



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.360 OF 2013

BETWEEN

ISAAC ALUOCH POLO ALUOCHIER.....PETITIONER

AND

UHURU MUIGAI KENYATTA.....1ST RESPONDENT

WILLIAM SAMOEI RUTO.....2ND RESPONDENT

JUDGMENT

Introduction

1. The Petitioner herein is a Kenyan citizen who describes himself as a person acting in the public interest while the 1st and 2nd Respondents are currently serving as President and Deputy President of the Republic of Kenya, respectively.
2. The Petitioner through his Petition dated 10th July 2013 seeks orders that:
 - a. *The Court declares that the Respondents, having been in contravention of Article 77(2) of the Constitution, as from 27th August 2010, and the 1st Respondent having been subsequently so found by the High Court, should have been expeditiously disciplined pursuant to Articles 75 (2) and 259 (8), a discipline involving dismissal or otherwise removal from appointive State office in their capacities as Ministers in the Cabinet.*
 - b. *The Court declares that notwithstanding that the Respondents were not dismissed from appointed State office, they stood dismissed or otherwise removed from the said appointive offices by the operation of the law.*
 - c. *The Court declares that by the operation of Article 75 (3) of the Constitution, the Respondents were rendered disqualified from holding any other State office. Consequently, any holding of State office by the Respondents, whether as Member of Parliament, Deputy Prime Minister, Minister of Finance or President or as a Member of Parliament, Minister for Higher Education, Science and Technology or Deputy President, was invalid, pursuant to Article 2 (4) of the Constitution.*
 - d. *The Court orders the Respondents' holding of the offices of President and Deputy President to*

cease with immediate effect, as they are not qualified to so hold these or any other State offices.

- e. *The Court orders the Respondents to pay general damages amounting to the cost of holding a presidential by-election, and the sum total of salaries and allowances they received as State officers over the period they had been dismissed or otherwise removed from office, the damages payable to the State, and their liabilities being joint for the cost of the Presidential by-election and severed for the unlawful salaries and allowances they separately received.*
- f. *The Court orders the Respondents to pay the Petitioner's costs, according to Schedule VI of the Advocates Act, 2006, assessed on a party to party basis.*

3. These prayers are based on grounds that:

- a. The 1st Respondent, H. E. Uhuru Kenyatta, currently President of the Republic of Kenya, prior to becoming President, between 27th August 2010 and April 2012, was both the National Chairman of The Kenya African National Union (KANU) and Deputy Prime Minister of Kenya and Minister for Finance, and continued to hold the position of Deputy Prime Minister following his resignation from the National Chairmanship of KANU around April 2012, right until he assumed office as President of Kenya.
- b. The 2nd Respondent, Hon. William Samoei Ruto, currently Deputy President of the Republic of Kenya, prior to becoming Deputy President, between 27th August 2010 and August 2011, was both the Deputy Party Leader of the Orange Democratic Movement (ODM) and Minister for Higher Education, Science and Technology.
- c. **Article 77 (2)** of the **Constitution** prohibits an appointed State officer from holding a political party office.
- d. By the Respondents holding both the offices of appointed Ministers in the Cabinet, and political party offices, they contravened **Article 77 (2)** of the **Constitution**.
- e. Pursuant to **Article 75 (2)** of the **Constitution**, the Respondents had to be disciplined for their contraventions of **Article 77 (2)**, a discipline that was not carried out against them.
- f. Notwithstanding the Respondents' failure to be disciplined, pursuant to **Article 2 (4)** of the **Constitution**, that failure to discipline the Respondents was invalid and the Respondents stood disciplined by operation of law.
- g. In the High Court at Mombasa, **Constitutional Petition 17 of 2010, Abdulrahman Ahmed Abdalla & 3 Others vs Uhuru Kenyatta & Another 2012 eKLR**, the 1st Respondent was found to have contravened **Article 77 (2)** of the **Constitution** as had several other State officers, but by the time the judgment was delivered on 17th September 2012, the 1st Respondent had already resigned from the National Chairmanship of KANU, and was therefore at that time no longer in contravention of **Article 77 (2)**.

The Factual Background

4. The facts giving rise to the Petition are fairly simple and are not disputed. They are set out here below.
5. The 1st Respondent, H.E. Uhuru Kenyatta, currently President of the Republic of Kenya, prior to becoming President, between 27th August 2010 and April 2012, was both the National Chairman of The Kenya African National Union (KANU) and had also been appointed Deputy Prime Minister of the Republic of Kenya and Minister for Finance, and continued serving as Deputy Prime Minister following his resignation from the position of National Chairman of KANU

around April 2012.

6. The 2nd Respondent, Hon. William Samoei Ruto, currently Deputy President of the Republic of Kenya, prior to becoming Deputy President, between 27th August 2010 and August 2011, was both the Deputy Party Leader, Orange Democratic Movement (ODM) and an appointed Minister for Higher Education, Science and Technology.
7. The 1st and 2nd Respondents were nominated by their political party as holders for the party tickets for the offices of President and Deputy President of the Republic of Kenya for the March 2013 General elections. They were, during the said elections, elected as President and Deputy President.
8. It is generally the election of the 1st and 2nd Respondent into the offices of President and Deputy President of the Republic of Kenya respectively, during Kenya's March 2013 General Elections that prompted the filing of this Petition.
9. On 18th July 2014, finding that although the Respondents are presently part of government, their actions which form the basis of the Petition turn on their past (as officials of political parties and at the same time, Ministers in Government) and therefore, those actions cannot be termed actions of the national Government to attract representation in Court by the Attorney General. Subsequently, they individually appointed Counsel to act for them.

The Petitioner's Case

10. Relying on his Petition dated 10th July 2013, his Affidavit also dated 10th July 2013, a reply to the written submissions of the 1st Respondent dated 28th December 2014 and a reply to the written submissions of the 1st Respondent dated 1st December 2014, the Petitioner's case is as detailed here below.
11. The Petitioner contends that the Respondents, by holding both the offices of appointed Ministers in the Cabinet, and political party offices, contravened **Article 77 (2)** of the **Constitution** from the date of the promulgation of the Constitution on 27th August 2010.
12. According to him, pursuant to **Article 75 (2)** of the **Constitution**, the Respondents had to and have to be disciplined for their contraventions of **Article 77 (2)**, an action that was not carried out against them. In this regard, he argued, notwithstanding the Respondents' failure, the failure to discipline was invalid and the Respondents stood disciplined by operation of the law in accordance with **Article 259 (8)** of the **Constitution**. Accordingly, he contended, the 1st and 2nd Respondents should have been disciplined without unreasonable delay and as often as the occasion arose by way of being dismissed or being removed from office by the then President in accordance with the **Constitution** and **Section 4 (5)** of the **National Accord and Reconciliation Act, 2008**.
13. The Petitioner adds that although the President and the National Assembly did not dismiss or remove the Respondents from office, by operation of **Article 2 (4)** of the **Constitution**, the Respondents stood legally dismissed, even though not physically so, i.e. *de jure* dismissed even though not *de facto* dismissed.
14. His case is also that the Court should find and hold that, taking into account that the dismissal/removal from office of the Respondents would have brought into effect **Article 75 (3)** of the **Constitution** and therefore disqualified the Respondents from remaining as Members of Parliament (MPs) for Gatundu South and Eldoret North Constituencies, as State officers under **Article 260** and also as holders of any political party positions, in accordance with **Section 13** of the **Political Parties Act, 2011**, the Respondents were effectively rendered out of the political game and were therefore ineligible for any elective State office, pursuant to **Articles 99 (2) (h)**,

193 (2) (g), 137 (1) (b), 148 (1), 180 (2) and 180 (5) of the Constitution.

15. Further, he claims that having been otherwise by operation of law removed from office, and having ceased to be State officers, the Respondents were no longer legally entitled to any salaries or allowances on account of their occupation of these offices and that they, lacking a legitimate claim of right to the salaries of these offices therefore stole the salaries and the allowances that they took while in office. Consequently, they are liable to pay back Kenya Shillings 4,600,000 and 4,300,000 respectively for the salaries they were paid during the time following when they were disqualified from office and Kenya Shillings 30,200,000 and 25,800,000 respectively, for salaries paid to them between 27th August 2010 and 4th March 2013.
16. He also claims that the Respondents have brought about quantifiable losses upon the people of Kenya as a result of their conduct in contravening the Constitution and that they must vacate their elective offices of President and Deputy President, and there would be need therefore to carry out a presidential by-election as the offices would be vacant in line with **Article 146 of the Constitution**. In this regard, that the Respondents are liable to the Republic of Kenya for the costs of carrying out a by-election, to the tune of Kenya Shillings 5,287,000,000.
17. He concludes by asking the Court, that since the case is brought in public interest to facilitate constitutional compliance in public service, to order that his costs or expenses properly incurred in these proceedings be paid in addition to general damages, drawing from the criminal law principles espoused in **Sections 32 and 171 (1) of the Criminal Procedure Code**.

The 1st Respondent's Case

18. The 1st Respondent's case is supported by his Submissions dated 18th December 2014.
19. The 1st Respondent, objecting to the jurisdiction of the Court to interrogate the Petition herein, reminds the Court that jurisdiction is everything and that central to the High Court's jurisdiction is **Article 165 of the Constitution**. To support his objection, he refers to **Samuel Kamau Macharia and Another vs Kenya Commercial Bank Limited & 2 Others, Supreme Court Application No.2 of 2011**, where it was held that a Court can only exercise jurisdiction as conferred by the **Constitution** or other written law. That this matter, dealing with issues revolving around a Presidential election, which commences from the declaration of intention of candidature and continues until the final declaration of election results, is reserved for the exclusive jurisdiction of the Supreme Court. He relies on the Supreme Court's Advisory Opinion **In the matter of the Principle of Gender Representations vs National Assembly and the Senate Advisory Opinion Application No.2 of 2012, [2012] eKLR** to support that proposition.
20. More specifically, he argues that the Petition includes the question of whether one is qualified or disqualified to contest the position of President under the **Constitution** or any other law. That the exclusive jurisdiction of the Supreme Court and the gazetted **Supreme Court Rules No. 155 of 2012 in Rule 12** guide the Court and the parties to the Petition in this regard by defining the scope of Presidential elections and Petitions brought in that regard. That the said Rules are also clear that only the Supreme Court can determine any question relating to the qualification or disqualification of a person who has been duly nominated to contest the position of President of the Republic of Kenya and that any other Court would be bound by the decision of the Supreme Court on that matter.
21. He also argues that the Supreme Court has already looked into the question whether the Respondents were validly elected and determined that they had indeed been validly elected into office in the case of **Raila Odinga & 5 Others vs Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR**. That the Petitioner cannot therefore purport to challenge that decision in this Petition through a backdoor manner in form of what he presents as a constitutional Petition for enforcement of rights.

22. He contends that in any case, an interpretation of **Article 88** of the **Constitution** would reveal that the mandate to determine eligibility of a candidate to contest the presidency lies exclusively with the Independent Electoral and Boundaries Commission (IEBC) at the first instance. He notes in this regard, that the Petitioner had indeed already lodged his complaint with the IEBC and that the IEBC having considered it and satisfied itself that the 1st Respondent was duly qualified, cleared him to contest the Presidency, a decision that the Petitioner did not appeal.
23. He further contends that the Petitioner had sought from the Supreme Court, a consideration of the same issues he brings before this Court on two occasions. On the first occasion, the Supreme Court recognised the issues and only failed to consider them as the Petitioner had filed his Petition before the declaration of the results of the Presidential election whereas the Court considered that such Petition should be filed following the declaration of the results of the Presidential elections. On the second occasion, his efforts also failed.
24. Further, according to him, whereas some of the constitutional provisions cited apply to appointed State officers, the 1st Respondent is an elected State officer whose election as President is not subject to **Article 73 (2)** of the **Constitution**.
25. In addition, that since the Respondent has been duly elected, declared and sworn in as President, the Petition herein cannot succeed, as a President can only be removed from office by way of constitutional provisions and not by way of Court proceedings or a constitutional Petition. In this regard, the 1st Respondent calls the Court's attention to **Article 145** of the **Constitution** with regard to removal from office of the President and **Article 150** of the **Constitution** with regard to removal from office of the Deputy President.
26. On disciplinary procedures, the 1st Respondent emphasises that **Article 75** of the **Constitution** provides that a person **may** be removed from office following disciplinary procedures and therefore the assertion that the 1st Respondent should automatically cease to hold office is misplaced.
27. The 1st Respondent concludes by submitting that the Petition is an abuse of the Court process, is vexatious, and an ill advised attempt and/or effort by the Petitioner to circumvent the express constitutional provisions on questions such as the validity of a Presidential election as clearly stated in the Constitution in **Article 140** and should therefore be dismissed.

The 2nd Respondent's Case

28. The 2nd Respondent's case is supported by his Submissions dated 25th November 2014.
29. He contends that the Respondents, having been elected through direct exercise of sovereignty by the Kenyan people, (with a majority of at least 50%+1 at national level and at least 25% of the votes cast in 24 Counties of the 47 Counties which make up the country) on a joint Presidential ticket, cannot be removed from office by this Court, as their removal can only be undertaken by the National Assembly in accordance with **Articles 144**, and **150 (1) (a)**, or **Articles 146 (1) (a)** and **(b)**.
30. He further contends that the core issue in the Petition is the qualification and eligibility of any person to vie for and be elected as President and Deputy President. That such a question can only be challenged before the Supreme Court, in accordance with its Advisory Opinion in **The Matter of the Principle of Gender Representation vs National Assembly and the Senate Advisory Opinion Application No.2 of 2012, [2012] eKLR** where the Learned Judges opined that they perceive **Articles 87(2)** and **163(3)** of the **Constitution** to mean that the Supreme Court was intended to adjudicate upon **all** such disputes that would arise from presidential elections and not just a specific element or disputes arising after election.

31. He refers to the **Supreme Court (Presidential Election Petition) Rules, 2013** which make it clear that the issue of eligibility of one to hold office of the President and Deputy President of Kenya is a matter to be exclusively decided by the Supreme Court. He also relies on the case of **International Centre for Policy and Conflict & 5 Others vs Attorney General & 4 Others [2013] eKLR** where it was held that any questions relating to qualification or disqualification of a person duly nominated to contest the position of President in Kenya, including questions on **Chapter 6** of the **Constitution**, can only be determined by the Supreme Court.
32. He further draws the Court's attention to the fact that the 2nd Respondent's eligibility and qualification with regard to the presidency had already been determined in the case of **Raila Odinga & 5 Others vs Independent Electoral and Boundaries Commission [2013] eKLR** and adds therefore, that the Petitioner's attack on the above decision is tantamount to an attack on the decision of the Supreme Court and the High Court should consequently not entertain the same.
33. He claims that the Petitioner knows or ought to know that the proper judicial forum to approach for determination of the issues in this Petition, and he has actually approached the Supreme Court twice, unsuccessfully on the same issues. As a case in point, the 1st Respondent calls the Court's attention to an earlier case filed by the Petitioner: **Isaac Aluoch vs Independent Electoral and Boundaries Commission & 19 others [2013] eKLR**, where the Petitioner was contesting the validity and approvals of nominations made by the IEBC in respect of candidature for the office of the President.
34. He contends that the IEBC is the constitutionally mandated body in the conduct and management of the entire electoral process including receiving of nominations from political parties on the candidates they would be fielding for respective elective positions during the election, a process which the IEBC undertook and through which they accepted the Respondents as constitutionally eligible, qualified and validly nominated for the Presidential election. That this was announced in Gazette Notice No. 2221/2013 dated 15th February 2013 and any dispute on this nomination process should have been challenged from the 15th of February 2013 with the IEBC, which has the jurisdiction under **Article 88 (4)(e)** of the **Constitution** to initially determine that dispute.
35. The 2nd Respondent further argues that **Article 38** of the **Constitution** on political rights guarantees the Respondents' the right to be elected freely and fairly and as a result hold office in an any elective public body or office established under the Constitution or any office of a political party in which any of them is a member; and that these rights cannot be limited by virtue of **Article 77(2)** of the **Constitution**.
36. He further argues that the Respondents have never been punished for any known offence under the **Constitution** in line with **Article 75** of the **Constitution** and that the Article does not in any event make it mandatory that all disciplinary procedures would lead to dismissal or removal from office. He adds, on this subject, that the Court cannot act as a disciplinary body or act on speculative or hypothetical grounds for disciplinary actions as pleaded by the Petitioner.
37. According to him, the Petitioner's prayer for general damages also has no foundation or basis in law as the Petitioner does not disclose any tortuous claim that would entitle him to general damages.
38. He concludes by stating that the Petitioner is a camouflaged litigant who wears the mask of public interest litigation but files vexatious and frivolous cases in Court and is therefore not legitimate. That the 2nd Respondent on the other has had to incur costs in a plethora of proceedings against him by the Petitioner and the case therefore calls for the award of exemplary costs to the 2nd Respondent as a deterrent against those like the Petitioner who wear the mask of public interest litigation to disguise political conspiracies.

The Petitioner's Rejoinder

39. In response to the Respondents' cases, the Petitioner asserts that in adopting the Constitution, Kenyans bound themselves thereto and must therefore exercise their sovereign power in accordance therewith. That the exercise of this sovereign power in any way that is contrary to the Constitution, for example in electing persons unqualified to take up office, is null, void and invalid. In this regard, if a declaration of the same is made by Court, the declaration would be valid.
40. He contends that the instant Petition is not an election Petition pursuant to **Article 140** of the **Constitution** but is rather based on the conduct of the Respondents with regard to contravention of **Article 77 (2)** and **Article 75** of the **Constitution**, and is therefore not a matter under the exclusive jurisdiction of the Supreme Court but under that of the High Court which has unlimited original jurisdiction in civil matters. That this jurisdiction is not limited by Parliament's constitutionally accorded powers with respect to impeachment of the President.
41. He further contends that where a Court finds that the Respondents are disqualified from holding State office by virtue of **Article 75 (3)**, the Court must so declare and order that the non-compliance be remedied and that the Constitution be complied with.
42. According to him, the Respondents, during the period they were in Cabinet from 27th August 2010, concurrently held offices in political parties and were both appointed and elected State officers as Members of Parliament. The contravention of the Constitution by the Respondents was therefore on account of their appointive cabinet positions and not on account of their elective parliamentary positions.
43. He clarifies that the other matters he brought before the Courts on similar issues were not heard on their merits because one was dismissed when his application to bring the matter before the Court as a pauper was not allowed and the other was dismissed on procedural technicalities. He also states that the matter he brought before the IEBC was not heard or determined by the IEBC.

Determination

44. I have read and considered all the pleadings submitted by the parties in the instant Petition together with their submissions. I now proceed to determine the key issues arising hereunder.

Whether this Court has Jurisdiction to Determine the Instant Petition

45. Before I address any other issue, I must first determine whether this Court has jurisdiction to consider this matter as the 1st and 2nd Respondents have raised objections to the same. In doing so, they have argued in concert that the issues raised in this matter concern the qualifications and eligibility of any person to vie for and be elected as President and Deputy President and that the Presidential election is not an event but a process, which commences from the declaration of intention of candidates and subsists until the final declaration of the results of the election. The key issues arising and the process, they argue, fall within the exclusive jurisdiction of the Supreme Court. That therefore, the High Court not having jurisdiction over challenges to presidential elections in Kenya does not have jurisdiction over these matters, which are reserved for the exclusive jurisdiction of the Supreme Court.
46. On jurisdiction, Nyarangi J in **The Owners Of Motor Vessel "Lillian S" vs Caltex Oil Kenya Ltd [1989] KLR 1** observed thus:

"Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction."

47. Similarly, in **Peter Ochara Anam and 3 Others vs Constituencies Development Fund Board**

and 4 Others, Kisii High Court Petition No. 3 of 2010 the Court observed:

“Jurisdiction, we all know is everything and once raised it must be confronted from the onset and if successful the court must down its tools.”

48. Furthermore, in **Macharia and Another vs Kenya Commercial Bank Ltd & 2 Others Civil Application No. 2 of 2011** the Supreme Court held thus:

“[68] A court's jurisdiction flows from either the Constitution or legislation or both. Thus a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings.”

49. In that context, **Article 163 (3) (a)** of the **Constitution** expressly addresses jurisdiction over disputes relating to the office of the President as follows:

“The Supreme Court shall have—

- a. *exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140.”*

Article 140 (1) referred to provides thus:

“A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.”

50. In addition, the **Supreme Court Rules No. 155 of 2012** in **Rule 12** includes among the grounds for which a Petition challenging the validity of election of a president elect, the validity of the qualification of a president-elect. This ground is to be determined by the Supreme Court.

51. The same has indeed been settled in case law. In the case of **International Centre for Policy and Conflict & 5 Others vs Attorney General & 4 Others [2013] eKLR** Msagha, Kimaru, Omondi, Nyamweya and Kimondo JJ held thus:

“The High Court has no jurisdiction to deal with any question relating to the election of the President. That includes the question whether one is qualified or disqualified to contest the position of President under the Constitution or any other law.”

52. The Supreme Court in **The Matter of the Principle of Gender Representation vs National Assembly and the Senate Advisory Opinion Application No.2 of 2012, [2012] eKLR** expressed itself thus regarding the Presidential election and the Supreme Court's exclusive jurisdiction on the same:

“... a Presidential election, much like other elected-assembly elections, is not lodged in a single event, it is, in effect, a process set in a plurality of stages. Article 137 of the Constitution provides for “qualifications and disqualifications for election as President” – and this touches on the tasks of agencies such as political parties which deal with early stages of nomination; it touches also on election management by the Independent Electoral and Boundaries Commission (IEBC). Therefore, outside the framework of the events of the day of Presidential elections, there may well be a contested question falling within the terms of the statute of elections, or of political parties. Yet still, the dispute

would still have clear bearing on the conduct of the Presidential election.”

and would therefore fall within the Supreme Court’s exclusive jurisdiction.

53.The Supreme Court in the same matter also observed thus:

“... a reading of Article 87(2) alongside Article 163(3) suggests, as we perceive it, that the Supreme Court was intended to adjudicate upon all such disputes as would arise from the Presidential election. We find no reason to presume that the framers of the Constitution intended that the Supreme Court should exercise original jurisdiction only in respect of a specific element, namely, disputes arising after the election – while excluding those disputes which might arise during the conduct of election.”

54.Duly guided, I am in agreement that this Court, as a Court that is subordinate to the Supreme Court, would be bound by the Supreme Court’s decisions on the above issues and that for these specific matters, this Court would not have jurisdiction. This is specified in **Article 165 (5) (a)** of the **Constitution** which provides thus:

“ The High Court shall not have jurisdiction in respect of

matters— (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution.”

55.While however I appreciate the Respondents’ contentions on the above, I am in disagreement on one aspect; the issue before me is not on qualifications and eligibility of any person to vie for and be elected as President and Deputy President and the entire process of their election *per se*. The issue before me is rather whether the 1st and 2nd Respondent by their actions of being appointed State officers who at the same time held political party offices, violated the Constitution. In my view, the Petitioner is calling upon this Court to interpret **Article 77** of the **Constitution** and then determine if the Respondents’ actions were in violation thereof. The main issue before me is therefore a matter of interpretation and application of the **Constitution**, and this falls squarely within the jurisdiction of this Court in accordance with **Article 165 (3) (d)** of the **Constitution**, which provides thus:

“...the High Court shall have— (d) jurisdiction to hear any question respecting the interpretation of this Constitution ...”

56.I am of the further view that determining the wider consequences of possible violation of **Article 77 (2)**, including nullification of the Presidential election is what may altogether constitute action that does not fall within the jurisdiction of this Court and I am therefore cautious not to delve into the same save to address it in that context only.

57.Having answered the question of jurisdiction in the positive, I will now proceed to determine violation of **Article 77 (2)** of the **Constitution** by the Respondents as alleged.

Whether the Respondents violated Article 77 (2) of the Constitution

58.It is not contested that the 1st Respondent, H.E. Uhuru Kenyatta, currently President of the Republic of Kenya, prior to becoming President, between 27th August 2010 and April 2012, was both the National Chairman of The Kenya African National Union (KANU) and the appointed Deputy Prime Minister of Kenya and Minister for Finance, and continued on as Deputy Prime Minister following his resignation of the National Chairmanship of KANU around April 2012.

59.It is also not contested that the 2nd Respondent, Hon. William Samoei Ruto, currently Deputy President of the Republic of Kenya, prior to becoming Deputy President, between 27th August

2010 and August 2011, was both the Deputy Party Leader of Orange Democratic Movement (ODM) and an appointed Minister for Higher Education, Science and Technology.

60. While the Petitioner argues that by the above actions the 1st and 2nd Respondent violated **Article 77 (2)** of the **Constitution**, the 1st Respondent argues that the said constitutional provision applies to appointed State officers, whereas he is an elected State officer whose election as President is subject to **Article 73 (2)** of the **Constitution**. The 2nd Respondent on his part argues that **Article 77 (2)** is not applicable to him as well as the 1st Respondent as they were elected Members of Parliament at the time in question.

61. In that context, **Article 260** of the **Constitution** defines a State officer thus:

““State officer” means a person holding a State office.”

Further, it includes **“Cabinet Secretary”** (the office is equivalent to that of a Minister in the pre-2010 regime) in the list of State offices.

62. **Article 77 (2)** of the **Constitution** then specifically provides thus:

“Any appointed State officer shall not hold office in a political party.” (Emphasis added)

63. Indeed, in **Mombasa Petition No.17 of 2010, Abdulrahman Ahmed Abdalla & Others v Hon Uhuru Kenyatta and Registrar of Political Parties**, the Court held thus:

“It would follow that a State officer cannot hold a political party position because it is outlawed in the Constitution.”

64. It is instructive that the State officer subject of these proceedings was Hon. Uhuru Kenyatta, the Present 1st Respondent and regarding the importance of the above and other related provisions, in the case of **Rogers Mogaka Mogusu vs George Onyango Oloo & 2 others [2015] eKLR**, this Court opined:

“[these laws] ought to be implemented otherwise perceived partisan, non-impartial officials of political parties will also play important roles in public entities, a situation that cannot be proper in our new and settling constitutional dispensation.”

65. I reiterate my opinion above and I am still of the same view and even without having to deeply delve into **Chapter 6** of the **Constitution** and the public ethics implications that form the basis of the existence of **Article 77 (2)**, I reiterate that the simple and correct interpretation of **Article 77 (2)** of the **Constitution** is that persons who are appointed to and proceed to hold State office(s) are proscribed from holding official positions in political parties at the same time.

66. The argument made that the 1st and 2nd Respondents were elected and not appointed persons in their capacities as Members of Parliament of Gatundu South and Eldoret North Constituencies has no bearing on the main facts in issue here because although MPs are also State officers, they are exempt from the above provision and can therefore hold political party offices. The same applies to the argument that the 1st Respondent is an elected President and therefore not subject to **Article 77 (2)**. The material fact is that at the time of focus of this Petition, before both Respondents stood for or were elected into the offices of President and Deputy President, they held appointive offices as Ministers (or State officers) in Government at the same time as they were holding offices in the political parties in which they were members. I therefore find that by these actions, the 1st and 2nd Respondents were indeed in violation of **Article 77 (2)** of the **Constitution**.

Whether the political rights guaranteed in the Constitution supercede Article 77 (2)

67. The 2nd Respondent argues that **Article 38 (2)** of the **Constitution** guarantees the Respondents' political rights that cannot be limited by virtue of **Article 77(2)** of the **Constitution**.

68. **Article 38 (2)** of the **Constitution** reads thus:

“Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—

(a) any elective public body or office established under this Constitution; or

(b) any office of any political party of which the citizen is a member.”

69. In my view, the operative word in the provision above is **“OR”**. The Constitution therefore guarantees rights to persons in the various elective bodies and constitutionally established offices **OR** political party offices.

70. The provision does not envisage a situation in which the same rights are guaranteed for persons who hold elective and other positions in constitutionally established offices (such as State officers) at the same time as they hold political party offices, as the Constitution already prohibits the same in **Article 77 (2)**. Therefore, this provision is not in competition with but rather in consonance with **Article 77 (2)** which anticipates appointive State officers holding only the one office, and not an additional political party office or *vice versa*.

71. I will now proceed to determine the other prayers that the Petitioner has sought.

Whether Article 75 of the Constitution is applicable in this context and dismissal of the Respondents from office by operation of the law

72. The Petitioner contends that the Respondents, having violated **Article 77 (2)** of the **Constitution** should have been, pursuant to **Article 75 (2)** of the **Constitution**, disciplined for their contraventions. He adds that notwithstanding the fact that the Respondents were not disciplined pursuant to **Article 2 (4)** of the **Constitution**, the failure to discipline them was invalid and that the Respondents stood disciplined by operation of law in accordance with **Article 259 (8)** of the **Constitution** - by way of being dismissed or being removed from office, effectively making them ineligible to hold any other State office, including on elective State office.

73. Conversely, on this issue, the 1st Respondent argues that **Article 75** of the **Constitution** only states that a person **may** be removed from office following disciplinary procedures and therefore the reasoning that he should automatically cease to hold office is erroneous; while the 2nd Respondent contends that the Respondents have never been punished in line with **Article 75** of the **Constitution** (which does not make it mandatory that all disciplinary procedures would lead to dismissal or removal from office) and the Court cannot act as the disciplinary body on the speculative grounds pleaded by the Petitioner.

74. In that regard, **Article 75 (2)** of the **Constitution** provides:

“A person who contravenes ... Article...77...

a. shall be subject to the applicable disciplinary procedure for the relevant office; and

b. may, in accordance with the disciplinary procedure referred to in paragraph (a), be dismissed or otherwise removed from office.”

75. **Article 75 (3)** of the **Constitution** then provides thus:

“A person who has been dismissed or otherwise removed from office for a contravention of the provisions mentioned in clause (2) is disqualified from holding any other State office.”

76. **Article 2 (4)** of the **Constitution** further states thus:

“Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”

77. **Article 259 (8)** falling under the general provisions of the Constitution and more specifically on construing of the Constitution states:

“If a particular time is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as occasion arises.”

78. The import of all the above provisions is that any person who violates **Article 77 (2)** of the **Constitution** must be subject to the applicable disciplinary procedure for the relevant office; and **may**, following that disciplinary procedure be dismissed or otherwise removed from office. In the event that the person is dismissed or otherwise removed from office, he/she would be disqualified from holding any other State office.

79. Applying the above provisions to the facts before me, I resolve that the 1st and 2nd Respondents **should at the time** they violated **Article 77 (2)** of the **Constitution** have been subjected to the relevant disciplinary procedures for the offices they were holding. This **may** have led to their dismissal or removal from office, which would have disqualified them from holding any other State office.

80. But none of the above happened. Despite **Article 259 (8)** that provides for the undertaking of actions without unreasonable delay as soon as the occasion arises, the fact remains that the disciplinary actions that may have led to the Respondents' dismissal or removal from office were not undertaken, and have now been delayed for at least three years and have been followed by several other actions such as the Respondents assuming other State offices.

81. In accordance with **Article 2(4)** of the **Constitution**, which invalidates any act or omission in contravention of the **Constitution**, the fact that the Respondents did not undergo any disciplinary procedures is indeed not a valid action.

82. The significance of the above findings is that such disciplinary procedure should have been carried out at the relevant time and this Court agrees with the Petitioner's argument to that extent only. This Court is in divergence however and finds that adverse consequences of a disciplinary action that **should have** taken place should not in this instance be visited upon the 1st and 2nd Respondents.

83. The Constitution uses the word “may” in reference to the outcomes of the disciplinary actions and only specifies removal from office and dismissal as possible sanctions resulting from the disciplinary actions; there is therefore a possibility that these disciplinary actions may lead to sanctions other than dismissal or removal from office. Apposite interpretation of this Article of the Constitution would then be, that in the case that disciplinary actions do not lead to removal from office or dismissal (or lead to other sanctions than removal from office or dismissal), then the persons who are subject to these disciplinary actions would not be disqualified from holding any other State office.

84. As the results of the disciplinary actions may vary, this Court would be remiss in imagining that disciplinary action against the Respondents took place and in doing so assuming the worst result thereof - the removal or dismissal from office of the Respondents - which would have the

weightiest consequences on them, i.e. disqualification from holding any other State office. In any case, this Court is not the institution mandated to undertake the disciplinary actions in question. Such assumptions by the Court would unprocedurally limit the rights to fair administrative action and political rights to take up elective and other State offices as established by the Constitution.

85. Therefore, even having found in the positive for a violation of **Article 77 (2)**, this Court cannot decorously declare that notwithstanding that the Respondents were not dismissed from appointive State offices, they stood dismissed or otherwise removed from the said appointive offices by operation of the law.

86. Having found that the 1st and 2nd Respondents cannot be said to have been dismissed or otherwise removed from office, I cannot also find that they are disqualified from holding other State office. I certainly cannot find that they would be disqualified from holding the offices of President and Deputy President precisely because, as I conferred earlier in this judgment, this subject falls under the exclusive jurisdiction of the Supreme Court. As a consequence, I cannot proceed to order, as prayed for by the Petitioner, that the Respondents ought to cease holding the offices of President and Deputy President with immediate effect for the reason that they are not qualified to so hold these or any other State offices.

87. On the foregoing, I also specify that the procedure of removal of a President and Deputy President from office, as the 1st and 2nd Respondents have been in office for a significant period of time, cannot be undertaken by this or other Court as it is clearly provided for in the Constitution under **Articles 144, 145 and Article 150 (2)** which state thus:

“(1) A member of the National Assembly, supported by at least a quarter of all the members, may move a motion for the investigation of the President’s physical or mental capacity to perform the functions of office.

...

(3) Within seven days after receiving notice of the resolution from the Speaker, the Chief Justice shall appoint a tribunal...

(6) The tribunal shall inquire into the matter and, within fourteen days after the appointment, report to the Chief Justice and to the Speaker of the National Assembly.

...

(9) If the tribunal reports that the President is incapable of performing the functions of the office, the National Assembly shall vote on whether to ratify the report.

(10) If a majority of all the members of the National Assembly vote in favour of ratifying the report, the President shall cease to hold office.”

“Article 145(1) states: A member of the National Assembly, supported by at least a third of all the members, may move a motion for the impeachment of the President—

...

(2) If a motion under clause (1) is supported by at least two-thirds of all the members of the National Assembly—

(a) the Speaker shall inform the Speaker of the Senate of that resolution within two days;

...

6(b) ... the Senate shall, after according the President an opportunity to be heard, vote on the impeachment charges.

(7) If at least two-thirds of all the members of the Senate vote to uphold any impeachment charge, the President shall cease to hold office.”

and

“(2) The provisions of Articles 144 and 145 relating to the removal of the President shall apply, with the necessary modifications, to the removal of the Deputy President.”

88. Prior to their taking office any challenge to the nomination and election of the President and Deputy President should have been, as discussed previously, brought before the IEBC in accordance with **Article 88 (4)(e)** of the **Constitution** and as appropriate, before the Supreme Court in accordance with and within the timeline specified in **Article 140** of the **Constitution**.

89. Accordingly then, I see no need to determine the Petitioner’s prayer for damages based on acquisition of underserved salaries and allowances by the Respondents and the conducting of Presidential by-elections due to vacancies in these offices and I will therefore not proceed to interrogate that question.

Conclusion

90. I note, as was stated by the 1st and 2nd Respondents that the Petitioner indeed brought other matters before the Supreme Court and the IEBC for consideration and determination, which matters contained some of the issues raised in this Petition and were duly disposed of by these institutions. The Petitioner also mentions in his Petition that the present matter has been brought before this Court in the public interest to facilitate constitutional compliance in public service.

91. This Court recognises the importance of and upholds the right to be heard but cautions against bringing matters, that seek to outwit other legal institutions; and matters which seeking remedies beyond public interest remedies, are not in the public interest although disguised as such. This Court can serve neither as an avenue to reconsider decisions that have been meted out by higher Courts nor as a forum to circumvent procedures that are clearly set out in the law.

92. My statements and findings notwithstanding, the vigilance of the Petitioner ought to be lauded. In a nascent constitutional dispensation where the people are sovereign, watchdogs of the Constitution and warriors of constitutionalism must remain vigilant to guard against the excesses and misconduct by State and other officers. I digress.

Disposition

93. For the above reasons, I find merit in the Petition dated 10th July 2013 as far as it concerns the first part of Prayer 1 and hereby declare that the 1st and 2nd Respondents were in contravention of **Article 77 (2)** of the **Constitution** when they both held State offices as Ministers in the Cabinet and at the same time were officials of political parties from 27th August 2010 until they ceased holding those offices.

94. I do not find any merit in the Petition as far as it concerns Prayers 2-6 and they are hereby dismissed.

95.Each party shall bear its own costs as the Petition was brought in the public interest.

96.Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF APRIL, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Kilukumi for 2nd Respondent

Petitioner present

Miss Njoroge holding brief for Mr. Ogeto for 1st Respondent

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE