



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

PETITION NO. 7 OF 2017

IN THE MATTER OF ARTICLE 2(3) AND (4) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLE 22 OF THE CONSTITUTION

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION AND INCONSISTENCE WITH ARTICLE 260 OF THE
CONSTITUTION OF KENYA**

DR. SAMUEL THINGURI WARWATHE.....PETITIONER

VERSUS

MARY N. MUNGAI

COMMISSIONER FOR CO-OPERATIVE

DEVELOPMENT.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. The Petitioner in this case is the Chairman of Chamber Unity Savings and Credit Cooperative Society Limited and Chamber Unity Housing Co-operative Society Limited. These two societies are registered under the Societies Act Cap 490.

2. On 3rd February 2017, the Petitioner received a circular dated 27th January 2017 from the 1st Respondent, the Commissioner for Cooperative Development. The letter stated thus;

As you are well aware General Elections will be held on the 8th August 2017, the Independent Electoral and Boundaries Commission regulations require that Public Officers intending to contest for elective posts in the General elections must resign from office by February 7th, 2017.

Consequently, all co-operative leaders intending to contest for elective posts in the General Elections must resign from office by February 7th, 2017. This is intended to shield the co-operative movement from political activities and also allow for uninterrupted service delivery to members.

3. The Petitioner is aggrieved by the letter. As an official of a Sacco, he believes that he is not a public officer and that therefore he should not have to resign from his position before running for an elective seat in the General Elections. He has therefore come to Court seeking the following orders:

1. A declaration that the 1ST Respondent's directive contained in the Circular dated 27th January 2017 is inconsistent with Article 260 of the Constitution in as far as it treats and terms chairmen/leaders of a co-operative Societies as Public Officers

2. A declaration and an order that Section 2(e) of the Public Officer Ethics Act is inconsistent with Article 260 of the Constitution and is therefore null and void.

3. A declaration that the Petitioner and or other chairmen, leaders and members of co-operative Societies are not public officers.

4. A declaration that the 1st respondent's Circular dated 27th January 2017 requiring Chairmen and Leaders of a co-operative Societies to resign six months before office to be in contravention of the Constitution since the chairmen/leaders of a co-operative Societies are not public officers.

5. An order Restraining the 2nd Respondent from disqualifying the Petitioner and chairmen/leaders of a co-operative Societies from the general elections on grounds of not vacating public office six months to the date of the election.

6. Any Section of the Cooperative Societies Act Cap 490 and any rules and regulations made thereunder that defines and or classifies Chairpersons and or leaders of Co-operative Societies registered under the Co-operative Societies Act as public officers is inconsistent with and in violation of Article 260 of the Constitution.

7. The Respondents be condemned to pay costs of the suit

4. In essence, the Petitioner believes that it is a violation of his Constitutional rights to treat him as a public officer. He believes that to the extent that the impugned circular is premised on the provisions of Section 2(e) of the Public Officer Ethics Act(No. 4 of 2003), that Act is in contravention with the Constitution to the extent that the Constitution supplies a definition of a Public Officer.

5. The 1st and 3rd Respondent filed an affidavit sworn by Mary Mungai, the Commissioner for Cooperative Development in the Ministry of Industry, Trade and Cooperative sworn on 15th March, 2017 and filed in Court on 15th March, 2017.

6. In her affidavit, the 1st Respondent confirms issuing the circular dated 27th January 2017 in which she directed all cooperative leaders intending to contest for elected posts in the general elections to resign from office by 7th February 2017.

7. The 1st Respondent believes that her circular is in line with the provisions of section 43(5) of the Elections Act, No. 24 of 2011 which states that a public officer who intends to contest an election under the Act shall resign from public office at least six months before the date of election.

8. The 1st Respondent further avers that according to the Public Officers Ethics Act No. 4 of 2003, a Public Officer is defined to mean any officer, employee or member including part time or temporary officers, employees or member of a co-operative society established under the Co-operative Societies Act No 12 of 1997.

9. Therefore, the 1st Respondent argues that the aforesaid law is applicable to the petitioner by virtue of him being the chairman of Chamber Unity Savings and Credit Co-operative Society. The 1st Petitioner believes that the Petitioner is a Public Officer and states that he has, indeed, been complying with Section 26(1) of the Public Offices Ethics Act, 2003 which requires public officers to declare their assets and liabilities periodically.

10. Consequently, the 1st Petitioner believes that Section 43(5) of the Elections Act applies to the Petitioner and that the Petitioner ought to comply as "the Law as Co-operative Societies are matters of public interest."

11. The 2nd Respondent is the Independent Electoral and Boundaries Commission (IEBC). It does not seem to share the views of the 1st and 3rd Respondents.

12. The 2nd Respondent avers that it is a creature of the Constitution established under Article 88(1) of the Constitution and charged with the responsibility of conducting or supervising referenda and elections to any elective body or office established by the Constitution or other elections as prescribed by an act of Parliament.

13. The 2nd Respondent avers that Article 82(1) of the Constitution provides that Parliament shall enact legislation to provide for the conduct of elections and referenda and the regulation and efficient supervision of elections and referenda including nomination of candidates for election. Hence, the 1st Respondent avers, pursuant to this constitutional provision, Parliament enacted the Elections Act No. 24 of 2011, which is the principal legislation governing election matters in the Republic of Kenya.

14. The 2nd Respondent further avers as follows:

(a) That Section 43(5) of the Constitution provides that a Public officer who intends to contest an election under this Act shall resign from public office at least six months before the date of election.

(b) That Articles 132(2) (101(1), 177(1)(a) and Article 180(1) of the Constitution provides for the dates of election of the deputy,

Members of Parliament, Members of County Assembly, the County Governors and their deputy as the second Tuesday in August in every fifth year.

(c) That the election as per the foregoing Articles of the Constitution shall be on the 8th August, 2017 and accordingly, the six month period for public officers to resign matures on the 7th February, 2017.

(d) That Article 88(5) of the Constitution provides that the 2nd Respondent shall exercise its power and perform its functions in accordance with the Constitution and National Legislation.

(e) That Article 260 of the Constitution defines public office to mean an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided for by Parliament and goes ahead to define a public officer to mean any state officer or any person, other than a state officer, who holds a public office.

(f) That Article 260 of the Constitution defines public service to mean the collectivity of all individuals, other than State officers, performing a function within a State organ and state to mean the collectivity of offices, organs and other entities comprising the government of the Republic of Kenya under the Constitution.

(g) That furthermore Article 260 specifically provides that state office means any of the following offices-

- i. President;
- ii. Deputy President
- iii. Cabinet Secretary
- iv. Member of Parliament
- v. Judges and Magistrates
- vi. member of a commission to which Chapter Fifteen
- vii. applies
- viii. holder of an independent office to which Chapter Fifteen
- ix. applies
- x. member of a county assembly, governor or deputy governor or a county, or other member of the executive committee of a county government
- xi. Attorney General
- xii. Director of Public Prosecutions
- xiii. Secretary to the Cabinet
- xiv. Principal Secretary
- xv. Chief of the Kenya Defence Forces
- xvi. Commander of a service of the Kenya Defence forces
- xvii. Director-General of the National Intelligence Service
- xviii. Inspector General and the Deputy Inspectors General, of the National Police Service
- xix. An office established and designated as a state office by national legislation.

15. The 2nd Respondent took the position that the Petitioner herein is not a Public Officer within the meaning of the Constitution and the Co-operative Societies Act as his remuneration and benefits of the office he holds are not payable directly from the Consolidated Fund or directly out of money provided for by Parliament and neither is he the Commissioner for Co-operative Development, a Deputy Commissioner or an employee of Co-operative Development undertaking administrative duties provided for under Section 3 of the Co-operative Societies Act.

16. However, the 2nd Respondent balks at the orders sought against it in the Petition calling them “notional and speculative.” It insists that the 2nd Respondent is bound to act in accordance with the Constitution and legislation and that no allegation has been made in the Petition against the 2nd Respondent and that, accordingly, no orders should issue against it.

17. As Constitutional petitions go, this is a rather straightforward one. The singular issue presented is whether Section 2(e) of the Public Officer Ethics Act (No. 4 of 2003) is inconsistent with Article 260 of the Constitution, and, consequently, null and void to the extent of its inconsistency.

18. A proper starting point in all cases which call for the interpretation of the Constitution is the in-built theory of interpretation of our Constitution in Article 259 of the Constitution. That Article provides as follows:

(2) *This Constitution shall be interpreted in a manner that-*

1. *promotes its purposes, values and principles;*
2. *advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;*
3. *permits development of the law; and*
4. *contributes to good governance.*

.....

(3) *Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking...*

19. The Supreme Court has interpreted Article 259 as among other things requiring Courts to interpret the Constitution in a manner that eschews mechanical jurisprudence but, instead to breathe meaning to the Constitution in a manner that comports with the lived realities of the People of Kenya. In other words, Courts are expected to interpret the Constitution contextually – aware of the history and social context that shaped it. Hence, in ***In the Matter of the Kenya National Commission on Human Rights, Supreme Court Advisory Opinion Reference No. 1 of 2012; [2014] Eklr*** thus (at paragraph 26) the Supreme Court, in stating that the Constitution must be interpreted holistically expounded thus:

But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in the light of its history, of the issues in dispute, and of the prevailing circumstances.

20. In an earlier case, ***Re In the matter of the Interim Independent Electoral Commission*** the Supreme Court quoted with approval the South African Case of ***Minister of Defence, Namibia -vs-Mwandinghi*** and stated as follows:

Interpreting the Constitution is a task distinct from interpreting the ordinary law. The very style of the Constitution compels a broad and flexible approach to interpretation.

21. In the ***Africa Rafiki Ltd Case*** Lenaola J. cited with approval a seminal decision by the US Supreme Court on the correct mode of Constitutional interpretation which is in line with the guidelines given by our own Supreme Court which I also adopt and will guide me here. The case is ***South Dakota vs North Carolina 192 US, 268 (1940) L ED***. In the decision the US Supreme Court stated at paragraph 465:

Elementary rule of constitutional construction is that no one provision of the constitution is to be segregated from all others to be considered alone, but all provisions bearing on a particular subject are to be brought into view and to be so interpreted as to effectuate the general purpose of the instrument.

22. This same principle was announced next door in Uganda in the case of ***Tinyefunza vs Attorney General Const. Petition No. 1 of 1996 (1997 UGCC 3)*** where the Court of Appeal of Uganda stated that:

The entire constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written constitution.

23. What emerges from these cases is the principle in constitutional interpretation that Courts are required by our Constitution to adopt a purposive interpretation of the Constitution that advances national values and principles, promotes the rule of law, good governance and human rights on the basis and in light of the socio-political and economic history, context, culture and circumstances of our country.

24. Yet, even purposive interpretation of the Constitution must begin and take seriously the words and text of the Constitution. For the task of constitutional interpretation is not a task of painting a pie in the sky: it is a task rooted in the constitutional text. It is, therefore, axiomatic that the interpretation of any text – Constitutional or otherwise – but begin with the words, the text to be interpreted. Of course, the text must be interpreted with a clear rear view of the history and purpose of the text as well as a clear view of the present context. Hence, O’Higgins, CJ, of Ireland, had this to say in ***People v O’Shea***:

The Constitution, as the fundamental law of the State, must be accepted, interpreted and construed according to the words which are used; and these words, where the meaning is plain and unambiguous, must be given their literal meaning. Of course, the Constitution must be looked at as a whole and not merely in parts and, where doubts or ambiguities exist, regard may be had to other provisions of the Constitution and to the situation which obtained and the laws which were in force when it was enacted. Plain words must, however, be given their plain meaning unless qualified or restricted by the Constitution itself.

25. The canonical US Supreme Court decision in ***U.S vs Butler, 297 U.S. 1[1936]***, the US Supreme Court expressed the duty of a Court in determining the constitutionality of a provision of a statute in the following terms

When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the Court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This Court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.

26. Taking into consideration these principles of interpretation, the task at hand is simple enough.

27. The Constitution defines who “Public Officers” are and what a “Public Office” is. That definition is in Article 260 of the Constitution. I have reproduced that definition in paragraph 14 above thus:

“public officer” means—

(a) any State officer; or

(b) any person, other than a State Officer, who holds a public office.

“public office” means an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament

28. This is a definition provided by the Supreme Law of the land. This definition is important because there are certain restrictions and constraints on the liberties and freedoms that Public Officers enjoy due to the nature of their work. These restrictions and constraints were deemed necessary by Kenyans as a means to ensure good governance of the Republic. They are specifically stipulated in the Constitution because Kenyans were informed by their history and context about the dangers that lurk behind the dark alleys of public offices when they are un-illuminated by regulatory rays. It therefore follows that whoever gets labelled a Public Officer must fit the constitutional category since it is one that comes with restrictions and constraints.

29. As Fredrick Douglas once stated, “In all matters where laws are taught to be made the means of oppression, cruelty, and wickedness, I am for strict construction....Where its text was unclear or open-ended, the Constitution should always be interpreted strictly in favour of maximizing justice and expanding human rights.”^[1]

30. In this case, we must interpret the Constitution strictly in favour of maximizing justice and expanding rights. Here, the definition in the Statute is different and more restrictive than the one contained in the Constitution. The Public Officer Ethics Act No. 4 of 2003 at the Section 2 supplies the following definition of a Public Officer:

“public officer” means any officer, employee or member, including an unpaid, part-time or temporary officer, employee or member, of any of the following—

(a) the Government or any department, service or undertaking of the Government;

(b) the National Assembly or the Parliamentary Service;

(c) a local authority;

(d) any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law;

(e) a co-operative society established under the Co-operative Societies Act ([No. 12 of 1997](#)):

Provided that this Act shall apply to an officer of a co-operative society within the meaning of that Act;

(f) a public university;

(g) any other body prescribed by regulation for the purposes of this paragraph;

31. It is eminently obvious that this definition is more restrictive than the one supplied in our Constitution at Article 260. Our Constitution is

clear: Any restrictions to the fundamental rights and freedoms it enunciates must be either pronounced in the Constitution itself or provided by a Statute which must meet the Article 24 test provided in the Constitution.

32. Here, the Constitution has supplied a clear definition to what “Public Officer” means. For purposes of elections, the IEBC, the 2nd Respondent agrees that that is the correct definition. I find no justifiable or reasonable reason why the 1st and 3rd Respondents would choose a different definition. It is readily obvious that the definition of “Public Officer” supplied in the The Public Officer Ethics Act No. 4 of 2003 is more restrictive than that provided in our Constitution. It is also readily obvious that cannot pass the Constitutional muster provided in our law and Constitution. Any law that is inconsistent with our Constitution is, simply, unconstitutional to the extent of its inconsistency. Such is the fate of the Section 2 of the Public Officer Ethics Act No. 4 of 2003 to the extent that it defines a “Public Officer” differently than is provided in the Constitution. To the extent of that unconstitutionality, that particular definition in Section 2 of the Public Officer Ethics Act No. 4 of 2003 is unconstitutional. It is declared as such.

33. It therefore follows that the orders prayed for by the Petitioner are merited. This Court, then, makes the following orders:

(a) A declaration hereby issues that the 1st Respondent’s directive contained in the Circular dated 27th January 2017 is inconsistent with Article 260 of the Constitution in as far as it treats and terms chairmen/leaders of a co-operative Societies as Public Officers

(b) A declaration hereby issues that that Section 2 of the Public Officer Ethics Act is inconsistent with Article 260 of the Constitution and is therefore null and void to the extent that it defines a “Public Officer” differently than the definition supplied by the Constitution.

(c) A declaration hereby issues to the effect that the Petitioner and or other chairmen, leaders and members of co-operative Societies are not Public Officers for the purposes of the Constitution and the Elections Act.

(d) A declaration hereby issues to the effect that the 1st Respondent’s Circular dated 27th January 2017 requiring Chairmen and Leaders of a co-operative Societies to resign six months before office to be in contravention of the Constitution since the chairmen/leaders of a co-operative Societies are not Public Officers.

(f) A declaration hereby issues that any Section of the Cooperative Societies Act Cap 490 and any rules and regulations made thereunder that defines and or classifies Chairpersons and or leaders of Co-operative Societies registered under the Co-operative Societies Act as public officers is inconsistent with and in violation of Article 260 of the Constitution.

Dated and delivered at Kiambu this 31st day of July, 2017.

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JOEL NGUGI

JUDGE

[1]Frederick Douglass, *Address at Glasgow: The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?* (Mar. 26, 1860), in 2 PHILIP S. FONER, *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS* 467–80 (1950).