tuesday in August in every fifth year would mean that the term of office of the President, Governors and Members of Parliament from 8<sup>th</sup> August, 2017 to 8<sup>th</sup> August, 2021 would be

four years. However, it is proposed that a harmonised interpretation of the Constitution would mean that all elected officials should hold office for a fixed term of five years.

23. The Court of Appeal in **Attorney General & another v Andrew Kiplimo Sang Muge & 2 others** [2017] eKLR highlighted one of the principles for interpreting the Constitution as follows:

**“Further the Constitution or a statute ought to be construed in accordance with the intention of Parliament or the people. This Court, relying on Halsbury’s Laws Of England, 4th Edition (Reissue), Butterworths, 1995, VOL. 44 (1), paragraph 1372 in the County Government Of Nyeri & Another V. Cecilia Wangechi Ndungu, Civil Appeal No. 2 of 2015, reiterated this principle stating that: -**

**‘The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore, the object in construing an Act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole in its context ...**

**It is one of the linguistic canons applicable to construction of legislation that an Act is to be read as a whole, so that an enactment within it is to be treated not as standing alone but as falling to be interpreted in its context as part of the Act. The essence of construction as a whole is that it enables the interpreter to perceive that a proposition in one part of the act is by implication modified by another provision elsewhere in the Act ...”**

24. It is evident from the language of the provisions of the Constitution that the drafters intended that all elected officials hold tenure for the same number of years, being five, and that they must be elected on the same day. Article 259(5)(c) of the Constitution provides for construction of time as follows:

**(5) In calculating the time between two events for any purpose under this Constitution, if the time is expressed—**

**(c) as years, the period of time ends at the beginning of the date of the relevant year that corresponds to the date on which the period began.**

25. This provision has been interpreted by the Court of Appeal in **Attorney-General & another v Andrew Kiplimo Sang Muge & 2 others** (*supra*). Through the same decision, the Court went ahead and established the date of the next general election as follows:

**“With the formula and applying Article 259 (5) (c) aforesaid the question of subsequent elections becomes an easy one to determine. Applying it, the second Tuesday in August, in the fifth year from 4<sup>th</sup> March, 2013 fell on 8<sup>th</sup> August, 2017.**

**’The fifth year’ would mean that each election year begins in August every second Tuesday and ends on the eve of the second Tuesday in August of the subsequent year to make 1 year. Therefore, counting 365 days for 1 year and taking into consideration the exact month from one year to the subsequent year, the 1st year would be counted from 8<sup>th</sup> August 2017 to 8<sup>th</sup> August 2018; 2<sup>nd</sup> year from 8<sup>th</sup> August 2018 to 8<sup>th</sup> August 2019; 3rd year from 8<sup>th</sup> August 2019 to 8<sup>th</sup> August 2020; 4th year would be from 8<sup>th</sup> August 2020 to 8<sup>th</sup> August 2021; 5th year would be from 8<sup>th</sup> August 2021 to 8<sup>th</sup> August 2022. ‘The second Tuesday in August in every fifth year’, after the elections of 8th August, 2017 would take the next general election date to 11th August 2022.”**

26. This Court is bound to interpret the Constitution in a holistic and purposive manner in order to promote its purpose, values and principles. The Articles which provide the dates for the election of the President, Governors, Members of Parliament and Members of County Assemblies must be interpreted in a manner which ensures that all elected officials benefit from serving full terms, and are also elected on the same date.

27. The term of office of a President, a Governor, a Member of Parliament and a Member of the County Assembly is five years unless otherwise terminated in accordance with the law. Agreeing with the petitioners’ arguments will violate the Constitution as it would reduce the terms of the current holders of those positions to four years. Indeed reading the Constitution as proposed by the petitioners will result in absurdity thereby going against the principle established by the Court of Appeal in **Center for Rights Education and Awareness & 2 others v John Harun Mwau & 6 others** [2012] eKLR that the court should avoid a construction that produces an absurd result.

28. Additionally, this Court is bound by the determination of the Court of Appeal that the next general election will take place in August, 2022. The 9<sup>th</sup> day is the second Tuesday of August in the year 2022 and that is the date the next general election will be held.

29. It is indeed contrary to the letter and the spirit of the Constitution for the petitioners to state that 17<sup>th</sup> August, 2021, which is the third Tuesday of August, 2021, is the correct date for holding the next general election. The general election is to be held on the second Tuesday, and not the third Tuesday, in August of the fifth year after the previous general election. I am therefore in agreement with the respondents and the determination of the Court of Appeal in **Attorney-General & another v Andrew Kiplimo Sang Muge & 2 others** (*supra*) that the next general election will be held on the second Tuesday of August in the year of our Lord 2022.

30. The inevitable outcome is that this petition stands to be dismissed and is indeed dismissed. Had the petitioners done some minimal research, they would have established that the issue they have raised in this petition was determined on 10<sup>th</sup> November, 2017 by the Court of Appeal in **Attorney-General & another v Andrew Kiplimo Sang Muge & 2 others** (*supra*) almost a year before they filed their petition on 26<sup>th</sup> October, 2018. For this reason, the petitioners must meet the costs of the respondents as they have engaged them in futile litigation at

unnecessary expense to the taxpayers of this country. I therefore award the costs of the proceedings to the respondents against the petitioners.

**Dated, signed and delivered virtually at Nairobi this 26<sup>th</sup> day of November, 2020.**

**W. Korir,**

**Judge of the High Court**