



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL PETITION NO 19 OF 2017

KATIBA INSTITUTE.....
PETITIONER

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....RESPONDENT

JUDGMENT

INTRODUCTION

1. This petition once again presents a cry on behalf of the women of Kenya over the elusive two gender principle. On 27th August, 2010, the people of Kenya gave to themselves a constitution that was hailed as one of the few transformative constitutions in the world. **Article 2 (1)** provided that the constitution was the Supreme Law of the Republic, and bound all persons and State Organs at both levels of government. **Article 3(1)** provided that “every Person” had an obligation to respect, uphold and defend the constitution. **Article 10(1)** provided for national values and principles of good governance and in particular stated that those national values and principles of governance bound all State Organs, State Officers and all persons whenever they applied or interpreted the constitution, enacted applied, interpreted any law, and made or implemented public policy decisions.

2. **Article 10 (2) (b)**, was clear that national values and principles of good governance included *human dignity, equity, social justice, inclusiveness, equality, human rights, non discriminations, and protection of the marginalised*. The constitution again stated in **Article 19 (1)**, that the Bill of Rights was an integral part of Kenya’s democratic state, and was the framework for social, economic and cultural policies.

3. Further, **Article 20(1)** provided that the Bill of Rights applied to all law and bound all state organs, and all persons. Yet again, **Article 20(2)** stated that every Person was to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. The constitution provided in **Article 27** that:-

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law;

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms;

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic cultural and social spheres.

(4) The state shall not discriminate, directly or indirectly against any person on any grounds, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age disability, religion conscience, belief culture dress, language or birth;

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified as contemplated in clause (4),

(6) To give full effect to the realization of the rights guaranteed under this Article, the state shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination;

(7) Any measures taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need;

(8) In addition to the measures contemplated in clause (6), the state shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same genders.” (emphasis)

4. **Article 22(1)** gave every person the right to institute proceedings claiming that a right or fundamental freedom in the Bill of Rights had been denied, violated, infringed or threatened, while **Article 258** gave everyone the right to institute proceedings claiming that the constitution had been contravened or was threatened with contravention.

The Petition

5. Katiba Institute, The petition, a Constitutional research, Policy and Litigation Institute, filed a Petition dated 25th January 2017, brought under various Articles of the Constitution, against the Independent Electoral and Boundaries Commission. The respondent, a Constitutional Commission established under Article 88 (1) of the constitution, seeking the following reliefs:-

a) A declaration that Political Parties are bound by the provisions of Articles 10, 19, 20, 27, 28, 56, 81(b) and 91(1) of the Constitution and hence any action under taken by them, including nomination process for candidates for members of parliament, must comply with the requirements of those provisions.

b) A declaration that the power conferred to the respondent in Article 88 (4) (d) of the constitution of “Regulation of the process by which parties nominate candidates for elections” obligates the respondent to ensure that nominations carried out by political parties meet the requirements of the constitution, especially Articles 10, 19, 20, 27, 28, 56 and 91(1).

c) A declaration that Articles 10, 19, 20, 27, 28, 56 and 91(1) of the Constitution obligate the respondent to reject any nomination list of a political party for its candidates for the 290 Constituency based elective positions for members of National Assembly and 47 County based positions for the member of the Senate that do not comply with two-third gender rule.

d) A declaration that the respondent has violated Articles 249, 35 (1) & (3) and the Access to Information Act, 2016, by failing to provide to the petitioners with the information sought.

e) An order requiring the respondent to accept and process the nomination for inclusion as candidates to the 290 Constituency based elective positions for members of National Assembly and 47 –County based elective positions for the members of the Senate for the 2017 General Election from only those nominations list of political parties that meet the two-third gender requirements.

6. The grounds upon which the petition was premised, were that women in Kenya have been

disadvantaged, and only given limited opportunities in political participation as members of parliament; that despite creation of 47 elective positions exclusively for women as members of parliament, only 19% of the members of National Assembly are women, while the Senate has only 27%, that still fall short of the minimum of 33% for elective posts in both houses, which is a contravention of the constitution.

7. It was stated that, whereas no obligations were imposed on political parties to comply with the two-third gender rule in the 2013 general election, the same thing was destined to happen in the election of 8th August, 2017, because the respondent does not seem to have put in place mechanisms that require political parties to comply with the two-third gender requirement, while conducting nominations and preparing party lists for the elective positions for both the National Assembly and the Senate in the coming election in accordance with **Article 27(8)** of the Constitution.

8. It was again stated, that political parties are bound by the constitution, and therefore, must comply with **Article 27**, as well as national values and principles of governance contained in **Article 10** of the Constitution. This is so, it was stated, because **Article 19** provides that **the Bill of Rights is an integral part of Kenya's democratic state**. To that extent, therefore, it was pleaded, women are a marginalised group that needed to benefit from the Bill of Rights, particularly **Article 27 (8)** in so far as the 290 constituency based elective positions and 47 Senate positions were concerned.

Respondent's Response

9. The respondent filed grounds of opposition dated 8th March 2017 and filed in court on 9th March 2017. The objection was to the effect that the respondent had no power to enforce provisions of **Articles 27(8)** and **81(b)** of the Constitution, that the petition offended provisions of **Article 38** and **81 (a), (d)** of the Constitution, that the power donated to the respondent by **Article 88 (4), (d)** did not extend to enforcing the provisions of **Articles 27(8)** and **81(b)** of the Constitution, and that **Articles 10** and **27** do not donate such power to the respondent to enforce these provisions (**Articles 27(8)** and **81(b)**) of the Constitution. It was further stated that there is no law in place at the moment stipulating the manner of realization of rights under **Article 27(8)** and **81(b)** of the Constitution, and finally that it would be against the rule of law and public policy for the respondent to be compelled to enforce provisions of **Article 27(8)** and **81(b)** of the Constitution. In a nut shell, the respondent's position was that the petition is unmeritorious.

Petitioner's Submissions

10. Mr Waikwa, learned counsel for the petitioner filed written submissions which he highlighted. Learned counsel clarified that the petition was not about failure by the National Assembly to enact a legislation as contemplated by **Article 27(8)** of the Constitution, but whether by virtue of the various **Articles** of the constitution, the respondent could require political parties to comply with **Article 27(8)** and present nomination lists for the 290 constituency elective posts and the 47 Senate elective posts that meet the two-third gender principle.

11. According to Mr. Waikwa, **Article 81(b)** should be read with **Article 27(8)** to guarantee that both the national Assembly and Senate meet the requirement of the two-third gender rule. Learned Counsel submitted that this being a transformative constitution, courts should not lose sight of the transformative aspect and referred to the case of; **The matter of Interim Independent Electoral and Boundaries Commission [2011], eKLR** to back his argument that, the constitution has non- legal aspects hence courts must take these into account when interpreting it.

12. Learned counsel went on to submit, that **Article 10** is an essential and integral part of interpreting the constitution, for it articulates national values and principles of good governance especially the values enumerated in **Article 10 (2) (b)** namely **human dignity, equity, social justice inclusiveness, equality human rights, non-discrimination and protection of the marginalized**. Learned counsel argued that the core of the petition is on the interpretation of constitutional provisions on equality and the requirement of equal opportunities for both women and men and affirmative action as a means of redressing inequality between the two genders. Counsel submitted that it was important that the constitution be interpreted in a manner that would lead to realization of the two-third gender rule, while appreciating the Kenyan

society's past history where women were not given a chance to pursue political opportunities.

13. The importance of the two-third gender rules, counsel argued, was the recognition of the fact that women had for long been marginalised and discriminated against which eroded their dignity. Counsel referred to the case of **Attorney General v Kituo cha Sheria & 7 others [2017],eKLR** in advancing his argument that in interpreting the constitution, the court must take into account national values and principles of governance set out in **Article 10(2) (b)**, of the constitution. Learned Counsel urged the court to apply a purposive interpretation and relied on the case of **R v Big M Drug Mart Ltd 1985**, saying that purposive interpretation was best in defining rights and freedoms guaranteed in the constitution. Counsel again referred to the case of **Marilyn Muthoni Kamuru & 2 Others vs. Attorney General & another[2016],eKLR** to support the proposition that purposive interpretation was best when dealing with the question of rights. Learned counsel also referred to the case of **S. Vs Zuma CCT5/94[1995]**, where it was stated that, regard must be paid to the legal history, traditions and usages of the country concerned and the purposes of its constitution are to be fully understood.

14. Learned Counsel submitted that the inclusion of the gender rule in **Article 27(8)** was an entrenchment of the desire by the people of Kenya to be free from discriminatory laws, and referred to the case of **Centre for Rights Education & Awareness (CREAW) v Attorney General & Another [2015] eKLR** to support this view. He also referred to the case **Federation of Women Lawyers (FIDA-K) & 5 Others v Attorney General & Another [2011]EKLR** for the proposition that the purpose of **Article 27(8)** was to provide or place obligations upon the state to address historical and traditional injustices that may have been encountered or visited on a particular segment of the people of Kenya. Mr Waikwa further referred to **Convention on the Elimination of all Forms of Discrimination Against Women, 1981 (CEDAW)** which requires that states take measures to ensure full development and advancement of women's enjoyment of human rights and fundamental freedoms on the basis of equality with men.

15. On whether political parties are bound by the constitution to ensure they comply with the two-third gender rule, Mr Waikwa submitted that the constitution binds everyone and that political parties are subject to **Article 10** and the **Bill of Rights**. Counsel submitted that political parties are state organs or public bodies within the meaning of the constitution since Kenya is a multi-party democratic states, that **Article 38** grants citizens the right to form political parties and therefore they are bound by **Article 10**. Counsel was of the view that political parties are players in the democratic state of which the Bill of rights is an integral part pursuant to **Article 19(1)**, and are therefore bound by **Article 20(1)** on the Bill of Rights. Being subject to the Bill of rights, political parties are bound by **Article 27** which requires equal treatment and equal opportunities for men and women and have mandate to undertake affirmative action and programmes to redress disadvantages suffered by women in the past. Learned counsel submitted that the requirement in **Article 27(8)** that the state take measures to ensure that elective and appointive bodies comply with the two-third gender rule includes political parties given their power to determine who is nominated as candidate for election and eventually becomes Member of Parliament. Counsel relied on **Article 81(b)** that not more than two-thirds of members of elective public bodies should be of the same gender.

16. Counsel further argued that nominations by political parties are a fundamental part of the electoral system since party nominations have a direct bearing on the outcome of general elections and cannot, therefore, be excluded from the scope of **Article 27(8)**. Mr Waikwa concluded on this point by submitting, that political parties are bound by **Article 91 (1)** on the right of the people to participate in the political process and to respect and promote human rights, fundamental freedoms and gender equality and equity, as well as promote the objects and principles of the constitution.

17. On the mandate of the respondent, Mr Waikwa submitted that the respondent was mandated by the constitution to ensure that political parties comply with the two-third gender rule. He cited **Article 249** which requires that commissions secure observance by all state organs of democratic values and principles and promotion of constitutionalism, as well as **Articles 2(1), 10 and 88 (4)** of the constitution to buttress his submission. Learned Counsel went on to submit that since **Article 91(1)** provides for obligations that political parties promote objects and principles of the constitution and rule of law, the respondent has an obligation to ensure that political parties comply with the constitution and in particular

Article 27(8) because of its unique role as a regulator in political party nomination activities. Mr Waikwa argued that the most effective way to enforce legislatively mandated gender quotas is to impose an obligation on the electoral commission to reject non-compliant party lists.

18. It was Mr Waikwa's submission, therefore, that there is breach of **Articles 27, 28 and 10** of the constitution when the respondent fails to ensure that political parties comply with the two-third gender rule. Counsel cited **Article 27(1)** which states that *every person is equal before the law and has the right to equal protection and equal benefit of the law; that women and men have the right to equal treatment, including the right to equal opportunities in political economic and social spheres*. According to Counsel, the introduction of **Article 27** conceptualized a substantive approach to equality, and contended that failure to accommodate substantive equality breeds substantive inequality leading to gender discrimination. He referred to the case of **Andrews v Law society of British Columbia 1989 ISCR 143** on what discrimination is, and further cited the case of **Canadian National Railway Co(IN) v Canada Canadian Human Rights Commission 1987 ISCR 1114** to support his submission that discrimination can be tacitly perpetrated.

19. Learned Counsel concluded, that failure by the respondent to ensure that political parties comply with the two-third gender rule is a violation of **Article 27** as it tacitly leads to perpetuation of discrimination against women. In counsel's view, **Article 28** guarantees the right to dignity, and submitted that, women's right to dignity cannot be over emphasized. He relied on case of **Rodriquez v British Columbia [1993]3SCR** which held that Human dignity means the individual or group should feel self-respect and self-worth.

Respondent's Submissions

20. Miss Olando, learned counsel for the respondent, submitted, in principle, the respondent was not opposed to political parties complying with the two-third gender rule, that the respondent was at the fore front in advocating for the two-third gender rule, and that the respondent was a party in the "**Gender rule**" case before the Supreme Court where it pushed for immediate realization of this right, although the Supreme Court eventually held that the right would be realized progressively. Counsel took the view, and submitted, that there are no appropriate mechanisms in place at the moment to enforce compliance and realization of the rule. Counsel submitted that unlike **Articles 97 and 98** which provide for composition of the National Assembly and Senate, **Articles 100 and 27 (8)** place an obligation on the State and Parliament to take legislative measures to promote representation of among others; women and marginalised groups in parliament.

21. It was learned counsel's further submission, that although various **Articles** of the constitution place an obligation upon Parliament to enact legislation on the two-third gender rule, this legislation has not been enacted. Learned counsel submitted, therefore, that in the absence of legislation, the two-third gender rule cannot be implemented. In counsel's view, the petitioner merely seeks to impose on the respondent an obligation it does not have under the constitution. Counsel relied on the Supreme Court decision in the case of **The Matter of the Principle of Gender Representation in the National Assembly and the Senate {2012} eKLR (Advisory Opinion No. 2 of 2011)** where the Supreme Court stated that **Article 81 (b)** being a general provision, could not replace **Articles 97 and 98** which had not ripened into a specific enforceable right with regard to composition of National Assembly and Senate hence the two-third gender rule could not be enforced immediately.

22. Learned counsel went on to argue, that although the Supreme Court's opinion related to the 2013 general election, circumstances obtaining then remain the same to date, hence the Supreme Court's decision applies to the present circumstances. Counsel referred to the case of **Centre for Rights Education and Awareness & 2 Others V the speaker of National Assembly & others, petition No. 371 of 2016**, where the court appreciated the fact that there was no legislation to actualize the two-third gender rule and ordered parliament to enact legislation within a given timeframe. Counsel further referred to the case of **Centre for Rights Education and Awareness & 2 Others V Attorney General & another [2015] eKLR** where again the court had found that there was failure to enact the legislation and gave the Attorney General timelines within which to prepare a Bill for the National Assembly to enact the

legislation. In counsel's view, the above decisions illustrate a clear need for legislation to put in place practical measures to realize the two-third gender rule.

23. On whether the respondent had powers to enforce **Article 27 (8)** and **81 (b)** of the constitution within political parties, learned counsel submitted, that the petitioner had only relied on general provisions of the constitution, knowing well that there was no specific provision as everyone awaits enactment of legislation. Miss Olando submitted that, to allow the petition would be tantamount to use the respondent as "**a sacrificial lamp**" where there is a lapse in law. Learned counsel submitted that unlike the elective posts, there are specific provisions in the constitution in relation to special seats, including **Articles 97 (1), (c), 98 (1) (b) (c) (d)** and **177(1) (b) (c)**, which provide for sanctions in case of non compliance. So is **Section 34 (6A)** of the Elections Act which gives the respondent power to take action in case of non compliance. Counsel took the view; therefore, that the drafters of the constitution had reason for not incorporating similar provisions in the case of elective posts in the National Assembly and the Senate and for that reason, legislation is necessary.

24. Miss Olando concluded that the petition does not stem from a specific provision of the constitution hence the court should not grant it. In learned counsel's view, it would be proper to wait for legislation rather than grant orders when there is no specific law and the respondent does not have power to enforce **Article 27 (8)**. Learned counsel argued that the respondent acknowledged that the rule may be attained where there was goodwill, and for that reason, it had implored political parties to consider revisiting their internal membership rules and practices towards realization of this requirement.

Analysis and Determination

25. I have considered the petition, the response thereto, submissions by counsels and authorities cited. The petition raises four questions for determination, namely; **(1)**, whether political parties are bound to comply with the two-third gender principle during their nominations for candidates for both National Assembly and Senate elective seats; **(2)**, whether the respondent, the **Independent Electoral and Boundaries Commission**, is mandated to enforce the requirement that political parties comply with the two-third gender principle when presenting their nomination lists for both the 290 National Assembly and 47 Senate elective seats; **(3)**, whether **Articles 10,19,20,27,28,56,**and **91(1)** of the constitution obligates the respondent to reject nomination list of a political party for its candidates for the 290 constituency elective posts for National Assembly and 47 Senate elective posts that do not comply with two-third gender rule; and **(4)** whether an order should issue requiring the respondent to accept and process the nomination for inclusion as candidates to the 290 Constituency based elective positions for members of National Assembly and 47 –County based elective positions for the members of the Senate for the 2017 General Elections from only those nominations list of political parties that meet the two-third gender requirements

I). Whether Political Parties are bound by provisions of Articles 10, 19, 20, 27, 28, 56, 81 (b) and 91 (1) of the constitution.

26. Counsel for the petitioner has argued that Political Parties are bound by **Article 27 (8)** of the constitution, and therefore should comply with the two-third gender principle. As pointed out at the beginning of this judgment, the country promulgated a transformative constitution with a robust Bill of Rights whose pillars include; human dignity, social justice, equality, equity human rights and fundamental freedoms. In the case of **Speaker of the Senate & another V Attorney General & 4 others, {2013} eKLR (Advisory Opinion 2 of 2013)**, the Supreme Court alluded to the Constitution thus;

“Kenyas Constitution of 2010 is a transformative charter. Unlike the conventional “Liberal” constitutions of the earlier decades which essentially sought the control and legitimization of public power, avowed goal of today’s constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy. ..\the principle is fleshed out in Article 10 of the constitution, which specifies the “national values and principles of governance”, and more particularly in Chapter Four (Articles

19-59) on the Bill of Rights...” (emphasis)

27. Article 259 of the constitution provides that the constitution be interpreted in a manner that Promotes its purposes, values and principles; advances the rule of law, human rights and fundamental freedoms in the Bill of Rights; Permits the development of law; and Contributes to good governance. Further, **Article 20 (4)** provides that in interpreting the **Bill of Rights**, a court, tribunal or other authority shall promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and the spirit, purpose and objects of the Bill of Rights.

28. When dealing with rights claims under the constitution, the court is called upon to interpret the constitution so as to give effect to its purposes, values and principles. That calls for a purposive interpretation, an approach was well stated in the case of R v Big M Drug Mart Limited [1985] 1 SRC 295 thus;

“The proper approach to the definition of rights and freedoms guaranteed by the charter was a purposive one. The meaning of a right or freedom guaranteed by the charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect [T]his analysis is to be undertaken, and the purpose of right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the charter. The interpretation should be ... a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter’s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore ... be placed in its proper linguistic, philosophic and historical contexts.”

29. **Onguto J**, expressed himself on this purposive interpretation in the case of Marilyn Muthoni Kamuru & 2 others v Attorney General & another [2016] eKLR, as follows;

It is the duty of this court ...to give effect to the constitution as a whole. The various provisions of the constitution that govern ...the gender rule must be read together in a manner that gives full effect to the purpose of the constitution... various provisions of the constitution must be read together with each sustaining the other and not each destroying the other...”

30. I will therefore adopt a purposive interpretation and give meaning to the various Articles of the constitution on this matter.

31. **Article 27** of the constitution introduced what is now known as the two-third gender principle. **Sub-article (8)** states that one gender should not occupy more than two-third of the members any elective or appointive positions and the state was obligated to take legislative and other measures to ensure compliance with this principle. The question of application of this principle was the subject of consideration by the Supreme Court in the case of The Matter of The Principle of Gender Representation in the National assembly and the Senate {2012} eKLR (Advisory Opinion No, 2 of 2012), which had sought an advisory opinion on whether the two-third gender principle could apply in the 2013 general elections. The Supreme Court held that realization of the principle was to be achieved progressively and Parliament was to enact an enabling legislation by **27 August 2015**, which did not happen and has not to date.

32. The present petition, therefore, argues that various **Articles** of the constitution should be interpreted to the effect that Political Parties are under obligation to comply with the two-third gender principle as provided for under **Article 27 (8)** and this should be reflected in their party nomination lists for the 290 National Assembly and 47 Senate elective posts.

33. **Article 2 (1)** of the constitution, provides that, the constitution is the supreme law of the Republic, and binds **all persons and all state organs** at both levels of government. **Article 260** interprets the word “**person**” to include **a company, association or other body of persons whether incorporated or unincorporated;** and a **“Political Party” as an association contemplated in Part 3 of Chapter Seven.** **Part 3** of Chapter Seven contains **Articles 91 and 92** on Political Parties. **Article 91(1)** provides for the basic requirements for Political Parties. It states;

1) Every Political Party shall-

a) have a national character as prescribed by an Act of Parliament;

b) have democratically elected governing body;

c) promote and uphold national unity

d) abide by democratic principles of good governance; promote and practice democracy through regular, fair and free elections within the party;

e) respect the rights of all persons to participate in the political process, including minorities and marginalised groups

f) respect and promote human rights and fundamental freedoms and gender equality and equity;

g) promote the objects and principles of the constitution and the rule of law; and

h) subscribe to and observe the code of conduct for Political Parties;(emphasis)

34. The constitution binds all persons, including Political Parties. They are bound by Article 91(1) to promote human rights, fundamental freedoms, gender equality and equity. Political Parties also play a key role in determining who is elected to Parliament, through nomination of candidates at Party primaries. Those nominated proceed to contest for various constituency and Senate seats in the General Elections, and the winners end up in Parliament. Simply put, political Parties are a vehicle to legislative bodies and eventually into leadership positions.

35. **Article 27** was intended to address gender inequality between women and men in leadership positions. In the **Final Draft Report of the Constitution of Kenya Review Commission (CKRC)**, one of the recommendations was that Political Parties be required to place one third of the candidates to be women on the single constituency party list and 50% on the proportional representation list for the National Assembly. The consensus therefore was that eventually, at least one third of members of Parliament and Cabinet be women. This was deemed as an appropriate measure for addressing systematic historical marginalization of women in representation and leadership position. Political Parties would therefore be required to ensure that there was gender balance within them.

36. The importance of political parties as a means of attaining gender balance for women representation was underscored by **Drude Dahlerup** and **Lenita Freidenvall**, in a paper titled **“Quotas as a “Fast Track” to Equal Political Representation for Women: Why Scandinavia is no longer the Model”** (2003) University of Stockholm Department of Political Science,-

37. In the sub heading **“Parties as gatekeepers”** they opined:-

“Quotas aim at changing the gender pattern of Party recruitment for elected positions. Research had pointed to the crucial role of the Political Parties as gate keepers to political office. In democratic political systems... Political Parties control or dominate the selection and nomination process. Quotas are thus a means to open system of closed and male dominated patterns of recruitment...quota systems properly implemented, do obstruct and overcome some

of the most crucial barriers for women's equal political representation... especially in the nomination process, and invalidate the common argument that the party could not find sufficient amount of women to stand for election. Instead, quota systems force parties to scrutinize and change their male-dominated gender profile and seriously start recruiting women who share their political conviction."

38. In another paper titled "**Political Parties: When do they work for women, (2005) Expert Group Meeting on Equal participation of women and men in decision making processes;** Teresa Sacchet observed:-

"The reason why this policy ,(quotas) has been more successful in some countries than in others has to do with certain conditions that are mainly related to the electoral system. In a country that has a system of proportional representation, employ closed list of candidates, adopt a placement mandate indicating the positions for male and female candidates in the list, and have laws to enforce compliance; the number of women elected has been far higher... In the absence of legal mechanisms that women can fall back on in case of non compliance... the tendency is for political parties... to place their female candidates at the end of the party list..."

39. On the other hand, Miki Caul, in a Paper Titled "**Women's representation in Parliament, the role of Political Parties**", **Party Politics Vol.5 No pp 79-98**, argues that parties are the real "gate keepers" to elected office because they play an important role in the composition of parliament. But parties differ in encouraging or discouraging women's access to Parliament. The author observes at page 83 that:-

"Parties can increase the proportion of nominated candidates by creating formal rules that prescribe a certain proportion of women among the party's candidates. Such direct action can take the form of quotas (mandated percentage of women) or target (recommended percentage of women). Implementation of gender quotas or targets by parties not only reflect acceptance that gender under-representation is a problem. It also demonstrates a willingness to act to fix the problem..."(emphasis)

40. The above views are illustrative of how political parties play an important role in narrowing the gender under representation gap by taking deliberate steps within their internal nomination processes, which could help achieve the two-third gender representation.

41. **Article 91(1)** of the constitution requires Political Parties, in mandatory terms, to respect the rights of all persons to participate in **political process including minorities and marginalised groups, respect and promote human right and fundamental freedoms and gender equality, equity and promote the objects and principles of the constitution and the rule of law.** To that extent, Political Parties have a constitutional obligation to abolish all forms of discrimination within them, and embrace gender equality, equity and promote inclusiveness. Otherwise, they risk perpetuating **tacit discrimination**. Dickson CJ captured this type of discrimination in the case of **Canadian National Railway Co.(CN) V Canada Canadian Human Rights Commission {1987}, SCR 1114**, in these words:-

"It is not a question of whether the discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is accidental by product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory."

42. Before registration, a Political Party is required to demonstrate that, it has a national outlook, gender balance and diversity in its composition, including minorities and marginalised groups. Once fully registered, a Political Party acquires a **corporate status** under **Section 10 of the Party's Act (No 11 of 2011)**. It then becomes a "**person**" as defined under **Article 260** of the constitution. Political Parties are thus required to uphold democratic principles and ensure that they encourage gender equality and equity within them, which is a constitutional requirement in an open and democratic institution.

43. More importantly, Political Parties are founded by the people of Kenya. **Section 23** of the Political

Parties Act establishes “**Political Parties Fund**” which according to **Section 24**, receives not less than **0.3% of national revenue**. Under **Section 25**, the fund is distributed to Political Parties according to their strength based on the total number of votes the Party received in the previous general election. **Section 26** provides that one of the main purposes of the money allocated to a registered Political Party, is for **promoting the representation of women, persons with disabilities, youth, ethnic and other minorities and marginalised communities in Parliament and in the County Assemblies.**

44. The Concise Oxford English Dictionary, Twelfth Edition, defines the word “**promotion**” to mean “**activity that supports or encourages**”. The same dictionary defines the word to “**encourage**” to mean “**give support, confidence, or hope to; or stimulate the development of;**”

45. From the above definitions, promoting representation of women and marginalised groups in Parliament (National Assembly and Senate), would mean taking real steps to support and encourage more women join parliament by putting in place favourable plans and strategies to make this representation a reality. It could not have been one of the key purposes of the fund, if the intention was not to ensure that political parties took proactive steps or measures to increase the number of women and the marginalised in Parliament. That would also mean, people of Kenya could not fund Political Parties that practice discrimination against women and marginalised groups. It is worth noting, that the Political Parties Act was enacted after the promulgation of the constitution and the legislature must have been a live to the provisions of the constitution, not least, Article 27 (8).

46. **Article 2(1)** of the constitution binds all persons and state organs, and Political Parties are not exempt. When **Article 3 (1)** states that ***every person has an obligation to respect, uphold and defend the constitution***, Political Parties are included. Moreover, **Article 4 (2)** states that Kenya is a **multi-party democratic state**, founded on national values and principles of good governance contained in **Article 10**. Political Parties are at the heart of this “**multi-Party democratic state**”, and are enjoined by **Article 91(1)** to observe these national values and principles of good governance. In fact, Political Parties are bound by **Article 10 (2) (b) to promote, human dignity, equity, social justice, inclusiveness, human rights, non discrimination and protection of the marginalized** . **Article 91(1) (f) and (g)**, in particular, reiterate that political parties respect and promote human rights and fundamental freedoms and gender equality and equity, as well as promote the object and principles of the constitution and the rule of law.

47. One of the constitutional objects and principles under **Article 27** in general and **27 (8)** in particular, is to eliminate all forms of discrimination against the female gender in the electoral system which has for long occasioned historical injustice to women. That is what the court referred to in the case of **Centre for Rights Education and Awareness (CREW) v Attorney General & another {2015} eKLR**, when it stated:-

“The people of Kenya recognised the inequalities in our electoral system, the inequality power relation between men and women and the socialization of Patriarchy as a result of the inter lia, discriminatory practices, gender insensitive laws and policies. They sought to remedy these historical wrongs by the express provisions in the constitution which are intended to ensure the equitable participation and representation of hitherto excluded groups such as women.”

48. In the case of **Federation of Women Lawyers (FIDA-K) & 5 others V Attorney General & Another {2011} eKLR**, the court again observed that the purpose of **Article 27 (8)** was to ***provide or place obligation upon the state to address historical injustices that may have been encountered or visited a particular segment of the people of Kenya***. I fully agree and add that, where the constitution clearly states that everyone is bound by it, Political Parties are not excluded. These are not mere words. They are laden with a heavy constitutional command that must be obeyed by all if we are to have a true, open and democratic society. Moreover, Political Parties as public bodies are funded by the people of Kenya to promote women and marginalised groups’ representation in Parliament and County Assemblies. That means they are required to mainstream gender equality and equity so that they eliminate gender discrimination. They cannot promote women representation in parliament if they do not move to actualize gender balance, and in particular, the two-third gender principle in elective positions, and formulate as well as implement policies that are geared towards women’s socio-economic and political

development thereby, combating all forms of discrimination against the female gender.

49. The two-third gender principle cannot be left to legislative process alone, if it has to be effectively and meaningfully realized. That is why the constitution uses the words “**other measures**” in **Article 27 (8)** to connote that the principle may be attained through other means even in the absence of legislation. Political Parties must take pro-active steps to realize this constitutional objective. Really, the question of two-third gender principle is about logistics and formula which political parties are capable of designing and implementing within their internal organization. They have an obligation to promote objects of the constitution and promote gender parity even during nominations. Any other interpretation, in my view, would not be in accord with **Article 259** of the constitution as it will depart from the purposes, objects and spirit of the constitution. I therefore find and hold that, Yes, Political Parties are bound by the provisions of **Articles 10, 19, 20, 27, 28, 56, 81 (b) and 91 (1)** of the constitution to the extent that any action they take including nomination processes for the 290 elective posts for National Assembly and 47 elective positions for Senate, must comply with the two-third gender principle.

2) Whether the power conferred to the respondent in Article 88 (4) of the constitution of “regulation of the process by which Parties nominate candidates for elections” obligates the respondents to ensure that nominations carried out by Political Parties, meets the requirements of the constitution, especially Articles 10, 19, 20, 27, 28, 56 and 91 (1).

50. The question posed here. Simply put, is whether the respondent is obligated to ensure that Political Parties comply with **Article 27 (8)** of the constitution when presenting their nomination lists for both the 290 National Assembly and 47 Senate elective positions, so that no one gender should be more than two-thirds.

51. Mr. Waikwa submitted that the respondent is bound by **Articles 249, 2 (1) and 10** while performing its functions under **Article 88 (4) (d)** in **regulating the process by which Political Parties nominate their candidates for elections**. The respondent in its submissions stated that it is not opposed to the two-third gender rule. It was submitted that;

“The respondent does not in any way oppose the aims and the objectives of the two-thirds gender rule. Being a national body responsible for the conduct of general elections in this country, the respondent is fully cognizant of the gender dynamics and social imperfections that have characterized elective bodies over the years. The respondent is in fact at the fore front in advocating for the principle of gender equity and inclusiveness in the political arena...”

52. The respondent’s main concern, however, was that there are no mechanisms for enforcing the two-third gender principle within political parties. According to the respondent, an obligation was placed on the **State and Parliament** to take legislative measures to achieve the two-third gender rule, a legislation that is not in place yet. Counsel referred to the Supreme Court decision in the **Principle of Gender Representation Case** (Supra), and submitted that as long as there is no legislation, the two-third gender principle will have to be realized progressively as was held by the **Supreme Court** in the above case. “The respondent cannot take obligations that are not bestowed on it by law”, counsel submitted.

53. The question of “**Two-Third Gender Principle**” remains a thorny issue in this country. There is endless debate and litigation on this matter. **Article 27 (8)** obligated the State to take legislative and “**other measures**” to implement the principle that no more than two-thirds of members of elective and appointive bodies should be of the same gender. An Advisory Opinion sought in the **Supreme Court in The Matter of the Principle of Gender Representation in the National Assembly and the Senate** (Supra) regarding whether the principle could apply in the 2013 general elections, ended with a majority of members of the **Supreme Court** holding, that the principle would be realized progressively. The Court stated at paragraph 74 of the judgment that;

“As Article 81 (b) of the constitution standing as a general principle cannot replace the specific provisions of Articles 97 and 98, not having ripened into a specific enforceable right as far as the composition of the National Assembly and Senate are concerned, it follows –and this is the

burden of our opinion on this matter- that it cannot be enforced immediately. If the measures contemplated to ensure its crystallization into an enforceable right are not taken before the elections of 4th March 2013, then, it is our opinion, Article 81(b) will not be applicable to the said elections. The effect is that Article 81(b) of the constitution is amenable only to progressive realization- even though it is immediately applicable in the case of County Assemblies under Articles 177”

54. The court then concluded on the timelines when the intended legislation should be in place, and stated at paragraph 79;-

“Bearing in mind the terms of Article 100 (on promotion of representation of marginalised groups) and of the Fifth Schedule (prescribing time-frames for the enactment of required legislation), we are of the majority opinion that legislation measures for giving effect to the one- two- thirds gender principle, under Article 81(b) of the constitution and in relation to the National Assembly and Senate, should be taken by 27 August, 2015”

55. The contemplated legislation has not been enacted to date, and that forms the crux of the respondent’s objection to this petition, that there is no legal framework to enable realization of the two-third gender principle. However, the holding by the Supreme Court that legislation to crystallize the two-third Gender principle on representation in the National Assembly and Senate be enacted by 27 August 2017, and failure to enact that legislation, is not the focus of this petition. The question here is whether the respondent, by virtue of provisions of the constitution, is obligated to ensure that political parties comply with the two-thirds gender principle during Party nomination exercises for the 290 constituency and 47 Senate elective positions.

56. **Article 249** provides that the objects of **Commissions and Independent Offices** are to ***protect the sovereignty of the people, secure the observance by all state organs of democratic values and principles and promote constitutionalism.*** Political Parties by virtue of being funded by the public are “**public bodies**” and are bound by constitutional values and principles. **Article 88 (4)(d)** provides that the **respondent (IEBC)**, is responsible for conducting or supervising referenda and elections to any elective body or office established by this constitution, any other elections as prescribed by an Act of Parliament and in particular for ***the regulation of the process by which parties nominate candidates for elections.***

57. As pointed out earlier, **Article 91(1)** binds Political Parties to, among other things, respect the right of all persons to participate in the political process, including minorities and marginalised groups, respect and promote human rights and fundamental freedoms, ***and gender equality and equity and promote the objects of the constitution and the rule of law.*** Political Parties are bound by constitutional principles to ensure that there is gender equality and equity. Political Parties are also funded by the public for among other purposes, ***promotion of the representation of women, and marginalised groups in parliament and in the County Assemblies.*** It could not have been the intentions of the legislature, therefore, that Political Parties funded to promote women representation in Parliament, fail to integrate the two-third gender principle. Political Parties are formed subject to the constitution and must, therefore, comply with national values and principles in the constitution.

58. The respondent was given constitutional mandate to regulate political parties’ nominations, to ensure that they comply with the constitution and the law. Being subject to the constitution, political parties are bound to ensure that they put in place **measures** that are in line with ***Gender Mainstreaming as a means of achieving gender equality and equity.*** That is why they are required to abide by the constitution (**Article 91(1)**) and the law (**section 7 of Political Parties Act**) The respondent, while **regulating nominations by Political Parties**, is obliged to ensure that they comply with the two-third gender principle. Political Party nominations being the “**gateway**” to the National Assembly and Senate representation cannot ignore the two-third gender requirement, and the respondent may not, for that matter, plead inability to regulate compliance by these Parties.

59. In its letter dated 11th January, 2017, titled “**Compliance by Political Parties with the Two-third Gender Rule during Nominations**”, addressed to the petitioner, the CEO of the respondent wrote:-

“As you may be aware, Article 88(4) (d) of the constitution mandates the commission to regulate the process by which Parties nominate candidates for elections. Further Article 90(2) of the constitution provides that, the Commission shall be responsible for the conduct and supervision of elections for the allocation of seats on the basis of proportional representation through nomination by Political Parties by use of Party Lists.

In light of the imbalance presented by inequitable gender representation in elective posts, the commission as a key player in the electoral system holds a strong interest in the realization of this rule. Through, its participation in the technical working group on the implementation of the Supreme Court Advisory on the two-thirds gender principle, the commission deliberated on the various proposals that would see to the realization of this principle. The deliberations included; proposals to be effected by political parties so as to increase the participation and representation of special interest groups noting that Political Parties are under the obligation to ensure their nomination rules comply with the constitution and all other relevant laws.”

60. The letter went on to state;-

“Furthermore, the commission has been engaged in the process of developing standardized guidelines/rules to regulate party nominations. The aforementioned guidelines inter lia, provide for the realization of two-third gender principle. In this regard, individual political parties will be expected to develop party nomination rules that are in sync with the afore stated guidelines....”(emphasis)

61. It is evident from the letter, that the respondent is fully aware of its mandate under the constitution, and the fact that Political Parties are indeed under obligation to comply with the two-third gender principle. I must also point out that it is not entirely correct as contended by the respondent, that only legislation may achieve the two-thirds gender principle. **Article 27 (8)** is clear that the state should take legislative and **“other measures”** to implement the two-third principle. In the absence of legislation, **other measures** including pro active strategies, and policies as well as nomination rules, in the case of individual political parties, may be taken to achieve the gender principle and remove tacit discrimination against the women of Kenya.

62. I agree with the holding by **Oguto J**, in the case of **Marilyn Muthoni Kamuru & 2 others V Attorney General & Another {2016}, eKLR** when the learned Judge stated;-

“There is no doubt that Article 27 (3) provides that, ‘women and men have the right to equal treatment, including the rights to equal opportunities in political, economic, cultural and social spheres’. In my view, by this provision, the constitution ensures that men and women are equal and it destroys the traditional patriarchy contour the Kenyan society has for long been constructed upon. In order to ensure that men and women participate in the affairs of the development of the Kenyan society, Article 27 (6) recognizes that there may be need to undertake extra measures....In my understanding, this provision reposes a positive command and obligation on the state to move by appropriate instruments to lay the necessary equality rendering structure...Article 27 (8) imposes upon the state the obligation to redress gender disadvantage by enacting laws that may be needed and also undertaking other measures including affirmative action that would ensure women are needed to redress any inequality that may manifest. Article 27 (8) enjoins the state to be pro-active and that may be achieved not just through legislation, but through appointments as the Article itself dictates.”(emphasis)

63. Failure to implement the two-third gender principle should not be blamed on the absence of legislation. Had the framers of our constitution intended that only legislation would achieve this principle, there would have been no need to include the words **“other measures.”** This, in my view, was deliberate to ensure that even in the absence of legislation, progress towards achieving the two-third gender principle, would still be made. **“Other measures”** such as **guidelines** that require political parties to comply with the gender principle during nominations, as pointed out in the respondent’s letter, would still help bridge this gender imbalance and redress discrimination against women in the political sphere.

64. The **two- third gender principle** should not be downgraded to a contest between men and women. **It is not.** It is about human dignity, equality, equity, social justice, human rights and fundamental freedoms, essential values in an open and democratic society. It is a right under Bill of Rights, and the Bill of Rights applies to all laws and binds all state organs and all persons, Political parties included. They are not exempt from observing **the** Bill of Rights, and **Article 27 (8) in particular**, as a way meant to secure equal rights for women, and address past gender discrimination. The respondent has constitutional mandate while approving Party Nomination Rules and **“regulating”** nominations by these parties, to demand that Political Parties put in place measures to embrace the two-third gender principle.

65. Women of Kenya are not lesser beings. They have equal rights and opportunities granted by the constitution. These rights must be respected, protected and upheld by all. It should not be the case that whenever women of this country demand rights granted to them by the constitution, the readily available answer is; **‘there is no enabling legislation’**, even though Political Parties are funded to address this shortcoming. Holding on to this supposition, in my respectful view, would take us back to the very old historical imperfections that led to the adoption of **Article 27 (8)**, in the first place; a situation the court aptly captured in the case of **Centre for Rights Education and Awareness (CREAW) V Attorney General & another (Supra)** when it stated;

“This (Gender inequality) presents itself as a manifestation of historically unequal power relations between men and women in Kenyan society... ‘The socialization of patriarchy’ and its resultant diminution of women’s participation in public affairs has had a major negative impact on the social terrain as a whole. Thus the constitution sets out to redress such aberrations, not just through affirmative action provisions such as those in Article 27 and 81 but also by way of a detailed and robust Bill of Rights as well as a set of national values and principles of good governance.”(emphasis)

66. Under **Article 2 (6)**, of the constitution, International Treaties and Conventions are part of our laws. **The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (Article 3)** requires state parties to take measures to ensure full development and advancement for purposes of guaranteeing women the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men. These are some of the stop gap measures meant to reverse the negative effects of systematic discrimination against women, and that is what **Articles 27 and 28** stand for.

67. The constitution has given the respondent mandate to manage and regulate nomination process of political parties and must demand that they comply. I find and hold that the respondent has mandate to enforce the provisions of **Articles 10, 19, 27, 81 (b) and 91** of the constitution, and require Political Parties to comply with the two third gender principle.

3) Whether Article 10, 19, 20,27, 28, 56, and 91 (1) of the constitution obligate the respondent to reject nomination list of Political Party for its candidates for the 290 constituency based elective positions for members of National Assembly and 47 County based elective positions for the members of the Senate that do not comply with the two-third gender rule.

68. Counsel for the petitioner submitted that the respondent has power to reject lists from Political Parties that do not comply with the gender requirement, and can compel political parties to submit a compliant list. According to counsel, the respondent has power under **Article 88 (4) (d)** to **“regulate”** nominations by Political Parties, and therefore has mandate to ensure compliance or reject non-compliant nomination lists. Counsel for the respondent, on the other hand, was of the view that there were no sanctions to force compliance by political parties.

69. The respondent is empowered by **Article 88 (4) (d)** to regulate nominations by political parties. It is also responsible for approving nomination rules by political parties. As already pointed out, political parties are required by the **Constitution and Political Parties Act**, to ensure that they embrace human dignity, inclusiveness, gender equality and equity, human rights and fundamental freedoms. Political parties are also funded to promote **women and marginalised groups representation in parliament**.

70. The respondent has also admitted in its letter referred above, that it has been in discussions with Political Parties to ensure that they embrace the two-third gender principle. The respondent is required by the constitution to ensure that there is compliance with the constitution and the law. This is a constitutional mandate, and any submission that there are no sanctions to force compliance by Political Parties is not correct. Political Parties are also supposed to put in place measures that ensure compliance with national values and principles of good governance. The two-third gender principle, as an aspect of human rights and fundamental freedoms, binds all state organs and all persons. The respondent cannot fail to enforce rights under Article 27(8)) within political parties given that it is the spirit of the constitution. And as the court stated in the case of **Milka Adhiambo Otieno & Another V Attorney General & 2 others**[2012]eKLR.

“... in breathing life to the constitution and giving it a purposive meaning, it is clear that the state and the public officers have a duty to deliberately bring into fruition the spirit and letter of the said constitutional provisions by taking such steps so as to ensure that the aspirations of women and other vulnerable groups are well taken care of. In particular, the one third gender rule ought to be complied with.”

71. The respondent, as a State organ mandated by the constitution to regulate Political Parties nominations, must take deliberate steps to demand that Political Parties comply with the two-third gender principle. The respondent should draw inspiration from the Supreme Court decision in the case of **Moses Mwicigi & 14 others V Independent, Electoral and Boundaries Commission & 5 others** [2016] eKLR where the court stated that;

“A political Party has the obligation to present Party lists to IEBC, which after ensuring compliance, takes the requisite steps to finalise the ‘elections’ for these special seats. In the event of non compliance by a political party, IEBC has power to reject the party list and to require the omission to be rectified, by submitting a fresh party list or by amending the list already submitted.”

72. Although that case was dealing with the issue of special seats, the bottom line is that the respondent (IEBC) can reject a list for non-compliance and demand that political parties comply. The respondent must be at the fore front to ensure that political parties take pro-active measures that encompass the two-third gender principle and proceed to ensure that this is followed during nomination processes for the elective seats. The two-third gender principle is a constitutional requirement and all institutions must embrace it and abide by constitutional dictates.

73. Given that the respondent appreciates the necessity of integrating the two-third gender principle within political parties, it must continue to lead the way, and where possible, take steps, including standardized guidelines or rules for party nominations, that take into account the two-third gender principle. The Bill of Rights must bind all persons and state organs, and the respondent has an obligation to ensure that there is compliance with the law. The argument, therefore, that there are no sanctions is an excuse rather than a reason for failure to require political parties to comply with the two-third gender principle. It is an abdication of duty.

74. In the case of **August V Electoral Commission CCT8/98**, South African court faced a similar situation when the South African Parliament failed to enact legislation to enable prisoners vote and the court stated at paragraph 33;

“Parliament cannot by its silence deprive any prisoner of the right to vote. Nor can its silence be interpreted to empower or require either the commission or this court to decide which categories of prisoners, if any, should be deprived of the vote and which should not. The commission’s duty is to manage elections not to determine the electorate; it must decide the how of voting, not the who. Similarly, the task of this court is to ensure that fundamental rights and democratic processes are protected.”(emphasis).

75. The above statement aptly captures the situation at hand. This court is not called upon to decide how

the two-third gender principle will be realized within Political Parties. Its mandate is to ensure that human rights and fundamental freedoms under the constitution are upheld, protected and preserved. It is for political parties to decide how they should incorporate the two-third gender principle.

76. The respondent has a constitutional mandate in the absence of legislation, and in case of reluctance by political parties, to put in place administrative arrangements and ensure that political parties comply with the two-third gender principle. Looking at the respondent's grounds of opposition, the letter and submissions, it leaves no doubt that the respondent is fully aware of its constitutional obligations, but is reluctant to undertake the mandate to the fullest extent and demand, that Political Parties put in place measures to comply with two third gender principle. **Article 19** of the constitution must be interpreted to mean, and it so says, that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies; and that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and promote social justice and the realization of the potential of all human beings. It must also be understood that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the state.

77. The two-third gender principle is part of the rights entrenched in the Bill of Rights. It is granted by the constitution and not the state. The constitution itself decrees that it be interpreted so as to promote its purposes, values and principles, advance the rule of law, and human rights and fundamental freedoms in the Bill of Rights. More importantly, it should be interpreted according to the doctrine of interpretation that the law is always speaking. The constitution has spoken and we must all be ready to listen.

78. Just as was stated in the Namibian case of **S vs Acheson 1991 (2) SA 805 (at p 813)**:

“The constitution of a nation is not simply a statute which mechanically defines the structures of the government and the relationship between the government and the governed. It is a ‘mirror reflecting the national soul’; the identification of ideas and... aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must, therefore, preside and permeate the process of judicial interpretation and judicial discretion.”

79. The ideals and aspirations of the nation of Kenya is to have a society that respects human dignity, promotes human rights and fundamental freedoms, enforces gender equality and equity and guarantees democratic principles; for these values reflect who we are. As was also stated by the Court of Appeal in the case of **Attorney General Vs Kituo Cha Sheria & 7 Others {2017} eKLR** ;

“...rights have inherent value and utility and their recognition, protection, and preservation is not an emanation of state largesse because they are not granted, nor are they grantable by the state. They attach to persons, all persons, by virtue of their being human and respecting rights is not a favour done by the state or those in authority. They merely follow a constitutional command to obey.” (emphasis)

80. It could not have been put any better. With the above in mind, I find and hold that the respondent has an obligation to obey the constitutional command, as a regulator of political party elections and nominations processes, to reject any nomination lists that fail to comply with the two-third gender principle. This is so, because, political parties are required to integrate the two-third gender principles within their internal organization. They are bound to promote representation of women and marginalised groups in parliament, and cannot do so without embracing the two-third gender principle. They are not simply doing a favour to women and marginalised groups; they have a constitutional and legal obligation to fulfill this desire. They are funded for that purpose and must be accountable in that regard. The respondent must demand this accountability from them, on behalf of the people of Kenya failure to which, it should reject non-compliant nomination lists. That is the spirit of our constitution and the law.

81. Holding otherwise, would go against the principle set in the case of **Attorney General Vs Kituo Cha Sheria & 7 Others (Supra)**, that;

“... Courts are commanded to be creative and pro-active so that the Bill of Rights may have the broadest sweep, the deepest reach and the highest claims... they are enjoined in their interpretative role to adopt a pro-rights realization and enforcement attitude and mindset calculated to the attainment as opposed to the curtailment of rights and fundamental freedoms...they must aim at promoting through their interpretation of the Bill of Rights the ethos and credo, the values and principles that underlie and therefore mark us out as an open and democratic society whose foundation and basis is human dignity, equality, equity and freedom...”

(4). Whether the respondent should be ordered to accept and process the nominations for inclusion as candidates for the 290 constituency based elective positions for members of National Assembly and 47 county based elective positions for the Senate for the 2017 General Election from only those nomination lists of political parties that meet the two-third gender requirement.

82. The last and final question is whether the respondent should only accept and process nomination lists from Political Parties that are two-third gender compliant, for purposes of the General Elections of 8th August, 2017. It was the petitioner’s submission, that this should be the case. According to counsel, Political Parties must meet the requirement for the two third gender principle in the nomination process and failure to do so, their nomination lists should be rejected.

83. I must admit, this is not an easy one, whereas, Political Parties as institutions must comply with constitutional obligation, the order sought at this moment, if granted, will cause more confusion than solve the problem. As it is, Political Parties are currently conducting party nominations for candidates for both the 290 constituency and 47 Senate elective positions. The respondent published timelines for completion of nomination processes in a special issue of Kenya Gazette of 17th March, 2017, and the exercise concludes by 26th April, 2017. Those who will have received party nomination certificates, will present them to the respondent, and thereafter, stand for election for their respective seats to be held on 8th of August 2017.

84. Bearing this in mind, it is inconceivable that Political Parties can readily comply with the two-third gender principle at this moment. Court orders must serve a purpose, least of which, should be to cause confusion and uncertainty. As Mr Waikwa correctly submitted, and it is acknowledged, we must not lose sight of the transformative nature of our constitution. The Constitution fixed the election date which cannot be changed. This is different from the previous Constitution where election dates were a secret. The spirit of our Constitution is that we must now have elections on the due date. Between now and the election date is a preparatory period, and the court must avoid disrupting this constitutional calendar. I do not even see how Political Parties can be made to re-work their nomination programmes so that they comply with the two-third gender principle, were they to be ordered to do so. It must also be appreciated that political parties will have to put in place mechanisms for their compliance. The order does not therefore commend itself for granting now. However, the court will make an appropriate order in the circumstances of this case.

Prayer (d) of the petition was abandoned that is why it does not form part of this decision.

Disposition

85. For the above reasons, the petition succeeds and I make the following orders;

1) A declaration is hereby issued that Political Parties are bound by the provisions of Articles 10, 19, 20, 27, 28, 56, 81(b) and 91(1) of the Constitution and hence any action under taken by them, including nomination process for candidates for members of parliament, must comply with the requirements of those provisions.

2) A declaration is hereby issued that the power conferred to the respondent in Article 88 (4) (d) of the constitution of “Regulation of the process by which parties nominate candidates for elections” obligates the respondent to ensure that nominations carried out by political parties

meet the requirements of the constitution, especially Articles 10, 19, 20, 27, 28, 56 and 91(1).

3) A declaration is hereby issued that Articles 10, 19, 20, 27, 28, 56 and 91(1) of the Constitution obligate the respondent to reject any nomination list of a political party for its candidates for the 290 Constituency based elective positions for members of National Assembly and 47 County based positions for the member of the Senate that do not comply with two-third gender rule.

4) An order is hereby issued directing Political Parties to take measures to formulate rules and regulations for purposes of actualizing the two-third gender principle during nominations for the 290 constituency based elective positions for members of National Assembly and 47-County based elective positions for the members of Senate within SIX months from the date of this judgment. In default, the respondent. The Independent, Electoral And Boundaries Commission, shall devise an administrative mechanism to ensure that the two-third gender principle is realized among Political Parties during nomination exercises for parliamentary elections. For avoidance of doubt, and in order to avoid disruption, this order shall not apply to the General Elections due on 8th August, 2017.

5) There will be no order for costs.

Dated, Signed and Delivered at Nairobi, this 20th Day of April 2017.

E C MWITA

JUDGE