



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO 360 OF 2017**

**MAJOR (RTD) JOEL KIPRONO ROP.....PETITIONER**

**VERSUS**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**OFFICE OF THE REGISTRAR OF POLITICAL PARTIES.....3<sup>RD</sup> RESPONDENT**

**PARLIAMENT.....4<sup>TH</sup> RESPONDENT**

**KENYA NATIONAL HUMAN RIGHTS &**

**EQUALITY COMMISSION.....5<sup>TH</sup> RESPONDENT**

**NATIONAL COHESION & INTEGRATION COMMISSION.....6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. In 2010, the people of Kenya adopted a new Constitutional dispensation with a transformative Constitution. Article 1(1) of the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution. Article 2(1) declares that the Constitution is the Supreme Law of the Republic and binds all persons and all state organs at both levels of government. Sub Article (3) thereof states that the validity or legality of the Constitution is not subject to challenge by or before any Court or other state organ. And Article 3(1) decrees that every person has an obligation to respect uphold and defend the Constitution. This therefore an embodiment of the supreme will of the people.

**The Petition**

2. Major (Rtd) Joel Kiprono Rop, the petitioner, filed a petition before this Court dated 17<sup>th</sup> July 2017 and filed in Court on 20<sup>th</sup> July 2017. The Independent Electoral and Boundaries Commission (IEBC), the Attorney General, office of the Registrar of Political Parties, Parliament, Kenya National Human Rights Commission and National Cohesion and integration Commission, are named as respondents in the

petition. The petitioner states that he presented this petition on his own behalf and on behalf of millions of other Kenyans, and has cited Articles 19, 20, 21, 26, 27, 28, 39, 43 and 47 of the Constitution as the foundation of his petition.

3. The petitioner's complaint is that there has been misinterpretation of the Constitution with regard to the term of the office of the President. According to the petitioner, under Article 136(2) (a) of the Constitution, Election of the President should take place ***"every fifth year"***. Even though this is clear in the constitution, the petitioner states that the Country is busy preparing for elections to be held on 8<sup>th</sup> August 2017, yet the President's term of five years has not expired. The petitioner contends that the President has been in office for about ***"four and half years"*** and by holding elections on 8<sup>th</sup> August 2017, the President's term will have been reduced without a referendum. This, he contends, will also affect the terms of office of Governors and Members of County Assembly.

4. The other ground raised by the petitioner is that independent candidates who have been cleared to stand are not bona fide independents since most of them hoped from parties after losing in the primaries, which has resulted into abuse of the concept of independent candidates under the constitution. The petitioner has complained that there are very many independent candidates, including in his own Koinon Constituency where there are two independent candidates including himself.

5. The petitioner has also cited the legal dispute over supply of Presidential ballot papers and the subsequent decision of 7<sup>th</sup> July 2017 to the effect that the tender for Presidential ballot papers be done a fresh, and the appeal against that decision which point to the fact that IEBC cannot redeem the electoral process ***"three weeks"*** to the general elections.

6. The petitioner further stated that there is a major standoff between major political parties, reckless heckling and stone throwing witnessed in parts of the country. In his view, these are not good signs for peaceful elections in the Country. Due to this he states, people have started moving from their places of work to relatively peaceful areas.

7. The petitioner also faults Parliament for failing to muster amendments to the Constitution in accordance with Articles 255, 256 and 257 of the Constitution and change the date for election. He further criticizes Parliament for failing to deliberate on the petitions he presented to parliament, which had raised substantial issues of national importance concerning security, unity and general elections.

8. The petitioner feels, therefore, that parliament should be recalled for emergency sessions to spearhead a referendum for purposes of amending the constitution within the remaining period and set a date for general elections in early March 2018. He now seeks, sought an order of this Court declaring the General Elections Planned for 8<sup>th</sup> August 2017, unconstitutional and that all activities associated with the elections should be stopped.

## **Responses**

9. The 1<sup>st</sup> respondent filed a Notice of Preliminary objection dated 26<sup>th</sup> July 2017 and filed in Court on the same day. The 1<sup>st</sup> respondent contended that the petition is a bare political diatribe devoid of any triable or constitutional issues for judicial adjudication, that Courts have already made judicial pronouncements on the date of the General election hence this matter is precluded from any further determination and that the general issues raised in the petition are a re-litigation of issues already decided upon by Courts.

10. The 3<sup>rd</sup> respondent also filed a notice of Preliminary Objection to the effect that the suit is ill intended since it has been filed too close to the election date, that the petition cannot qualify as a public interest litigation, that the petition is fatally defective for it does not specify any breach by the 3<sup>rd</sup> respondent of the rights referenced therein, that the relief sought cannot be granted owing to the Court of Appeal decision of 20<sup>th</sup> July 2017 which re affirmed the election date as 8<sup>th</sup> August 2017.

## **Petitioner's Submissions**

11. Both written and oral submissions were made. The petitioner argued that the letter and spirit of the Constitution is to maintain the five year election cycle that has been practiced since independence and which is anchored in Article 177(4) of the Constitution. According to the petitioner, the words "**Fifth**" in Articles 101(1), 136(2) (a) 177(1)(a) and 180(1) is an acknowledgement of the five year term.

12. The petitioner contended that the first General election under the Constitution should have been held in accordance with rules 9(2) of the Sixth Schedule to the Constitution that is; the second Tuesday of August 2012, which would have caused minimal disruption to the then President's and parliament's terms. If that happened, he contended, the five year election cycle would have smoothly kicked in and there would have been no complications on the President's and Parliament's term of office because Articles 102, on the term of Parliament, and 142 on term of President remained suspended in accordance with section 2(1)(a) of the Sixth Schedule to the Constitution. This would have been made easier, he submitted, because terms offices of the Governor and MCAs provided for under Articles 186(2) and 177(4) respectively were not in existence.

13. The petitioner contended that by holding elections on the second Tuesday in every fifty year, IEBC treats the current elective positions as if they were in a transition period. He was of the view that the transition period should have been in 2012, and shortening the current term of elective positions, is making up for where the country failed in 2012.

14. The petitioner concluded that in a proper context the term Five years means the current elected leaders should serve their full five year terms to March 2018 as the country engages in a referendum to make relevant Constitutional amendments with respect to elections date.

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

15. Mr Kagim, learned Counsel for the 1<sup>st</sup> respondent, submitted that the petitioner is precluded from further proceedings due to collateral estopped, since the petition is a re-litigation of an issue that has already been decided. According to Counsel, the case of **John Harun Mwau & 3 Others v Attorney General & 2 others** [2012] eKLR decided the issue of general election and there is no need for further litigation over that same issue. Counsel also referred to the case of **Andrew Kiplimo Sang Muge & 2 Others v Independent Electoral and Boundaries Commission** [2017] eKLR saying that case had also settled the issue of holding election on the second Tuesday of the fifth year.

16. Counsel raised issue estoppel as a ground for rejecting this petition contending that the issue raised in this petition namely; the date of holding general election has been conclusively determined. He relied on the case of **Blair v Curran** (1939) 62 CLR 464531-2 for the proposition that a judicial determination directly involving an issue of fact or law disposes of once and for all the issue, so that it cannot be raised afterwards by the same people or their privies.

17. He referred to the case of **Fatuma A. Chakono & 40 Others v District Commissioner, Msambweni District & another** [2013] eKLR for a similar proposition, and submitted that the issue before Court has been litigated upon and a final judgment delivered hence the current petition should be dismissed.

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

18. Mr Ogosso, learned Counsel for the 2<sup>nd</sup> respondent, submitted that there was no issue before Court for determination since the issue of election date had been determined in previous litigations. Counsel refers to the case of **John Harun Mwau & 3 others v Attorney General & 2 others (supra)** where it was stated that the 2013 General election was transitional and the next election would be held on the Second Tuesday of August in the fifth year.

19. According to Counsel, Articles 101, 136(2) (a), 177(1) (a) and 180(1) of the Constitution are clear

when elections should be held. He submitted that the petitioner's contention that holding elections on 8<sup>th</sup> of August 2017 is unconstitutional has no factual or legal basis. He relied on the decision in the case of **Constitutional Implementation Commission v Speaker of the National Assembly**, Petition No 403 of 2015 (para 115) to emphasize the point that a Constitutional provision cannot be unconstitutional.

20. Mr Ogosso submitted that it was not in the public interest to grant the petition, arguing that people have a constitutional right to exercise under Article 38 of the Constitution to exercise their political rights which should not be interfered with. He prayed that the petition be dismissed.

### **Analysis and Determination**

21. I have considered the pleadings herein, submissions by parties and authorities cited. In my view, there is only one issue for determination in this petition, that is; whether holding of general elections on 8<sup>th</sup> August 2017 is unconstitutional.

22. The petitioner challenges the general election due on 8<sup>th</sup> August 2017 on the grounds that the term of five years of the current government has not expired. According to the petitioner, general elections were held in March 2013 hence the next General Election should be due about the same time in 2018 when the term of office for elective positions will have come to an end.

23. I understood the petitioner to argue that the transitional election should have been held in August 2012 when offices such as those of Governors and MCA's had not begun, but since the election was held in March 2013, the country has misunderstood the word fifth year in deciding to hold elections on the second Tuesday of August this year. The petitioner argues that the petition raises a constitutional issue which requires interpretation of the Constitution.

24. The Constitution is the Supreme Law of the land. Article 22(1) provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. Article 258 of the Constitution is also clear that every person has the right to institute Court proceeding claiming that the Constitution has been contravened, or is threatened with contravention.

25. The two Articles give every person locus to approach the Court where there is actual violation of Fundamental Rights or Freedoms or a threatened breach of the the Constitution. It is on the strength of this that the petitioner has moved this Court saying that he is doing so on his own behalf and on behalf of other Kenyans who believe like he does, that there is a threatened breach of the constitution. In this regard, the petitioner has a right to approach the Court whether as an individual or in association with others. He is before Court by virtue of the right granted by the Constitution.

26. The holding of general elections is a constitutional issue, which requires interpretation of the constitution. But before addressing the issue raised in the petition, it is important to consider the principles of constitutional interpretation.

27. Article 259 of the Constitution provides the manner the Constitution should be interpreted. It states-

***“ (1) The Constitution shall be interpreted in a manner that:-***

***a) promotes its purposes, value and principles,***

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

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

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

28. In the case of Re The Matter of the Interim Independent Electoral and Boundaries Commission. Application No 2 of 2011, the Supreme Court citing the words of Mahomed AJ in the Namibian case of State v Acheson 1991 20 SA 505 stated;

***“[51] The Constitution of a nation is not simply a statute which mechanically defines the structures of governance 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 tenor of the Constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion”***

29. The Constitution should be interpreted in such a manner that it promotes its purposes and principles which include; human rights, the rule of law and democracy. The Constitution should also be interpreted liberally and in a broad manner so as to give effect to its principles and purposes.

30. In the case of Njoya & 6 Others v Attorney General & another [2004] eKLR the Court emphasized on the need to interpret the Constitution liberally and stated:-

***“Constitutional provisions ought to be interpreted broadly or liberally. Constitutional provisions must be read to give values and aspirations of the people. The Court must appreciate throughout that the constitution, of necessity, has principles and values embodied in it, that a constitution is a living piece of legislation. It is a living document.”***

31. The Constitution as a living document has various provisions which must be read as one document and as an integrated whole but not disjointly. In the case of Tinyefuza v Attorney General of Uganda, Constitutional petition 1 of 1997 [1997 3] the Constitutional Court of Uganda stated-

***“The entire Constitution has to be read together as an integrated whole, not one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness. And exhaustiveness.”***

32. In Attorney General of Tanzania v Rev. Christopher Mtikila[2010]EA 13 the Court of Appeal of Tanzania stated that the cardinal Principle of Constitutional interpretation is to read the entire constitution as are entity. While in the case of Saleh M. W Kamba & Others v Attorney General of Uganda & Others Constitutional Petition no 16 of 2003, the Constitutional Court stated

***“A Constitutional provision containing a fundamental human right is a permanent provision intended to cater for all times to come and therefore should be given a dynamic progressive liberal and flexible interpretation, keeping in view, the locals of the people their Social Economic and Political Cultural values so as to extend the benefit of the same to the maximum possible. Where words or phrases are clear and unambiguous, they must be given their primary plain, ordinary or natural meaning. The language used must be construed in its natural and ordinary sense” (see Okello John Livingstone and 6 Others v the Attorney General & another***

33. And in the case of Institute of Social Accountability & Another v National Assembly & 4 Others, Petition No 71 of 2014 [2015] eKLR the Court emphasized on the principles of constitutional interpretation and in particular Article 259 thus:-

***“The Court is enjoined under Article 259 of the constitution to interpret the Constitution in a manner that promotes its purposes values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance. In exercising its judicial authority, this Court is obliged under Article 259(2) (e) of the Constitution to protect and promote the purpose and principles of the Constitution...”***

34. The constitution should be given a purposive interpretation and not as if it was it were an ordinary

statute so that it can give effect to the nation's ideals and aspirations.

35. The transformative Constitution promulgated in 2010 transformed governance architecture in the Country. One of the transformative features introduced is the express provision in a number of Articles in the Constitution on the time of holding general elections, a departure from the retired Constitution which had no such provisions.

36. Article 101(1) of the Constitution provides-

***“A general election of members of Parliament shall be held on the second Tuesday in August in every Fifth Year.”***

37. This provision relates to elections of members of parliament, the National Assembly and Senate. In so far as presidential election is concerned, Article 138(3) provides-

***“In a presidential elections-***

***a) .....***

***b) The poll shall be taken by secret ballot on the day specified in Article 101(1) at the time and in the places and in the manner prescribed under an Act of parliament.”***

38. The Act of Parliament referred to here is the Elections Act, 2011. Article 101(1) is clear that elections shall be held on the second Tuesday in August in the fifth year. Article 177(1) provides as follows with regard to County Assembly elections.

***“ a County Assembly consists of –***

***a) Members elected by registered voters of the wards, each ward constituting a single member constituency, on the same day as a general election of members of parliament being the second Tuesday in August in every fifty year.”***

39. From these Articles of the Constitution, the general election is to be held on the Second Tuesday in August in every fifty year. The petitioner's understanding is that the current government's term has to run for a full term of five years as contemplate in the above provisions because they refer to five years. In his view, holding elections on 8<sup>th</sup> August 2017 will shorten the term by a couple of months. He contends that the general election should be held in March 2018 when the five years term will have ended.

40. The words used in the Constitution in Article 101(1) that the general election shall be held on the second Tuesday in August in ***very fifty year*** are clear and unambiguous. Article 138(3) (b) reiterates that the elections (Presidential elections) shall be by secret ballot ***on the day specified in Article 101(1)***. The date specified in Article 101(1) is the second Tuesday in every fifty year. Article 177(1)(a) is also clear that election of members of county assembly shall be on the same day as the general election of members of parliament, being the second Tuesday in August in every fifty year.

41. The Constitution does not say that the general elections be held at the end of the fifth year, or at the end of the term. It simply states that the general elections be held on the second Tuesday in August in every fifth year. This is simple clear and unambiguous language. The petitioner's contention that the general elections should be held at the end of the term of five years is with respect not in the Constitution.

42. It is also important to note that the Constitution only gives the day and month when the general elections should be held and not the date. Dates will vary each election cycle depending on the calendar year. Where the words or phrases used in the Constitution or Act of parliament are clear and unambiguous they must be given their primary, natural or ordinary meaning.

43. The phrase used in the Constitution namely; on the ***second Tuesday in August in every fifth year***

must be read to mean general elections should be held in the fifth year and not at the end of the fifth year as contended by the petitioner. If the contention by the petitioner was to be stretched to its logical conclusion, it would lead to a misinterpretation of the Constitution. I say so because there is nothing in the expression “***on the second Tuesday in August in every fifth year***” to justify it acquiring a different meaning than that assigned to it by the Constitution.

44. The general elections were held on 4<sup>th</sup> March 2013. A simple arithmetic shows that the second Tuesday in August in the fifth year falls on 8<sup>th</sup> August this year. That date is in the fifth year following the previous election. No other construction can be given to the provisions relating to the general elections without distorting the purpose and principles of the Constitution.

45. It must not also be lost, that Article 102 of the Constitution provides that the term of each House of Parliament expires on the date of next general election. This means the terms of the National Assembly and Senate expire on the date of the next general election is held. That conclusively brings the Parliamentary term to an end on the date elections are held next. The second Tuesday of August in the fifth year is 8<sup>th</sup> August 2017.

46. Article 142 states, with regard to the Presidential term, that the president shall hold office for a term beginning on the date on which the president was sworn in, and ending when the person next elected President in accordance with Article 136(2) (a), is sworn in. Article 136(2) (a) is clear on the day and month of holding general elections.

47. As stated in *Tinyefuze v Attorney General of Uganda* (supra) and *Attorney General of Tanzania v Rev. Mtikila* (supra), the entire Constitution must be read together as an integral whole no one provision destroying the other but each sustaining the other. Only then will the Constitution achieve its principles and purposes.

48. All provisions of the Constitution relating to both the general elections and terms of Parliament and president respectively, point to one undeniable fact, that the general elections be held on the second Tuesday in August in every fifth year. The term of parliament expires on the Election Day while that of the President ends on the swearing in of the person elected next as president.

49. Applying the rule of harmony, completeness and exhaustiveness, in construing these constitutional provisions, I don't see any contradiction in any of them as to when the general elections should be held or terms of both Parliament and Presidency should come to an end. As was stated by **Chief Justice Mutunga** in the case of *Judges and Magistrates Vetting Board & 2 others v Centre for Human Rights and Democracy & 11 others* (2014) eKLR no provision of the Constitution is unconstitutional. Holding otherwise in this petition would amount to artificial interpretation of the Constitution.

50. In the case of *Government of Republic of Namibia v Cultura* 2000, 1994(1) SA 407, **Chief Justice Mahomed** cautioned against giving to Constitutional provisions rigid and artificial interpretation thus-

***“A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid the ‘austerity of tabulated legalism’ and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation.”***

51. The people of Kenya aspired that there be certainty of the time for holding general elections in the Country. They embraced the idea of having elections on the second Tuesday in August in every fifth year. They were aware of the history of the country and the challenges they had faced without that certainty. They therefore, had reason and purpose for including the certainty of the date of the general election cycle in the Constitution. The Court in interpreting the constitution must do so in a manner that leads to the achievement of the ideals aspirations and the will of the people to hold elections on the day they desired.

52. Article 2(1) restates the supremacy of the Constitution and the fact that it binds all persons and state

organs including this court. It also states that validity or legality of the Constitution is not subject to challenge. In this regard, no provision of the Constitution can be challenged for being unconstitutional since the fact of a constitutional provision being unconstitutional cannot arise.

53. The petitioner's contention that the first election under the Constitution should have been held in August 2012 is stale and is without basis now. The issue of when the first general elections under the Constitution were to be held was the subject of litigation in the case of ***John Harun Mwau & 3 Others v Attorney General & 2 Others*** [2012] eKLR, where the Court held:

***"[163] the election date for the first elections under the Constitution is provided under the sixth schedule and is not affected by the provisions of Article 101 et seq, which deal with subsequent elections. Whatever date the first elections are held on, the next elections must be conducted on the second Tuesday of August of the fifth year from that date, hence the term for the next president, members of parliament, governors and members of the county assemblies may be shorter than five years as a consequence of the constitutional provisions."***

54. The court went on to give three possible scenarios for holding the first election under the Constitution; the last option being sixty days from expiry of the term of the National Assembly, on 15<sup>th</sup> January 2013 carried the day and the first election was held on 4<sup>th</sup> March 2013. With this decision, and the subsequent elections held on 4<sup>th</sup> March 2013, the current term of elective positions was shortened and the elections are to be held on the second Tuesday in August in the fifth year.

55. The petitioner's contention that there should be constitutional amendments to address any perceived constitutional anomalies regarding the president's and parliament's term is misplaced. The petitioner was unable to point out any perceived unconstitutionality and I have not seen any myself regarding holding of general elections as provided for in the Constitution.

56. If the drafters of our Constitution intended that general elections be held at the end of the fifth term, they surely would have said so in no uncertain terms. Since the Constitution is clear on this issue and it demands that it be interpreted in a manner that promotes its purposes and principles, and for the Court to effectuate the greater purpose of the Constitution, there cannot be any other interpretation than, that general elections be held on the second Tuesday in August in the fifth year.

57. In that regard, I agree with the observation by **Muriithi, J** in ***Andrew Kipsang Muge & 2 others v Independent Electoral and Boundaries Commission & another*** 2017 eKLR that;

***" In accordance with the Mischief rule of interpretation of statute, the provisions of the Constitution for ascertainment of the election date are understandably geared towards certainty of the election date, lest it be used as in the past as a secret weapon by the ruling political party against other parties to the election. All the Constitutional provisions for elections under the Constitution of Kenya 2010 appoint the second Tuesday of August of the fifth year as the election date and decree that all the elections for the various elective positions in the national and county levels must be held on the same date..."***

58. The petitioner has also stated that he would want election postponed to allow Parliament be recalled to spearhead constitutional amendments with regard to when general elections should be held. The answer to such an adventure is simple. The Court's duty is to interpret the Constitution, but not to detour into areas that are outside its mandate. If parliament failed to consider petitions presented before it by the petitioner as he alleges, that is not an issue before this Court. The Court has no business addressing an issue that is not before it. And regarding the contention that there are many independent candidates who lost in party primaries and were cleared as independent candidates, the petitioner must appreciate that the Constitution allows citizens to exercise their political rights. There is no petition before this Court against any person alleged to have breached the Constitution in that regard. The issue of party hoping falls under the jurisdiction of Political Parties Disputes Tribunal and not this Court and the less I say about it the better.

59. The other concerns raised by the petitioner including litigation over presidential ballot printing tender, fears of violence and competition or rivalry between the major political parties, are issues that cannot form the basis of postponing the general elections as presented in this petition because they are merely collateral to the petitioner's main complaint that the terms of Parliament and President have not expired.

60. In any case, Presidential ballot papers have been printed and are already in the Country. Even if the Court was to contemplate postponing the election for any other reason, it would be against public interest. A lot has been put into the preparations and any postponement at this stage would not be justified. The petitioner was aware of the preparations for election, he knew that there was rivalry between major political parties and that elections were to be held on the second Tuesday in August in the fifth year, yet did nothing only to come to Court at the trail end of process to seek to postpone the general elections. I do not see any bona fides in this litigation.

61. Having given due consideration to this petition, I do not think the same was well thought out. Granted, the petitioner exercised his right to come to court, but in my view, it was without justification. This petition has no merit and must be dismissed, which I hereby do. I will however make no order as to costs.

62. Order accordingly.

Dated, Signed and Delivered at Nairobi this 4<sup>th</sup> Day of August, 2017

E C MWITA

JUDGE