



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.116 OF 2019

IN THE MATTER OF ARTICLES 2,3,10,19,20,21,22,23,24,27,28,36,38,41 AND 43 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF NATIONAL LAND COMMISSION ACT

AND

IN THE MATTER OF NATIONAL LAND COMMISSION

AND

IN THE MATTER OF NATIONAL POLICE SERVICE COMMISSION ACT

AND

**IN THE MATTER OF ALL LAWS DISCRIMINATIVE TO FORMER MEMBERS OF
PARLIAMENT AND COUNTY ASSEMBLIES AND CONTESTANTS OF POLITICAL ELECTIONS**

BETWEEN

FOPA ASSOCIATION KENYA.....PETITIONER

Suing through its Officials

HON. DR. HUMPHREY KIMANI NJUGUNA - Chairman

HON. KINOTI GATOBU – Secretary

- VERSUS -

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE KENYA LAW REFORM COMMISSION.....2ND RESPONDENT

THE NATIONAL ASSEMBLY.....3RD RESPONDENT

THE SENATE.....4TH RESPONDENT

AND

COUNTY ASSEMBLIES FORUM.....1ST INTERESTED PARTY

JUDGMENT

1. **M/s FOPA ASSOCIATION KENYA** through a petition dated 22nd March 2019 and filed on even date pursuant to Articles 2,3,10,10,20,21,22,23,24,27,28,36,38,41 and 43 of the Constitution of Kenya seeks the following orders:-

- a) A declaration that Section 8(3) (c) of National Land Commission Act and Section 5 (5) (a) of the National Police Service Commission Act are unconstitutional, null and void.
- b) A declaration that Section 8(3) (c) of National Land Commission Act and Section 5 (5) (a) of the National Police Service Commission Act are unconstitutional, null and void for infringing the rights to equality, dignity, social-economic rights and non-discrimination.
- c) A declaration that Section 8(3) (c) of National Land Commission Act and Section 5(5) (a) of the National Police Service Commission Act are unconstitutional, null and void for being otherwise unreasonable and unjustifiable in an open democratic society based on human dignity, equality and freedom.
- d) A declaration that Section 8(3) (c) of National Land Commission Act and Section 5(5) (a) of the National Police Service Commission Act are unconstitutional, null and void for failure to comply with provisions of Article 24 of the Constitution.
- e) A declaration that any law that disqualifies a person from employment or recruitment as public officer by virtue of having contested for a seat of Member of Parliament, County Assembly or as Governor is unconstitutional, null and void.
- f) An order prohibiting the Respondents by themselves, their employees, agents, servants or any government agency office or organ from implementing recognizing and/or complying with the impugned laws namely Section 8(3) (c) of National Land Commission Act and Police Service Commission Act and Section 5(5) (a) of the National Police Service Commission Act.
- g) An order prohibiting the Respondents by themselves, their employees, agents, servants or any government agency office or organ above from barring or in any manner disqualifying any applicant for recruitment as a member of National Land Commission and National Police Service Commission on the ground of having previously been a member of Parliament, County Assembly, a Governor or having contested for Parliamentary, County Assembly or Governors' election.
- h) Any other or further order and or reliefs as the Honourable Court may deem fit and just.
- i) Costs of this Petition.

2. The petition is supported by the petitioner's affidavit in support sworn by Hon. Dr. Humphrey Kimani Njuguna sworn on 2nd March 2019 and supplementary affidavit sworn on 6th June 2019.

3. The 1st and 2nd Respondents did not file any response, however the 3rd Respondent filed a Replying affidavit dated 10th June 2019 and sworn on the even date.

4. The 4th Respondent filed grounds of opposition combined with brief submissions.

Petitioner's Case

5. The petitioner is an associate whose membership comprises former members of parliament, both senate and National Assembly, former Governors, speaker and members of County Assembly. The Respondents are the stakeholders, who are directly affected by the orders sought or have mandate over the issue involved in the petition.

6. The petitioner's complaint is against the laws that bar former members of parliament, Governors and County Assemblies from recruitment as commissioners of the National Land Commission, National Police Service Commissioner or any other government agency solely on the basis of them having been elected or having stood for election in the preceding five (5) years. The petitioner contends the provision of section 8(3) (c) of the National Land Commission Act and National Police Service Commission Act section 5(5) (a) that bar its members from being recruited in the commissions violate the constitution and are therefore null and void.

1st and 2nd Respondents Response

7. The 1st and 2nd Respondents did not file any response but relied on counsel submissions at the time of hearing.

The 3rd Respondent's Case.

8. The 3rd Respondent filed a Replying affidavit sworn by Michael Sialai, EBS, on 10th June 2019. The 3rd Respondent contend, that the National Assembly's mandate to enact, amend and repeal laws is derived from the constitution and, that the petitioner's prayers in the petition threatens the legislative role of parliament and specifically the National Assembly, derived from Articles 1(1), 94, and 95 of the

constitution and as such the petition seeks to restrict the National Assembly from carrying out its constitutional mandate.

9. It is further 3rd Respondent's contention, that in enacting the National Land Commission Act and the National Police Commission Act, the 3rd Respondent was exercising, its mandate under Articles 94,95 and 109 of the constitution, which mandates parliament to enact, amend or repeal any law through Bills passed and asserted to by the President.

10. The 3rd Respondent further contends the impugned sections are not unconstitutional nor discriminative, urging the petitioner's petition contravenes the principle of presumption of constitutionality of legislation enacted by parliament.

The 4th Respondent's Case

11. The 4th Respondent filed grounds of opposition dated 6th June 2019 in opposition of the petitioner's petition. The same raises similar issues to the ones raised by the 3rd Respondent on the role of parliament and senate; urging that the senate represents the counties, and serves to protect the interest of counties and their governments and that its roles are set out in Article 96 of the Constitution of Kenya, which include, amongst others;

a) Participate in law making function of Parliament by considering, debating and approving Bills concerning Counties as provided in Article 109 and 113;

b) Determines the allocation of national revenue among counties revenue among counties, as provided in Article 217 and exercises oversight over national revenue allocated to county governments.

c) Exercising oversight over state organs.

12. The 4th Respondent contends, that the impugned sections are not unconstitutional nor are they discriminative. The 4th Respondent further urge the petition contravenes the principle of presumption of constitutionality of legislation enacted by parliament. It is further urged the orders sought are tantamount to asking the Honourable court to amend or repeal a piece of legislation.

Analysis and Determination

13. I have very carefully perused the petition, the Replying affidavit, counsel rival submissions both written and oral as well as the authorities relied upon by both rivals parties, and from the above the issues arising for consideration can be summed up as follows:-

a) Whether the impugned sections 8(3) of the National Land Commission Act and Section 5(5) (a) of the National Police Service Commission Act are unconstitutional, null and void.

14. **Article 248 of the constitution** sets out thirteen (13) independent commissions, which include the National Land Commission and the National Police Service Commission. Article 250(3) of the constitution provides, that to be appointed to commissions and independent offices, a person shall have the specific qualifications required by the constitution or national legislation.

15. Pursuant to Article 250(3) of the constitution, the National Land Commission Act 2012 under section 8, provides the qualification for appointment as a chairperson or member of the commission. **Section 8(3) (c) of the National Land Commission Act** provides:-

"[3) A person shall not be qualified for appointment as the chairperson or a member of the Commission if the person-

(c) Has at any time within the preceding five years, held or stood for election as a member of Parliament, a county assembly or a governor"

16. The functions of the National Land Commission are set out in Article 67 as follows:-

"a) To manage public land on behalf of the national and county governments;

b) To recommend a national land policy to the national government;

c) To advise the national government on a comprehensive programme for the registration of title of land throughout Kenya;

d) To conduct research related to land and the use of natural resources and make recommendations to appropriate authorities;

e) To initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;

f) To encourage the application of traditional dispute resolution mechanisms in land conflicts;

g) To assess tax on land and premiums on immovable property in any area designated by law; and

h) To monitor and have oversight responsibilities over land use planning throughout the country."

17. It should be noted, that the functions, of the National Land Commission has some quasi-judicial functions. It has judicial functions to make determination and adjudicate disputes which relate to land. I therefore find as such, the impugned provisions are connected to a legitimate purpose that:-

"i) To ensure political neutrality of the persons entrusted with the responsibility of managing public land on behalf of the National and County Government;

ii) To guard against possible (whether real or perceived) political interference by persons who may be inclined towards a certain political disposition;

iii) To maintain public trust and confidence in the institution charged with the task of managing public land;

18. On the other hand **section 4 of the National Police Service Act** prescribes the qualifications for appointment as a chairperson or member of the commission. **Section 5(5) of the National Police Service Commission Act** states as follows:-

"[5] A person shall not be qualified for appointment as a chairperson or member if the person-

(a) Is or has been at any time within the previous five years a Member of Parliament or a county assembly."

19. The powers, mandate and responsibilities of National Police Service Commission under **Article 246 of the constitution** include recruitment and appointment of persons to hold or act in office in the service. The commission also is entrusted in determining promotions and transfers within the National Police Service, and also exercises disciplinary control over and removes persons holding or acting in offices with the service. **Section 73(1) (a)** of the constitution requires objectivity and impartiality decision making.

Section 73(1) (a) of the Constitution provides:-

"(1) Authority assigned to a State officer—

(a) Is a public trust to be exercised in a manner that—

(i) is consistent with the purposes and objects of this Constitution;

(ii) Demonstrates respect for the people;

(iii) Brings honour to the nation and dignity to the office; and

(iv) Promotes public confidence in the integrity of the office."

Under **Article 232 (1) (c) of the constitution** is a list of responsive, prompt, effective, impartial and equitable provision of service, as the principles and values of public service.

20. It is therefore the contention of the Respondents that the impugned section of the National Land Commission and the National Police Service Commission are necessary to maintain independence and impartiality of the commission. It is further their contention the impugned sections advances a compelling public interest to manage independence of the commissions free from political persuasions effectively as opposed to individual interest of persons who may be interested in looking for an opportunity to maintain their political party allegiance and continue to serve in independent commissions. It is thus submitted by the Respondents such scenario goes against the spirit, purpose and intention of the legislation to establish fiercely independent institutions. It is further urged the provision satisfy the ethos set out under **Article 24 of the constitution** in that the limitation is provided under the law and that the same is reasonably justifiable in modern democratic society.

21. In the case of **David Mwaure Waihiga vs Public Service Commission & 4 others [2017] eKLR** the Court held as follows when the constitutionality of Section 5(3) (a) of the Ethics and Anti-Corruption Commission Act which provides:- "A person shall not be qualified for appointment as a chairperson or as a member if the person-

(a) Is a member of a Political Party" was challenged on grounds that the said provision is discriminatory, unfair, irrational, disproportionate and violates the doctrine of legitimate expectation.

"It is my view that the impugned provision is reasonable and valid and that the restriction serves public interest. The provision is logically related to the legitimate public concerns of ensuring that the war against corruption is fought gallantly on all fours including shielding the commissioners from political interference."

"The Court further stated that "A law aimed at promoting the legitimate public interest is fair, reasonable, and is in my view consistent with the provisions of the constitution particularly Article 232 on the values and principles of public service which includes impartiality."

22. Further in the case of **Nelson Andayi Havi vs Law Society of Kenya & 3 others [2018] eKLR** the Court stated that:-

"The provisions in question advance a compelling public interest to ensure the affairs of the Law Society are placed under the management of the most qualified persons, which is a legitimate interest. A law aimed at promoting legitimate public interest is fair, reasonable, and is in my view consistent with the provisions of the Constitution. The provisions of the constitution must be read and interpreted in a wholesome manner. The right to contest for the leadership of the first Respondent must be read and appreciated with the constitutional provisions that prescribe values and principles of public service, leadership and integrity and national values and principles of governance."

23. The petitioner in challenging the impugned sections of the National Land Commission Act and the National Police Service Commission Act has referred to parent Articles 67 and 246 of the constitution which he urges do not have similar provisions to the offending sections. A quick perusal of the two Articles clearly confirms that they do not contend provisions which are similar to the impugned sections of the two Acts above. There are 13 independent commissions as per Article 248 of the Constitution of Kenya, and it is clear that where the makers of the constitution wanted to disqualify certain category of persons from membership of the independent commission, it is expressly stated so, by inserting the relevant provisions directly as can be found under **Article 88(1) (2) (a) (i) (ii) and (b)** of the constitution which provides:-

"(1) There is established the Independent Electoral and Boundaries Commission.

(2) A person is not eligible for appointment as a member of the Commission if the person—

(a) Has, at any time within the preceding five years, held office, or stood for election as—

(i) A member of Parliament or of a county assembly; or

(ii) A member of the governing body of a political party; or

(b) Holds any State office."

Similarly under **Article 233(3) (a) and (b)** of the constitution it is provided as follows:-

"(3) Subject to clause (4), a person is not eligible for appointment as a member of the Commission if the person—

(a) Has, at any time within the preceding five years, held office, or stood for election as—

(i) A member of Parliament or of a county assembly; or

(ii) A member of the governing body of a political party; or

(b) Holds any State office."

There is therefore clear and unambiguous provisions disqualifying certain category of persons under Independent Electoral and Boundaries Commission and the Public Service Commission as provided under the relevant Articles but there is none for National Land Commission and the National Police Service Commission in the constitution.

24. The petitioner contends, that **Article 10 of the constitution** deals with National Values and Principles of governance which bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the constitution. It sets out the national values and principles of governance which include, patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice; inclusiveness, equality, human rights, non-discrimination and protection of marginalized and the following other Articles; Article 19(2), which provides, that the purpose of recognizing and protecting human rights and fundamental freedom. Article 19(3) which provides the rights and fundamental freedoms under the Bill of rights belong to each individual and that are not granted by state; Article 24(1) and (2) which provides that a right in the Bill shall not be limited except by law which must state the nature and extent of the limitation; as well as Article 25 which provides the rights to freedom from torture; cruelty, inhuman and/or degrading treatment in particular shall not be limited; has been violated by the provisions of the impugned sections in the two acts of parliament.

25. The petitioner further contend Article 27(1) which provides that every person is equal before the law and has the right to equal protection and equal benefit before the law; Article 27(2) which provides equality which includes the full enjoyment of all rights and fundamental freedoms; Article 27(3) which provides that women and men have the right to equal treatment, including right to equal treatment, equal opportunities in political, economic, cultural and social spheres, Article 27(4) which provides that the state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status; ethnic or social origin, colour, age, disability, religion, conscience; belief; culture; dress, language or birth; Article 28 which provides, that every person has inherent dignity and the right to have dignity respected and protected as well as Articles 36, 38, Article 41, Article 43(1) has been violated.

26. The petitioner in this petition contends, that the above-mentioned constitutional rights and fundamental freedoms have been abridged by impugned provisions of the National Land Commission Act and National Police Service Commission Act. The section complained of do not have support from the constitutional provisions of Article 67 and Article 246 being the Articles which establishes the National Land Commission and National Police Service Commission. I find the conduct and action of the Respondents in enacting the impugned sections

did not take into consideration their impacts on the rights and fundamental freedoms as given under the Bill of rights. The impugned section do indeed depart and derogate from the National values of human dignity, equity, social justice, inclusiveness, equality, human rights and non-discrimination as provided by Article 10(2) (b) of the constitution.

27. **Article 24 of the constitution** provides:-

"(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."

28. The impugned sections of the two Acts failed to satisfy the conditions as set out under Article 24 of the constitution. The impugned sections did not comply with mandatory provision of Article 24 of the constitution by failing to expressly indicate that certain rights and freedoms were being curtailed. The limitation has not been demonstrated to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The sections have within the preceding five years, banned people who had held or stood for election as Member of Parliament, a County Assembly or a Governor being disqualified for appointment as a chairperson or a member of commission. No reasonable reason is given for such limitation nor is there justification for the same. There is further no disqualification for petitioner's members from being qualified for appointment as chairperson or a member of any other commissions. I find the impugned sections violate the petitioner's members rights of equality before the law, right to equal opportunities in political, economic and social spheres under Article 27; the right of inherent dignity and the right to have dignity respected and protected; freedom to association as provided by Article 36; the right for every citizen to make political choices under Article 38; right to fair labour practices under Article 41, economic and social rights under Article 43. I find that petitioner's constitutional rights have been violated, infringed and contravened without reasonable and justifiable limitation as provided under Article 24 of the Constitution of Kenya 2010, to the extent of banning citizen who vie for parliamentary, seat County Assembly and Governor's positions from qualifying for recruitment in the National Land Commission and National Police Service Commission. The vying for such recruitment is not automatic recruitment, as I believe, there are requirements to be met and there is also a process of vetting.

29. The impugned section of the National Land Commission Act and National Police Service Commission Act, indirectly deprive the citizens their constitutional rights to vie for election until after five (5) years due to the existing discriminatory sections on the two acts. Having held the position of being an **MP, MCA, Governor** or even having contested for such position having not been criminalized in the Country to justify barring any one to vie for the recruitment; I find that to be discriminatory and unjustified. That even after 5 years one remain an **ex-MP, ex-MCA, ex-Governor** or a unsuccessful contestant and allowing one to contest after 5 years and not before has no justification. The position do not change. I find that the limitation is unreasonable and unjustifiable. It is unjustified to lumping together electoral contestant with felons, bankrupts and constitutional violators, so I find that upholding or maintaining the impugned law would be a direct threat to expansion of democracy as it would mean an electoral contestant would subsequently became unfit for public office for simple reason of having contested for an electoral post in the Republic of Kenya.

30. The import of **section 8(3) (c) of the National Land Commission Act and section 5(5) of the National Police Service Commission Act**, is that those who had exercised their constitutional and democratic rights to vie for constitutional elections are now demonized for subsequent 5 years for no offence but for exercising their constitutional and democratic right to take part to seek elective post. The import of the two sections is further that the petitioner's members are lumped together with convicted criminals; felons, bankrupts, constitutional violators for a period of five years; a group that is disqualified from applying for membership of the two commissions.

31. The Respondents urge, that not every differentiation amounts to discrimination, urging in such situation, it is important to look not only the impugned legislation, but what has created a distinction that violates the right to equality but also to larger social, political and legal context. That it is only by examining the larger context that a court can determine whether differential treatment results in equality. The Respondent position is, that the two acts preserving the qualifications for person to be appointed to the commission are aimed at insuring their independence from political party inclination, and as such this cannot be said to be unconstitutional and the suspension is only for 5 years.

32. The reasons urged by the Respondents are not reasonable and justifiable. Taking into account, that the recruitment of members of the two commissions are recruited as individuals and not members of political parties; that all former **MPs, Governors, MCA** and unsuccessful contestants are not all from political parties as the Republic of Kenya allows independent candidates to contest for political positions. That means that there is independence from political party inclination. Secondly what do five years have to do with independence from political party inclination? I find no basis of saying after five years are over, one would be independent from a political party inclination (if one was of such character). Do those former **MPs, MCA, Governors** and unsuccessful contestants who have promptly been appointed to other commissions or given big political positions in sensitive commissions not have the influence from their political party inclination? Why is it that the ex-MPs, Governors, MCA and unsuccessful contestants are barred not from vying for recruitment in other commissions, if one can claim there is no discrimination but only in the two commissions?

33. In view of the foregoing I am not convinced by the Respondents, that the impugned provisions of the two acts do not violate the petitioner's rights to property; the petitioner's rights to equality, dignity, social-economic rights; non-discrimination or any other right for that matter. I agree the petitioner's members can apply for other public offices that do not have restrictions but find the restrictions in these two commissions are unreasonable and unjustified. I further find allowing petitioner's members to vie for the recruitment in the two commissions does not amount to right to occupy and hold the office but to exercise their constitutional rights to vie for recruitment, whether they would succeed or not is another issue as they would have exercised their constitutional rights.

34. The upshot is that I find the offending provisions of the two acts complained of are discriminative to the petitioner's members, they degrade their dignity and deprive them their economic and social right and freedoms. I find that the impugned provisions will curtail the number of those seeking electoral political positions and deal a major blow to democracy and constitutional space which is still in its emerging stage in Kenya. The petitioner contend that they are free to apply as members of the following commissions:-

"a) Kenya National Human Rights and Equality Commission;

b) Parliamentary Service Commission;

c) Commission on Revenue Allocation;

d) Salaries and Remuneration Commission;

e) Teachers Service Commission; and

f) Judicial Service Commission;

g) Commission on Administrative Justice."

There is no logical explanation as to why some of the petitioner's members have successfully joined the independent policy oversight Authority and not the other two.

35. Having considered the petition, the response and counsel submissions, I am convinced that the impugned provisions are grave violation of fundamental rights to the petitioner's members as well as all other contestants of public elections. The impugned provision; in my view, if let to stand would be a serious threat to democratic space in our country; in situation where thousands and thousands of contestants vie for elections in which only just a minimal number win and the rest are condemned as losers, and all contestants and even the winners are barred from vying for recruitment in the two commissions for 5 years. It is further of great interest to note even in more crucial commissions, are led and/or have former MPs, Parliamentarian as chairperson and Commissioners, but people who should be appointed to such positions should all pass integrity test to counter corruption in the commissions. It should not be a place for rewarding friends to authority and the corrupt ones.

36. I have considered the petition, the Respondents Replying affidavit and grounds of opposition and rival submissions and I have found the petitioner's petition to be meritorious. I proceed to that extent to make the following orders:-

A) A declaration be and is HEREBY issued that Section 8(3) (c) of National Land Commission Act and Section 5 (5) (a) of the National Police Service Commission Act are unconstitutional, null and void.

B) A declaration be and is HEREBY issued that Section 8(3) (c) of National Land Commission Act and Section 5 (5) (a) of the National Police Service Commission Act are unconstitutional, null and void for infringing the rights to equality, dignity, social-economic rights and non-discrimination.

A declaration be and is HEREBY issued that Section 8(3) (c) of National Land Commission Act and Section 5(5) (a) of the National Police Service Commission Act are unconstitutional, null and void for being otherwise unreasonable and unjustifiable in an open democratic society based on human dignity, equality and freedom.

C) A declaration be and is HEREBY issued that Section 8(3) (c) of National Land Commission Act and Section 5(5) (a) of the National Police Service Commission Act are unconstitutional, null and void for failure to comply with provisions of Article 24 of the Constitution.

D) A declaration be and is HEREBY issued that any law that disqualifies a person from employment or recruitment as public officer by virtue of having contested for a seat of Member of Parliament, County Assembly or as Governor is unconstitutional, null and void.

E) An order be and is HEREBY issued prohibiting the Respondents by themselves, their employees, agents, servants or any government agency office or organ from implementing recognizing and/or complying with the impugned laws namely Section 8(3) (c) of National Land Commission Act and Section 5(5) (a) of the National Police Service Commission Act.

F) An order be and is HEREBY issued prohibiting the Respondents by themselves, their employees, agents, servants or any government agency office or organ above from barring or in any manner disqualifying any applicant for recruitment as a member of National Land Commission and National Police Service Commission on the ground of having previously been a member of Parliament, County Assembly, a Governor or having contested for Parliamentary, County Assembly or

Governors' election.

G) This is a matter brought in public interest and as such I order each party to bear its own costs.

Dated, signed and delivered at Nairobi this 20th day of June, 2019.

J .A. MAKAU

JUDGE