



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

MISCELLANEOUS PETITION NO 33 OF 2017

IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS

UNDER ARTICLE 22 (1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES

19, 20, 21, 23, 32 AND 38 OF THE CONSTITUTION OF KENYA

BETWEEN

HOMA BAY COUNTY CITIZENS ASSOCIATION (also known as

BUNGE LA WANYENCHI).....PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

INDEPENDENT ELECTORA

AND BOUNDARIES COMMISSION (IEBC).....2ND RESPONDENT

RULING

1. The Petitioner (**HOMA BAY COUNTY CITIZENS ASSOCIATION** (also known as **BUNGE LA WENYENCHI**) has sought:

- a) *a declaration that section 22 of the Elections Act No 24 of 2011 is unconstitutional and invalid for violating Articles 27, 32, 137 and 182 of the Constitution of Kenya and is in conflict with Articles 1.10, and 257 of the Constitution of Kenya*
- b) *A declaration that the continued enforcement of section 22 by the 2nd Respondent violates the Bill of Rights and therefore militates against the public interest*
- c) *An injunction barring the 2nd respondent from demanding academic certificates from candidates as a requirement for election into public office*
- d) *An order that each party bears its own costs*

2. **HOMA BAY COUNTY CITIZENS ASSOCIATION (also known as BUNGE LA WENYENCHI)** is described as a non-partisan, non-profit making and community based organization committed to the enhancement of good governance, fight against corruption, and protection, promotion and enhancement of enjoyment of civil rights through public interest advocacy, training and information. The background to this matter is informed by the certain political figures in the country have had the credibility of their academic qualifications questioned and that such requirement is likely to negatively impact on an individual's right to political participation.

3. The petitioner contends that it is unreasonable to prohibit 97% of Kenya's citizens from contesting elective posts on the basis of academic qualifications as this denies the citizenry the right to freely choose leaders of their own choice and subjects such potential leaders to unequal treatment, indignity and a denial of freedom of conscience and opinion

4. It is the petitioner's case that the provision impacts on the aspirations of Kenyan citizens because an Economic Survey by the Kenya National Bureau of statistics shows that the cumulative total enrolment in both public and private universities stood at 512,924 in the year 2015 against a population of 46,050,302- which translates to 2.2% as the ratio of the public that is the Elections Act has allowed to enjoy political rights enshrined under **Article 38 (3) (c)** of the **Constitution of Kenya**.

5. The Petitioner argues that **Article 38 (3) (c)** of the **Constitution** provides that every adult citizen the right, without unreasonable restrictions to be a candidate for public office yet this right is taken away by **Section 22 (1) (b)** and **(2)** of the **Elections Act** which imposes an unreasonable restriction. The requirement that any citizen who does not hold a certificate, diploma or a degree is constitutionally unfit to legislate or exercise executive authority, is described as degrading 97% of the Kenyan populace. The petitioner points out that leadership and representatives of the citizens are drawn from all walks of life and are different from a professional occupation where prolonged training and formal qualification is imperative. It is further contended that such requirement actually whittles down the people's sovereignty which is proclaimed by **Article 1** of the **Constitution of Kenya**. This sovereignty may be exercised either directly or through their representatives.

6. The petitioner draws comparison from the United Kingdom, United States of America, Canada and India which merely impose age and citizenship as the criteria for elective public offices and no academic requirements.

7. The petition is opposed on grounds that it is hinged on the wrong provisions of the law as **Section 22** of the **Elections Act No 24 of 2011**) was amended by section 8 of the **Election Laws (Amendment) Act (No 1 of 2017)**. Further that the petition does not meet the evidentiary threshold to sustain it and is simply an abuse of the court process. . In any event the Petitioner is faulted as having no locus to seek the orders stated.

8. The court directed that the matter be canvassed by written submissions but only the petitioner filed its written submissions. The petitioner listed several issues for determination but these can be collated into one main issue:-does **Section 22** of the **Election Act** violate the citizen's right to political participation under **Article 38 (3) (c)** of the **Constitution of Kenya** by unreasonably setting minimum academic qualifications? Does it contravene **Articles 27, 32, 137** and **182**? Does it also come into conflict with **Articles 1, 10** and **257** of the **Constitution**?

9. It is submitted that the unequal distribution of resources in this country has resulted in unequal availability of opportunities so that those from poor economic backgrounds are unlikely to scale the heights of academic pursuit. The petitioner contends that in order to give full realization of the rights guaranteed under **Article 27** of the **Constitution** then the court must declare that such academic requirements results in marginalization of a certain section of the population. It is also submitted that one cannot exercise their free will in choosing a representative when that choice is already predetermined by certain limitations.

10. Actually this petition is almost on all fours with the petition in **HON JOHNSON MUTHAMA, MP**

Vs MINISTER FOR JUSTICE AND CONSTITUTIONAL AFFAIRS AND ANOTHER [2012]eKLR in the sense that the concern is with regard to the exercise of sovereign power by the citizen and the protection of citizen's democratic right to participation in their governance. Mumbi J in the Muthama case held that such requirement violated the Constitution of Kenya as it was discriminatory on the basis of status and social origin because it is the poor in Kenya who invariably fail to acquire education especially post secondary education. Does the situation still persist? However the only difference is that in the present case the complaint is that such limitation will restrict the voter rather than the aspirant.

11. **Article 38 (1)** of the **Constitution** provides that every citizen is free to make political choices **sub-article (2)** gives every citizen the right to free expression of their will for any elective public body established under the Constitution and (3) states that:-

“Every adult citizen has the right, without unreasonable restrictions to be a candidate for public office...”

12. The right to participate in public affairs, voting rights and the right to equal access to public service as contemplated in the **International Covenant on Civil and Political Rights (ICCPR)** is addressed in **UN General Comment No 25** as follows:-

“The effective implementation of the right and the opportunity to stand for elective office ensures that persons entitled to vote have a free choice of candidates. Any restrictions on the right to stand for elections such as minimum age must be justifiable on objective and reasonable criteria. Persons who are otherwise eligible to stand for elections should not be excluded by unreasonable or discriminatory requirements as such as education, residence or descent, or by reason of political affiliation.

13. **Section 22 (1) (b) of the Election Act No 24 of 2012** provided as follows:-

(1) A person may be nominated as a candidate for an election under this Act only if that person –

a. Is qualified to be elected as a candidate under the Constitution and this Act and

b. Holds a post secondary school qualification recognised in Kenya

14. **Article 27** of the **Constitution** provides for equality for all and freedom from discrimination. **Article 27 (3)** provides the right to equal opportunities in political, economic, cultural and social spheres. This provision has since been amended by the **Section 8** of the **Election Laws (Amendment) Act (No 1 of 2017)** which provides that:-

“8 (22) of the Elections act, 2011 is amended –

a. In subsection (1) by deleting paragraph (b) and substituting therefor the following new paragraph –

b. Holds –

i. In the case of a Member of Parliament, a degree from a university recognized in Kenya, or

ii. In the case of member of a county assembly, a degree from a university recognized in Kenya

(b) By inserting the following new subsections immediately after subsection (1) –

(1A) notwithstanding subsection (1), this section shall come into force and shall apply to qualifications for candidates in the general elections to be held after the 2017 general elections.

(1B) The provisions of this section apply to qualifications to nomination for a party list member under section 34.”

15. This provision must be read alongside **Article 137** which provides for qualification and disqualifications for election as a President of the republic of Kenya and one of the requirements is to qualify to stand for election as a member of parliament- this includes under **Article 99 (b)**, **satisfying any educational requirement set by the Constitution or any Act of Parliament** [emphasis mine].

16. Article 180 addresses the qualification for one vying for the position of Governor and must be eligible for election as a member of the **County Assembly. Article 193** which addresses qualifications for members of the County Assembly includes educational requirements

17. I will pose the same question posed by Mumbi, J in the **Muthama** case-does the limitation have a rational connection to the legitimate purpose? Is there reasonable justification and what was the objective for the academic qualification? Would lack of the academic qualification result in poor governance? Does the amendment under **Section 8** of the **Election Laws** cure the concerns Mumbi, J addressed? No it does not-it infact confirms the earlier position with a rider that the section shall come into force and the qualifications shall apply to candidates in the general elections to be held after the 2017 elections. I am sure the petitioner's concern is with regard to the forthcoming 8th August general elections. My understanding is that the constitution must be read as a whole and must be given a purposive interpretation. **Article 27** recognizes that people of the same qualification must have an equal opportunity to achieve their political aspirations. The decision by Lenaola J, (as he then was, in **JOHN HARUN MWAU Vs IEBC AND ANOR [2013]eKLR** resonates with my way of addressing the issue; infact that case was a sequel to the **Muthama** case. The judge did not share the views held by Mumbi J and I can do no better than reproduce what he stated therein as follows:-

I am unable to accept his argument for two reasons. First, the nature of the duties and functions performed by the National Assembly and the Senate in my view require higher educational qualifications, skills and wide exposure which is gained through higher education. It is important that a representative to either of the House understands the proceedings, nature of business being carried out and most important be in a position to make his/her contribution to the various and many at times complex motions and debates in Parliament. It must also be understood that the elected persons represents the people who appointed them and they should therefore be able to execute that duty without any difficulties.

Secondly, the sovereign power belongs to the people of Kenya and that power ought to be exercised in accordance with the Constitution. The people may inter alia exercise their sovereign power through their democratically elected representatives. It is thus crystal clear that the ultimate will of the people of Kenya is to be found in the Constitution. At Article 99(2)(b), the people of Kenya have envisaged, in passing the Constitution, that a person would not be eligible to run for certain offices if they did not meet the criteria set by Parliament. While the Constitution does not set an educational criteria, it imposes a duty on Parliament to enact legislation setting that criteria, and this is what has now been done in the Elections Act. In my view, the provisions of Section 22 of the Election Act were enacted by Parliament pursuant to the provisions of Article 99(1)(b) of the Constitution. This Article envisages a situation where Parliament prescribes an educational threshold for those who seek to be elected as Members of Parliament. In its wisdom, Parliament prescribed the provision of a post secondary qualification. I do not think this qualification is unreasonable or unattainable by all in Kenya. I am alive to the fact that each year, the tax payer spends billions of shillings in both free primary and secondary education. Every Kenyan from all walks of life therefore has in my view opportunity to gain this qualification. I therefore find the argument that any other academic qualification would be sufficient to even include Primary education cannot hold water. In any event, it does not reflect the ultimate will of the people of

Kenya as can be seen from the requirements of Article 99(1)(b).

18. I therefore echo the conclusion made in the **Mwau** case that the academic requirements spelt out by **Section 22 (1) (b)** of the **Elections Act** is attainable and reflects the values and principles and ideals of an independent and progressive Kenya-the same is constitutional and simply amplifies what the various provisions in the Constitution have contemplated. Indeed to hold otherwise would be absurd 54 years after independence, consequently the petition lacks merit and is dismissed. Since the same was filed as public interest litigation I direct that each party bears its own costs.

Delivered and dated this 1st day of August, 2017 at Homa Bay

H.A.OMONDI

JUDGE