



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL PETITION NO 56 OF 2017

**IN THE MATTER OF ARTICLES 10, 22, 23, 24, 36, 38, 91, 258 (1) OF THE CONSTITUTION OF
KENYA, 2010**

IN THE MATTER OF THE POLITICAL PARTIES ACT

IN THE MATTER OF THE ELECTIONS ACT, 2011

IN THE MATTER OF THE ELECTION LAWS (AMENDMENT) ACT, 2017

BETWEEN

COUNCIL OF COUNTY GOVERNORS.....PETITIONER

VERSUS

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

INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....2ND RESPONDENT

JUDGEMENT

Petitioners case

This petition challenges the constitutionality of the provisions section 10 of the Elections Laws (Amendment) Act, 2017 [1] which amended section 28 of the Elections Act.[2] It is alleged that the above provision limits freedom of making political choices and freedom of association under Article 36 (1) of the constitution before the lawful deadline for the conduct of party primaries.

The petitioners case is that persons dissatisfied with the outcome of party primaries or nominations will not by law be able to defect to another political party (within the nomination deadline) as their names will have already been submitted by the earlier political party within the 120 days deadline, hence limiting a genuine right to political party defection and that such limitation is not justifiable.

First Respondents Grounds of opposition

The first Respondent filed grounds of objection on 9th March 2017 stating that the petition offends the doctrine of constitutionality, that the petition has not set out with certainty the rights to be violated, that the challenged provision is meant to give effect to articles 36, 38, 91 and 92 of the constitution, that the

section is meant to instil discipline among members of a political party.

Second Respondents Replying affidavit

Ruth Makuthu, the Senior Legal Officer of the second Respondent in the Replying Affidavit filed on 21st March 2017 avers *inter alia* that the petitioner did not state specifically how their fundamental rights have been limited by the challenged section, that the said section does not in any manner limit the rights enshrined under Article 36(1), that the section does not restrict the right to form, join or participate in the activities of an association, that the challenged section only requires political parties to submit a list of its members at least one hundred and twenty days before the general election or forty five days before a by-election, hence the provision does not limit rights under Article 38 (1) of the constitution, hence the challenge section is not unconstitutional.

Interested Party

On 8th March 2017, The National Assembly successfully applied to be enjoined in these proceedings as an interested party. In its grounds of opposition filed on 22nd March 2017, it states *inter alia* that the petitioner has not made out a case of unconstitutionality of the challenged section and that the petition lacks merits and that the section does not limit political rights of any person to form or join a political party.

Petitioners Advocates' submissions

Counsel submitted that the impugned section offends Article 36 (1), (2) of the constitution and that the right to freedom of association is an essential component of democracy.^[3] Counsel submitted that the impugned section also violates Article 38 of the constitution on political rights which provides that every citizen has the right to make political choices which includes the right to form, or participate in forming a political party, participate in the activities or recruit members for a political party or to campaign for a political party^[4] and that the limitation complained of is not justifiable within the meaning of Article 24 of the constitution.

First Respondents Counsels Submissions

Counsel for the first Respondent submitted that submission of party lists referred to in the challenged section is a constitutionally recognized way of regulating political parties and cited *William Omondi vs Independent Electoral & Boundaries Commission & 2 Others*^[5] where the court upheld the need for the law to instil discipline among political parties and stop party hopping and that the impugned provision is constitutional and does not offend articles 38 and 36 (1) of the constitution.

Second Respondents' Counsels Submissions

Counsel submitted that the petitioner failed to demonstrate to the court the alleged unconstitutionality of the challenged section.

Interested Parties Counsels' Submissions

Counsel for the interested party submitted that the declarations sought by the petitioner cannot issue, that the petitioner failed to prove that the challenged provision is unconstitutional and that the petition is frivolous and vexatious.

Guiding principles on constitutional interpretation

Determining the issues raised by the petitioner will involve interpreting the section that is alleged to be unconstitutional and also the relevant provisions of the Constitution that are alleged to be offended by the section complained of. To effectively address the said issues, it is important to bear in mind the relevant guiding principles.^[6]

Under Article 259 of the constitution, the court is enjoined 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 and in a manner that contributes to good governance. In exercising its judicial authority, this court is obliged under Article 159 (2) (e) of the constitution to protect and promote the purposes and principles of the constitution.

There is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on every person who alleges otherwise.^[7] (The court should start by assuming that the Act in question is constitutional).

In determining whether a statute is constitutional or not, 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. 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 constitution should be given a purposive, liberal interpretation and 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.^[8] It is important to bear in mind that the spirit of the constitution must, preside and permeate the process of judicial interpretation and judicial discretion.^[9]

Constitutional questions must be determined in formidable terms guided by some constitutional principles that transcend the case at hand and which are applicable to all comparable cases. Court decisions cannot be *had hoc* but must be justified and perceived as justifiable on more general grounds reflected in previous case law and other authorities that apply to the instant case.^[10] A constitutional order is a document *sui generis* to be interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation. It is important to give full recognition and effect to the fundamental rights and freedoms.^[11]

A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to the language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation recognition of the character and origin of the instrument and to be guided by the principle of giving full recognition and effect to the fundamental rights and freedoms.^[12]

The recognition of the sanctity of the Constitution and its special character calling for special rules of interpretation was captured in the decision of the High Court of Kenya in the case of *Anthony Ritho Mwangi and another vs The Attorney General*^[13] where the court stated that “Our Constitution is the citadel where good governance under the rule of law by all three organs of the state machinery is secured. The very structure of separation of powers and independence of the three organs calls for judicial review by checking and supervising the functions, obligations and powers of the two organs, namely the executive, and the legislature. The judiciary though seems to be omnipotent, is not so, as it is obligated to observe and uphold the spirit and the majesty of the Constitution and the rule of law.”

Ringera J put it more succinctly in *Njoya and Others vs Attorney General*^[14] when he observed that the Constitution is a living document and not like an Act of Parliament when he observed that “the Constitution is the supreme law of the land; it’s a living instrument with a soul and a consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleologically to give effect to those values and principles.”

Discussing the presumption of Constitutionality of a statute, the Supreme Court of India in the case of *Hamdarddawa Khana vs Union of India* Air^[15] stated that:-

“In examining the Constitutionality of a statute it must be assumed that the legislature understand and appreciates the need of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is,

therefore, in favour of the Constitutionality of an enactment.”

Thus, in interpreting the constitution, the court should attach such meaning and interpretation that meets the purpose of guaranteeing Constitutionalism, non-discrimination, separation of powers, and enjoyment of fundamental rights and freedoms.

Principles of statutory interpretation

This court has been called upon to determine the Constitutionality or otherwise of section 10 of The Election Laws (Amendment) Act 2017^[16] and as a basis for so doing I wish to state some crucial guiding principles. First, statutory interpretation is the process by which courts interpret and apply legislation. The court interprets how legislation should apply in a particular case as no legislation unambiguously and specifically addresses all matters. Legislation may contain uncertainties for a variety of reasons such as:-

- a. Words are imperfect symbols to communicate intent. They can be ambiguous and change in meaning over time.*
- b. Unforeseen situations are inevitable, and new technologies and cultures make application of existing laws difficult.*
- c. Uncertainties may be added to the statute in the course of enactment, such as the need to compromise or catering for certain groups.*

Therefore, a court must try to determine how a statute should be enforced, but I am alive to the fact that in constructing a statute, the court can make sweeping changes in the operation of the law so this judicial power should be exercised carefully.

There are numerous rules of interpreting a statute, but in my view and without demeaning the others, the most important rule is the rule dealing with the statutes plain language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive. In any event, one possible suggestion of the indeterminacy of canons is that statutory construction should be a narrow pursuit, not a broader one:-

"[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others.... [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."^[17]

Thus when the language is clear, then it is not necessary to belabour examining other rules of statutory interpretation. The Supreme court of India in *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and others*^[18] observed that:-

"Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual."

A word in a statutory provision is to be read in collocation with its companion words. The pristine principle based on the maxim *noscitur a sociis* (meaning of a word should be known from its accompanying or associating words) has much relevance in understanding the import of words in a statutory provision.^[19]

In addition to being guided by rules of statutory interpretation, one key function of the court in interpreting a statute is the creation of certainty in law. Certainty in law enables planning of human affairs in reliance on the law, and the realization of expectations based on such planning. It makes for uniformity

in the administration of justice, and prevents the unbridled discretion of the judiciary. It makes available the tested legal experience of the past.^[20] The other key point for the court to consider while interpreting the law is to change and adapt the law to new and unforeseen conditions. Law must change because social institutions change.^[21] The courts should resolve these uncertainties and assist in adapting the law to new conditions.

While interpreting the law, the court should bear in mind that they should make laws when necessary to make the ends of justice. Legal systems world over could not grow as has been the case without a great amount of judicial law making in all fields. However, to the extent that judges make laws, they should do so with wisdom and understanding. Judges should be informed on the factual data necessary to good policy making. This includes not only the facts peculiar to the controversy between the litigants before them, but also enough of an understanding of how our society works so that they can gauge the effect of the various alternative legal solutions available in deciding a case.

Jurisdiction

Article 165 (3) (d) (i) & (ii) of the Constitution provides that the High Court has power to hear any question respecting the interpretation of the Constitution including the determination of the question whether or not any law is inconsistent with or in contravention of the constitution and also the question whether anything said to be done under the authority of the constitution or of any law is in consistent with, or in contravention of, the constitution. An unconstitutional statute is not law; and more important judicial function includes the power to determine and apply the law, and this necessarily includes the power to determine the legality of purported statutes.

Whether the challenged provisions are unconstitutional

At the outset I must emphasize that in the case of a law that infringes a right in the Bill of Rights, the primary source of the dispute is the breach of a right. This dispute flows directly from the infringement of a right in the Bill of Rights. It must be clear that the challenged provision infringes the right in question and that the infringement is not permitted by the law or it is not reasonably justifiable in a democratic society.

The challenged provision provides that:-

28 (1) A political party that nominates a person for an election under this Act shall submit to the commission a membership list of the party-

(a) in the case of a general election, at least one hundred and twenty days before the date of the election; and

(b) in the case of a by-election, forty five days before the date of the by-election.

(2) The Commission shall publicize the membership lists as received from political parties.

Article 88 (4) of the constitution provides that:-

88. (4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

(d) the regulation of the process by which parties nominate candidates for elections;

(e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;

(j) the development of a code of conduct for candidates and parties contesting elections; and

(k) the monitoring of compliance with the legislation required by Article 82 (1) (b) relating to nomination of candidates by parties.

(5) The Commission shall exercise its powers and perform its functions in accordance with this Constitution and national legislation.

This court cannot deviate from its own duty of determining the constitutionality of an impugned statute. Every law has to pass through the test of constitutionality which is stated to be nothing but a formal test of rationality. The foundation of this power of judicial review, as explained by Indian nine-judge bench of the Supreme Court in the case of *Advocates on Record Association & Others vs Union of India*^[22] is the theory that the Constitution which is the fundamental law of the land, is the ‘will’ of the ‘people’, while a statute is only the creation of the elected representatives of the people; when, therefore, the “will” of the legislature as declared in the statute, stands in opposition to that of the people as declared in the constitution-the “will” of the people must prevail.

A law which violates the constitution is void. In such cases, the Court has to examine as to what factors the court should weigh while determining the constitutionality of a statute. The court should examine the provisions of the statute in light of the provisions of the Constitution. When the constitutionality of a law is challenged on grounds that it infringes the constitution, what the court has to consider is the “*direct and inevitable effect*” of such law. Further, in order to examine the constitutionality or otherwise of statute or any of its provisions, one of the most relevant consideration is the object and reasons as well as legislative history of the statute. This would help the court in arriving at a more objective and justifiable approach.

Thus, the history behind the enactment in question should be borne in mind. Thus any interpretation of these provisions should bear in mind the history, the desires and aspirations of the Kenyans on whom the Constitution vests the sovereign power, bearing in mind that sovereign power is only delegated to the institutions which exercise it and that the said institutions which include Parliament, the national executive and executive structures in the county governments, and the judiciary must exercise this power only in accordance with the Constitution.^[23]

Determination

The alleged unconstitutionality brings to light the provisions of Article 36 (1), (2) and 38 of the constitution reproduced below:-

Freedom of association.

36. (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.

Political rights.

38. (1) Every citizen is free to make political choices, which includes the right—

(a) to form, or participate in forming, a political party;

(b) to participate in the activities of, or recruit members for, a political party; or

(c) to campaign for a political party or cause.

The petitioner alleges that their rights to change parties popularly referred to as party hopping has been curtailed by the above section. The petitioner argues that after the submission of the party list as per section 28, in the event of not being successfully nominated, the window will have been closed for them

to move to other parties or even vie as independent candidates.

Political parties are essential to the development and sustenance of any pluralistic democracy. They are crucial instruments in ensuring participation in political life and the expression of the will of the people, which should form the basis of the authority of the government in a democratic state. The international framework for protecting the rights of political parties is based mainly on the rights to freedom of association and freedom of expression, and the right to assemble peacefully. These three principles were stipulated in the 1948 Universal Declaration of Human Rights and have subsequently been transformed into binding legal obligations through a number of international, regional and national human rights instruments. Most notably, both the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms include provisions containing the rights and freedoms that safeguard the free functioning of political parties.

Like most constitutional rights, the freedom to associate is not absolute. A law requiring political parties to file a list of party members within a set time frame prior to a general election or by-elections or a law regulating internal party nominations is in my view “necessary to the integrity of the electoral process” and cannot be said to be unconstitutional.

The provision in question advances a compelling state interest to manage the electoral process efficiently as opposed to the individual interests of petitioners who seem to be interested in looking for an opportunity to shift party allegiance after losing nominations. A law aimed at promoting the legitimate state interest in fair, honest, and orderly elections is in my view consistent with the provisions of the constitution that require elections to be credible.^[24] The provisions of the constitution must be read and interpreted in a wholesome manner. The rights to freedom of association must be read and appreciated with the constitutional rights that guarantee a free, fair, credible and transparent elections and the provisions that mandate the IEBC to manage elections in accordance with the constitution and best practices possible. Thus, the time frames for presenting party lists ought to be construed as part of the IEBC's constitutional mandate to prepare for the electoral process sufficiently in time which is absolutely necessary.

My reading of the challenged section does not in any manner reveal any infringement of the provisions of the constitution. The challenged provisions are clear and precise, and unambiguous. However, if at all any limitations are imposed on the rights of the petitioners, then in my view such a limitation is proportionate considering the purpose of the law in question. In my view, the challenged provision is necessary in a democratic society to ensure proper preparation and management of the electoral process.

What seems to me to be important is that the pre-selection process within a political party is such that it is transparent and transparently exercised free of any taint of electoral fraud or coercion, and one in which party voters at plebiscites and voters at general elections can know with confidence that fair means produced a candidate.^[25]

Persons aspiring for elective offices must embrace systems that promote democratic values and practices that are consistent with the spirit and intent of the constitution or 'an ethical system of candidate selection.' Thus, if an individual is not successfully nominated, his inability to shift his allegiance to another party within the time frame spelt out by IEBC cannot be said to be a limitation of his rights. Individual rights must where circumstances so permit, give way to public interests.

Further, the petitioners did not address themselves to the provisions of section 14 (5) of the Political Parties Act^[26] which provides that "a person shall not be a member of more than one political party at the same time" and the clear provisions of section 14 (1) which provides for resignation from a political party.

Another important component of these rights is the freedom of individual candidates who have no political party association to seek and obtain political or public office without facing any form of undue obstacles. There is no provision in the challenged law barring the petitioners from participating in the elections as independent candidates.

To me, this petition is premised on a clear misapprehension of the law. In view of my findings hereinabove, I find that the petitioners have failed to demonstrate that the challenged section is unconstitutional or in any manner infringes any provisions of the constitution. The upshot is that this petition has no merits at all and I hereby dismiss it with costs to the Respondents and the interested party.

Orders accordingly

Signed, Dated at Nairobi this 25th day of April 2017.

John M. Mativo

Judge

Delivered at Nairobi this 25th day of April 2017.

E. C. Mwita

Judge

[1] Act No. 1 of 2017 which came into force on 9 January 2017

[2] Chapter 7, Laws of Kenya

[3] Counsel cited Eirc Gitari vs Non-Governmental Organization Board & 4 Others {2015}eKLR & Stuart Woolman, Constitutional Law of South Africa, 3rd Edition (JUTA), Roberts vs United states Jaycees, 486, u.s. 609, (1984), Tashjian vs Republican Party, 479 U.S. 208 (1986)

[4] Counsel cited UDM vs President of the Republic of South Africa & Others 2002, 11 BCLR (CC); 2003 1 SA 495 (CC)

[5] Pet No 288 of 2014, {2014} eKLR

[6] See The Institute of Social Accountability & others vs The National Assembly & Others, Pet No. 497 of 2014

[7] See Ndyanabo vs A. G of Tanzania {2001} E. A. 495

[8] See Tinyefunzavs A G of Uganda, Constitutional Petition No. 1 of 1997 { 1997}, UGCC 3

[9] State vs Acheson {1991} 20 SA 805

[10] See Wechsler, {1959}. Towards Neutral Principles of Constitutional Law, Vol 73, Havard Law Review P. 1.

[11] The privy council in the case of Minister for Home Affairs and Another vs Fischer {1979} 3 ALL ER 21

[12] Ibid, **Lord Wilberforce**, while delivering the considered opinion of the court

[13] Nairobi Criminal Application no. 701 Of 2001

[14] {2004 } 1 KLR 232, {2008} 2 KLR (EP) 624 (HCK)

[15] {1960} 554

[16] Act No. 1 of 2017

[17] Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992). The Court takes much the same approach when it chooses congressional intent rather than statutory text as its touchstone: a canon of construction

should not be followed “when application would be tantamount to a formalistic disregard of congressional intent.” Rice v. Rehner, 463 U.S. 713, 732 (1983).

[18] {1987} 1 SCC 424

[19] K. Bhagirathi G. Shenoy and others v. K.P. Ballakuraya and another {1999} 4 SCC 135

[20] Quintin Johnstone, An Evaluation of the Rules of Statutory Interpretation, Kansas Law Review, {1954} Vol 3 at page 8-9

[21] Ibid page 9

[22] {1993} 3SCC 441

[23] See Article 1 of the Constitution of Kenya 2010

[24] Marchioro v. Chaney, 442 U.S. 191 (1979).

[25] Queensland Criminal Justice Commission. April 2001. *The Shepherdson Inquiry: An investigation into electoral fraud*. p 170. www.cjc.qld.gov.au/shepinquiry/finalreport.pdf

[26] Chapter 7B Laws of Kenya