



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS CONSTITUTIONAL AND HUMAN RIGHTS
PETITION NO 358 OF 2014

EVANS GOR SEMELANG'O.....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....RESPONDENT

DOMINIC OMBATI.....INTERESTED PARTY

JUDGMENT

Introduction

1. Mr. Evans Gor Semelang'o wishes to vie as an independent candidate for the Mathare Constituency Parliamentary seat in the by-elections initially scheduled for 7th August 2014. In pursuit of this goal, he took various steps towards nomination and presented his nomination papers to the Returning officer for Mathare Constituency.
2. However, the Returning officer rejected his nomination on the basis that he did not meet the requirements of section 43(5) of the Elections Act, 2012. Aggrieved by the decision of the Returning Officer, he appealed to the **Disputes Resolution Committee** (hereafter "**the Committee**") of the **Independent Electoral and Boundaries Commission** (hereafter "**IEBC**" or "**respondent**"). By its decision made on 16th July 2014, the Committee affirmed the decision of the Returning officer rejecting the petitioner's nomination on the basis that he was a public officer who had not resigned from his position not less than six months before the elections as required by section 43(5) of the Elections Act. It is this decision of the Committee that has precipitated the present petition.
3. The petitioner approached the court by way of an application brought under Certificate of Urgency dated 22nd July 2014 in which he sought, among others, orders that the Mathare Constituency by-elections be postponed pending the hearing and determination of the petition to enable him enjoy his political right to contest in a free and fair election.
4. When the matter came up for directions on 23rd July 2014, the parties agreed to proceed with the petition and to dispense with the application for conservatory orders. Thereafter, on 24th July 2014, the Interested Party, **Mr. Dominic Ombati**, applied and was granted leave to participate in the proceedings. The petition was argued before me on 31st July 2014.

Background

5. The factual background giving rise to the petition, which is largely undisputed, is set out in the affidavit sworn by the petitioner on 22nd July 2014. The petitioner was the Chairperson of the Board of the Youth Enterprise Development Fund, a public office to which he had been appointed by the President of the Republic of Kenya on 16th January, 2013. His appointment was, however, revoked on 7th April 2014 through **Gazette Notice No. 2339** dated 27th February, 2014 and one Bruce Odhiambo appointed to the office for a period of three years with effect from 1st March, 2014.

6. On 17th June, 2014, the petitioner sought a clearance certificate from the Registrar of Political Parties to contest the Mathare Constituency by-election as an independent Candidate. Upon payment of the requisite search fee, he was cleared by the Registrar on 18th of June 2014.

7. On 9th July, 2014, the petitioner provided the IEBC with general information about himself, including the fact that he served as the Chairperson of the Board of the Youth Enterprise Development Fund until his removal. He then submitted his nomination forms as an independent candidate on 11th July, 2014 to the Mathare Constituency Returning officer at St. Teresa's Girls Primary School. His nomination papers were, however, rejected. The Returning officer indicated that the forms had been **“rejected on the basis of violation of Section 43(5) of the Elections Act that required the candidate to have resigned within the stipulated period”**.

8. The petitioner then lodged a complaint with the Committee against the decision of the Returning Officer. He prayed that the Committee finds that he had qualified for nomination; that section 43(5) of the Elections Act be declared to be inapplicable in the circumstances of his case; that his nomination papers be deemed to be proper; and that the Returning officer be ordered to accept the said papers and issue a nomination certificate to him.

In its decision made on 16th July, 2014, the Committee rejected the petitioner's complaint and affirmed the decision of the Returning Officer. It is against this decision of the respondent's Dispute Resolution Committee that the petitioner now seeks the court's intervention.

The Petition

10. In the Amended Petition dated 24th July 2014, the petitioner seeks the following orders:

(a) A declaration that the decision of the Returning Officer, Mathare Constituency communicated on 11th July, 2014 denying the Petitioner a nomination certificate does not accord with Section 43(5) of the Elections Act, 2011, and hence unconstitutional, null and void;

(b) A declaration that the decision of the Returning Officer, Mathare Constituency in denying the Petitioner a nomination certificate contravened the Petitioner's rights to equal protection and equal benefit of the law; political rights; legitimate expectations of fair administrative action and fair hearing;

(c) An order of Certiorari be and is hereby issued bringing before the Honourable court for purposes of it being quashed the decision of the Returning Officer, Mathare Constituency communicated to the Petitioner on 11th July, 2014;

(d) An order of Mandamus be and is hereby issued compelling the Returning Officer, Mathare Constituency to immediately issue a nomination Certificate to the Petitioner to contest the by-election as an Independent Candidate;

(e) An order that the Petitioner's name as an Independent Candidate be included on the ballot papers and other relevant election materials for the forthcoming Mathare Constituency by-

election;

(f) An order for compensation general damages (sic) for violation of the Petitioners fundamental rights aforesated;

(g) Costs.

The Petitioner's Submissions

11. Learned Counsel, Mr. Miyare, Learned Counsel for the petitioner, submitted that the first of several issues for determination was **whether section 43(5) of the Elections Act is applicable to the circumstances of the petitioner**. It is the petitioner's case that the provisions of the section do not apply to him.

12. Counsel submitted that the petitioner is not a public officer to warrant the invocation of the Act; that he was a public officer as the Chairman of the Youth Enterprise Development Fund since 2013, but that the appointment was revoked by the President through Gazette Notice No. 2339 dated 27th February 2014 and published on 7th April 2014; and that he therefore ceased to be a public officer with effect from 27th February 2014. The petitioner contends therefore that upon revocation of his appointment, he became a free citizen to whom the requirements of section 43(5) do not apply.

13. According to the petitioner, the said section is specifically applicable to public officers; that it adopts the definition of a public officer under Article 260 as "*any person who holds a public office*"; that at the time the petitioner formed the intention to contest, he was a free citizen and able to contest the seat in exercise of his political right to vie for elective office and, if elected, to hold such office.

14. Mr. Miyare submitted that the spirit of section 43(5) is captured in Article 99(2) on the disqualification of persons for elections, specifically Article 99(2)(a), which states that a state officer or public officer, other than a member of Parliament, is disqualified from being elected as a member of Parliament.

15. Counsel submitted further that the court is enjoined by Article 20(3)(a) and (b), in applying the Bill of Rights, to develop the law to the extent that it does not give effect to a fundamental right and freedom; and to adopt an interpretation that best advances the enjoyment of a right. It was his submission that section 43(5) of the Elections Act does not apply to private citizens; and that if any ambiguity arises with respect to its interpretation, it should not be interpreted to bar the petitioner in the enjoyment of his political rights.

16. The second issue raised by the petitioner relates to the decision of the Returning officer to reject his nomination. He contends that the said decision was made without hearing him, thus violating his right to fair administrative action and fair hearing. The petitioner is aggrieved that when he sought to be cleared for the by-election, the Returning officer rejected his bid to vie as an independent candidate on the basis that he had not complied with section 43(5) and demanded a resignation letter from him. He contends that at the time, he had ceased to be a public officer and could therefore not have provided the respondent with the resignation letter demanded from him; and that five months had elapsed from the time he ceased to be a public officer.

17. The petitioner asserts that by demanding a resignation letter from him so as to comply with section 43(5), the Returning officer acted unreasonably; that he considered matters that he should not have considered, thereby violating the petitioner's rights under Article 38(3). Counsel relied on the decisions in **Associated Provincial Picture Houses, Ltd -vs- Wednesbury Corporation [1947] 2 All E.R 680** and **R -vs- Big M Drug Mart Ltd.: [1985] 1 SCR 295** in support of these submissions.

18. Mr. Miyare submitted that the petitioner had already sought and obtained clearance to vie as an independent candidate and was bound to receive a nomination certificate until complaints were made by the **Orange Democratic Party (ODM)** and an anonymous resident of Mathare Constituency. He

contended that the dates of the complaints coincided with the decision to bar the petitioner from vying; that the decision was made on the basis of the two complaints without giving him an opportunity to respond to the complaints, thus violating his right to a hearing under Article 50(1) of the Constitution; and that the petitioner only learnt about the complaints on 11th July 2014 when he attended the office of the Returning officer where he expected to be issued with the clearance certificate.

19. The petitioner further claims that the same set of facts and circumstances were a violation of his right to fair administrative action guaranteed under Article 47 of the Constitution. The alleged violation of this right arose in that the respondent, in dealing with the nomination and the complaints against the petitioner's candidature, did not take, as it should have, the role of an umpire under the Elections Act and Article 50. The Returning officer made a decision adverse to the petitioner without according him a hearing; and the respondent's Disputes Resolution Committee was thus sitting as a judge in its own cause when it dealt with his complaint against the decision of the Returning Officer.

20. The petitioner therefore asked the court to grant the prayers sought in the Amended Petition and foster his enjoyment of the rights guaranteed under Article 38 without unreasonable restrictions.

The Respondent's Submissions

21. The respondent filed two affidavits sworn by **Mr. Mohamed Jabane**, its Legal Affairs Manager, on 25th and 30th July 2014, together with a list of authorities, and made oral submissions in response to the petition. The respondent's case as it emerges from the affidavits and oral submissions is that this petition is without merit as the respondent acted in full compliance with the law in barring the petitioner from vying as an independent candidate in the Mathare by-elections.

22. It contends that section 43(5) of the Elections Act is a normative derivative of Article 82 and 87(1) of the Constitution which provide for the enactment of legislation to govern elections and the settlement of electoral disputes respectively; that it would be unreasonable and unjustifiable in light of the public interest to provide for public officers to leave office in order to contest in elections within a period of less than six months; and that Article 24 allows for limitation of the rights guaranteed under Article 38 of the Constitution.

23. According to the respondent, the Elections Act must be interpreted as a whole and in accordance with the Constitution. It was its case that the mischief sought to be remedied by the provisions of section 43(5) was threefold. First, it was to prevent public officers from interfering with elections; secondly, to maintain the dignity of public office; and finally, to prevent the deployment of public resources in election campaigns. According to Mr. Mukele, these reasons extend to those individuals who have left public office. It was the respondent's contention that the provision was not confined to the individual still in public office but also any individual who may use public resources, including resources acquired illegally, in the election campaigns.

24. With regard to the petitioner's current circumstances, Mr. Mukele submitted that the fact that his appointment was revoked did not make a difference to the requirements of section 43(5) of the Act: he was still bound by its provisions. Counsel posed the question whether, were the appointment revoked on 6th August 2014, on the basis of the petitioner's argument, he could be found eligible to vie in the elections scheduled for 7th August 2014. In the respondent's view, it would be an absurdity to permit this, and the public had the legitimate expectation that public officers should not use any residual influence before or after their departure from office to give themselves an upper hand in elections.

25. Counsel referred to the principles governing free and fair elections enunciated in Article 81(e) of the Constitution. He submitted that for the respondent to conduct elections properly, section 43(5) must be interpreted as a whole and alongside section 43(6) which sets out the offices excluded from its operations. It was his submission that such offices did not include a former public officer; that were the court to find that section 43(5) did not apply to former public officers, the consequences would be dire as there would be public officers who would trigger their own dismissal or revocation of office in order to vie for public office.

26. Counsel asked the Court, in considering the matter, to bear in mind the provisions of section 12 and 22 of the Leadership and Integrity Act, as well as Article 73 of the Constitution. In his view, a public officer is given an elevated advantage over other individuals who would be running for office, and section 43(5) was intended to cure this advantage. It was his submission further that the mischief in question was not limited to when the individual was in public office but even after he left office.

27. The respondent also opposed the petition on the basis that there were proceedings filed in court seeking to reinstate the petitioner. These proceedings were **Industrial Court Petition No. 42 of 2014-Okiya Omtatah Okoiti and Another –vs- Anne Waiguru and Others** and **High Court Petition No. 27 of 2014-Evans Muchahi Mburu and Another –vs- Attorney General and Another** in which the reinstatement of the petitioner was one of the prayers sought. He wondered what the situation would be if the petitions succeeded and the petitioner was reinstated.

28. With regard to the petitioner's contention that he had not been accorded a fair hearing and that the respondent sat as a judge in its own cause, Counsel referred the court to the case of **Diana Kethi Kilonzo & Another –vs- The Independent Electoral & Boundaries Commission & Others High Court Petition No. 359 of 2013** in which a similar allegation had been made with regard to the role of the Dispute Resolution Committee. It was his submission that where organs have been established to deal with certain unique disputes under the Constitution, they must be left to perform their duties. Article 88(4)(e) and section 74 and 109 of the Elections Act mandated the respondent to settle any electoral dispute, and the respondent had carried out its mandate in accordance with Article 88(4). It was the respondent's contention that the allegation that it sat in its own cause has no basis.

29. In response to the contention that the petitioner had been denied a right to a hearing in that he was not heard on the complaint by ODM and the Interested Party, the respondent's answer was twofold. First, Counsel submitted that the Returning officer for Mathare has not been made a party to the petition in order for him to respond to the allegations made against him.

30. Secondly, under Regulation 3 of the **Elections (General) Regulations**, the respondent is mandated to appoint a Returning officer to perform certain statutory functions including carrying out the nomination process; and it was therefore mischievous to make allegations against the Returning officer and not make him a party. In any event, the Returning officer had made a deposition to the effect that the petitioner had been given an opportunity to respond to the two complaints but had failed to do so.

31. With regard to the petitioner's contention that the respondent had violated his legitimate expectation, it was the respondent's case, in reliance on the **Diana Kethi Kilonzo** case (supra), that a legitimate expectation could not arise out of an illegality.

32. On the orders of Mandamus sought by the petitioner, Counsel submitted that such an order could only issue against a public officer to compel the public officer to perform its duty, not on how to perform its duty. Counsel relied for this proposition on the decision in **Kenya National Examination Council vs Republic ex parte Geoffrey Gathenji Njoroge & 9 Others Court of Appeal Civil Appeal No. 266 of 1996**.

33. The respondent further opposed the petition on the basis that the petitioner had not been diligent enough in prosecuting his claim; that he was entitled to move to the Dispute Resolution Committee within 7 days, but only did so on the last day; and that he also filed an Amended Petition in this matter without leave, thereby causing further delay.

34. Finally, it was the respondent's case that the petitioner's rights under Article 38 are limited by Article 24; that the respondent has spent colossal public resources in printing the ballot papers, which are already in the country; and that the rights of the people of Mathare Constituency cannot be limited by the rights of an individual. Mr. Mukele asked that the rights of the Mathare constituents be weighed against those of the petitioner and the petition be dismissed with costs.

Submissions by the Interested Party

35. Mr. Otieno, Learned Counsel, presented the Interested Party's case in reliance on the replying affidavit of **Mr. Dominic Ombati** sworn on 28th July 2014 as well as submissions of the same date. Mr. Ombati had lodged a complaint with the Returning officer with regard to the petitioner being a public officer and therefore disqualified under Section 43(5) of the Elections Act. He had also been a party before the Disputes Resolution Committee.

36. In his affidavit, he makes averments similar to those he made before the Committee: that the petitioner was a public officer until March 2014 and was therefore disqualified under the provisions of section 43(5); that Mr. Ombati had received information from the Acting Chief Executive Officer of the Youth Enterprise Development Fund regarding the tenure of the petitioner and his entitlement to use the resources of the fund. Having continued to hold office after 8th February 2014, it was the Interested Party's contention that the petitioner became automatically ineligible to vie as a candidate in the by-elections.

37. According to the Interested Party, the issue before the court is whether section 43(5) applies to the circumstances of the petitioner, pointing out that the petitioner had not challenged the constitutionality of the section or sought to have its provision declared unconstitutional. He contended that the section applied to the present circumstances as section 2 of the Elections Act defines "election" to include by-elections.

38. Mr. Otieno submitted that the petitioner was a public officer on 7th January 2014; that he should have resigned then in order to contest the elections scheduled for 7th August 2014; that when he did not resign he became ineligible to vie for the by-elections; and consequently, by the time he was removed from office, he had already become ineligible.

39. Mr. Otieno submitted further that the petitioner's political rights are not absolute and can be limited; that Parliament enacted section 43(5) to limit the participation of public officers as the court found in the case of **Charles Omanga & Another –vs- The Independent Electoral and Boundaries Commission High Court Petition No. 2 of 2013**; and **Josiah Taraiya Kipelian Ole Kores –vs- Dr. David Ole Nkediye & 3 Others –vs- Independent Electoral and Boundaries Commission Milimani High Court Petition No. 6 of 2013**; and he prayed that the petition be dismissed and the respondent allowed to conduct the elections.

Petitioner's Submissions in Reply

40. In his submissions in reply, Mr. Miyare while agreeing with the respondent that in interpreting section 43(5) the court should also consider section 43(6), maintained that the section does not apply to free citizens such as the petitioner.

41. To the contention that the Returning officer should have been made a party to the present proceedings, Counsel argued that it would not have added any value to do so. This was because the issue before the court is similar to the one before the Disputes Resolution Committee to which the Returning Officer had filed a response which was attached to the petition. Further, it was his case that the Returning officer was an employee of the respondent; that the respondent was an independent commission established by Article 252 – 253, with power to sue and be sued in its own name and to employ officers, and the Returning officer is one such officer.

42. Counsel submitted further that section 43(5) does not bar public officers perpetually from running for office; that the rights in the Bill of Rights are to be enjoyed by individuals; that it is heretical to suggest that the rights of the public should supersede the rights of the petitioner; and that the court should bear in mind that there are over 1000 voters who support the petitioner whose rights should be considered when balancing the rights of parties.

43. In response to a question from the court on the intention behind the enactment of section 43(5), Counsel for the petitioner argued that it was intended to cure situation where public officers still serving would want to contest thereby bringing a conflict of interest, as determined in the case of **Patrick Mutua**

Kimilu –vs- Independent Electoral and Boundaries Commission Machakos High Court Petition No. 12 of 2013; that law was meant to stop abuse of office and status by officers who want to gamble by having one leg in public office and the other as an elected officer.

Determination

44. I have set out in some detail above the respective submissions of the parties on the matters in dispute. The submissions have been extensive on a number of issues, and the petitioner has invited the court to deal with several issues set out in his submissions. However, I believe that this petition turns on the determination of one key issue set out in the petitioner’s written submissions and which all the parties recognize as the core of the petition. This issue is **whether the provisions of section 43(5) of the Elections Act apply to the petitioner**. Before delving into a consideration of this issue however, I will first address my mind to two collateral issues that emerge from the pleadings and submissions.

Whether the Respondent Violated the Petitioner’s Rights Under Article 47 and 50 of the Constitution

45. Article 88(4) of the Constitution and Section 74 of the Elections Act vest jurisdiction for the resolution of electoral disputes in the respondent. Article 88 (4)(e) states as follows:

“The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

(a).....

(e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;”

46. Section 74 echoes the provisions of the above Article by providing that:

74. (1) Pursuant to Article 88 (4) (e) of the Constitution, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.”

47. The dispute before me is an ‘*electoral dispute*’ as contemplated under the above provisions. The petitioner was dissatisfied with the decision of the Returning Officer, and he properly filed a complaint with the Disputes Resolution Committee of the respondent. This is the body mandated by law to hear disputes arising from the electoral process, except after the declaration of results. As the Court observed at paragraph 115 and 116 of its decision **Diana Kethi Kilonzo & Another –vs- The Independent Electoral & Boundaries Commission & Others High Court petition No. 359 of 2013**:

[115]. *“Ms. Kilonzo does indeed have a right to a fair hearing under Article 50(1) of the Constitution. This right, in respect of a dispute pertaining to the electoral process in exercise of her rights under Article 38, is constitutionally required to be exercised before the Committee in accordance with the Constitution, the Act, Regulations, and the Rules enacted in accordance with the IEBC’s mandate under Article 88(4)(e). As long as the dispute is heard and determined in accordance with these provisions, Ms. Kilonzo cannot properly be heard to argue that her rights under Article 50(1) were violated. As Majanja, J observed in Francis Gitau Parsimei & 2 Others –vs- The National Alliance Party & 4 Others, Petition No. 356 and 359 of 2012:*

“5. On the other hand, it must be clear that political rights are exercised through a political process involving many actors; the citizens and institutions. This is the process provided for under the provisions of Chapter Seven of the Constitution titled, “Representation of the People.” These provisions are operationalized by the Independent Electoral and Boundaries Commission Act, 2011,

the Elections Act, 2011 and the Political Parties Act, 2011. Individual political rights and the electoral process cannot be divorced from one another but must go hand in hand. It is therefore proper that political rights are realized within a structured process that takes into account the larger interests of the society and the need for a free and fair election which is enhanced by a self-contained dispute resolution mechanism underpinned by the Constitution itself and statutes enacted to give effect to its provisions.

[116]. The question then is: Did the Committee, in hearing the complaint before it, deal with it in accordance with the Constitution and national legislation?...

48. The petitioner complains about the conduct of the Returning officer and the Disputes Resolution Committee. The procedure for dealing with disputes arising before elections is set out under the **Rules of Procedure on Settlement of Disputes** made by IEBC in accordance with Section 109 of the Elections Act (Legal Notice No. 139 of 3rd December, 2012). **Rule 9** thereof provides for the lodging of a complaint objecting to the nomination of a candidate. Under **Rule 11**, the Returning officer is authorized to decide any dispute arising from the nomination of a candidate within his electoral area. **Rule 13** permits a person aggrieved by the decision of a returning officer to appeal such decision to the IEBC's Disputes Resolution Committee. He also has a right to review of the decision of the Disputes Resolution Committee to the High Court, which the petitioner has exercised in the present proceedings. Consequently, the petitioner was under an obligation to present to the court material on the basis of which it could conclude that there was a violation of his rights by the Disputes Resolution Committee.

49. I have read the petitioner's affidavit in support of the petition, the affidavits sworn by the respondent and Interested Party in reply, the proceedings of and the decision by the Committee dated 16th July 2014 as well as the submissions of the parties. The record of proceedings before the Committee indicates that the Committee heard both the petitioner and the Returning Officer. It accepted the explanation of the Returning officer that he had given the two complaints that he had received to the petitioner, but that the petitioner had not made any response to them. I am therefore unable to find any evidence that supports the petitioner's contention that he was not accorded a fair hearing by the respondent or that there was any violation of his rights under Article 47 and 50 of the Constitution.

The Impact of Pending Litigation

50. The respondent has opposed the petition on the basis that there are pending before the Industrial Court two petitions seeking reinstatement of the petitioner to his position as Chair of the Youth Enterprise Development Fund Board. The petitioner had averred that there were no proceedings pending in court regarding the revocation of his appointment. Despite the averments on oath by the respondent on the pendency of these proceedings, the petitioner did not make any comment on the petitions before the Industrial Court seeking his re-instatement to the public office that he was removed from following the revocation of his appointment.

51. The averments by the petitioner do disclose what appears to be a deliberate non-disclosure of the existence of these suits. While he is not the petitioner in the two petitions, he has not claimed to have been unaware of these suits. The respondent interprets this as showing bad faith and rendering the petitioner undeserving of the relief he seeks.

52. It is indeed true, on the face of it, that the petitioner did make an averment that was false. However, while this conduct is to be deprecated and unworthy of a person seeking public office, particularly in light of the provisions of Article 73 and 232 of the Constitution, I believe it does not have an impact on the present petition. There is nothing to prevent the petitioner from litigating his claim in the Industrial Court if he deems his removal from office was unfair or unlawful, and I am not able, from the respondent's depositions and submissions, to see how the pending cases impact on his bid for elective office. Had he been removed from office say 8 months prior to the by-elections, he would, on the basis of the argument by the respondents and interested party, be entitled to vie, and would not thereby be deprived of his right to pursue a claim for unfair dismissal should he so wish.

Whether the Provisions of Section 43(5) apply to the Circumstances of the Petitioner

53. As noted earlier, the core of the petitioner's case is that as his appointment as a public officer had been revoked and he was no longer a public servant, the provisions of section 43(5) did not apply to him. He was, in the words used repeatedly by his Counsel, Mr. Miyare, a **"free citizen"** at liberty to vie for the Mathare Parliamentary seat in the forthcoming by-election. The petitioner's case is captured succinctly at paragraph 56 and 57 of his submissions that:

[56.] ***"The Petitioner became a free citizen eligible to contest an election for membership to the National Assembly as herein, upon revocation of his appointment as a public officer.***

[57.] ***"By the said revocation, the Petitioner ceased to hold a public officer. As such, the intention of the Petitioner to vie in the Mathare Constituency by-election cannot be brought within the ambit of Section 43(5) of the Elections Act, 2012, only applicable to public officers who intend to contest an election!"***

54. He concludes at paragraph 72 of his submissions as follows:

"The Petitioner became a free citizen upon revocation of his appointment by the President. He is therefore free to exercise his political rights under Article 38 (2) (a) and (3) (c) of the Constitution without being limited or entangled by the strictures of Article 99 (2) (a) as read together with Section 43 (5) of the Elections Act, 2012."

55. It is thus evident, as submitted by the Interested Party, that the petitioner has no quarrel with the provisions of section 43(5). He does not challenge its constitutionality or allege that it limits the political rights of public officers guaranteed under Article 38. This is no doubt prudent given the well-reasoned decision of Lenaola J in **Charles Omanga and Another -vs- Independent Electoral and Boundaries Commission High Court Petition No. 2 of 2012**, in which he found that sections 43(5) and (6) of the Elections Act were not in contravention of the Constitution. At paragraph 24 of the said decision, Lenaola J expressed himself as follows:

[24]. ***'It is their (the respondents) common argument that public officers need to be restricted in their political activities so that while in office they should not be seen to be engaged in partisan political activities and which may impede the objective discharge of their duties. That the requirement that they should resign from public office seven months before the date of elections is therefore reasonable and Section 43(5) and (6) are not in contravention of the Constitution.'***

56. He then concluded at paragraph 25 as follows:

[25.] ***I have considered the rival arguments and it does not take much persuasion for me to agree with the Respondents. I say so, with respect to the Petitioners and the Interested Parties, because the purpose of the two sections are obvious to me. For the Government at the national and devolved levels to function during an election period, certain functions cannot be suspended including those of the President and County Governor, otherwise there would be chaos. How would the government function without the Head of State and other such Officers? The same Constitution in any event also differentiates between elected officials and other public officials because the former have specific time frames within which they must serve – invariably for five years.'***

57. It is noteworthy also, that the petitioner does not question the applicability of section 43(5) in the context of a by-election. What he is saying in effect is that the provision is perfectly in order. It just does not apply to him because he is a **"free citizen"** who ceased to be a public officer upon revocation of his appointment as Chairman of the Youth Enterprise Development Fund.

58. In considering this issue, it is important to consider the context, intent and purpose of Article 99(2) of the Constitution, and section 43(5) of the Elections Act. Article 99(2)(a), which is relevant to the present

dispute, provides as follows:

“A person is disqualified from being elected a member of Parliament if the person—

(a) is a State officer or other public officer, other than a member of Parliament;..“

59. Political rights are guaranteed under Article 38 of the Constitution. Sub-article 38(3) is relevant for the present proceedings and provides as follows:

“Every adult citizen has the right, without unreasonable restrictions—

(a) to be registered as a voter;

(b) to vote by secret ballot in any election or referendum; and

(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.” (Emphasis added.)

60. Article 24 provides for the circumstances under which certain rights in the Bill of Rights can be limited. It provides as follows:

“ (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

...

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.”

61. No doubt in recognition of the fact that there cannot be an absolute bar on public or state officers vying for elective office, Parliament enacted section 43(5) of the Elections Act, which does limit the rights of public officers under Article 38 but gives them an option and the circumstances under which they can vie for elective public office by providing as follows:

“A public officer who intends to contest an election under this Act shall resign from public office at least six months before the date of election.”

62. Section 43(6) is in the following terms:

“This section shall not apply to-

(a) the President;

- (b) *the Prime Minister;*
- (c) *the Deputy President;*
- (d) *a member of Parliament;*
- (e) *a County Governor;*
- (f) *a Deputy County Governor*
- (g) *a member of a County Assembly.”*

63. As found by Lenaola J in the **Charles Omanga –vs- IEBC** case (supra), a finding I fully agree with, the provisions of section 43(5), are not in contravention of the Constitution. My task in this petition is to consider and determine whether they apply to a person in the position of the petitioner who ceased to be a public officer, though revocation of his public appointment, less than the six months permitted under the section.

64. To determine whether this provision applies to a former public officer such as the petitioner, one must consider what the intention was behind providing a six month gap (initially seven month gap in the 2011 Act) between a public officer leaving office and the date of the elections. When considering the provisions of this section in the **Charles Omanga –vs- IEBC** case, Lenaola J expressed himself at paragraph 26 thereof as follows:

[26.] “I also wish to state that the impartiality of public servants is a cardinal value enshrined in Article 232(1)(a) of the Constitution which provides that the public servant and service must be “responsive, prompt, efficient, impartial and equitable” in the provision of services. How can a public servant espouse those principles if he is allowed to remain in office until the election date?

Suppose a Judge who intends to run for an elective post (it is his right) is allowed to sit on the bench and preside over election related cases until the election date? Where is his impartiality? Similarly how can a Commissioner in the Independent Election and Boundaries Commission (IEBC) serving his last year in office and with ambition to run for elective office, be allowed to remain in office and oversee an election in which he is a candidate? The absurdity of both situations merely serves to show the justifiability of the need for public servants to leave public office within a reasonable time before the election in which they will be candidates.”

65. Let us extend the illustration used by Lenaola J in the **Charles Omanga** case above to a public officer in the position of, or similar to, that of the petitioner. And let us assume that the public officer will reach retirement age two months before the elections; or whose term in an appointive public office comes to an end by operation of law three months to the elections. Or, to use the more dramatic illustration used by Counsel for the respondent, what of a public officer who, wishing to vie in an upcoming election, engineers his own dismissal less than six months before the elections? Upon retirement, expiration of statutory term or dismissal, the public officer will be, in the words used with regard to the petitioner by his Counsel, a “*free citizen.*” Would it in such circumstances be proper for the public officer to vie for elections? Would not the “*objective discharge of (his) duties*” alluded to in the **Charles Omanga** case be compromised or impeded as the officer would have half his mind on his office, and the other in the forthcoming elections? And would the purpose of Article 99(2)(a) and 43(5) not be defeated in such circumstances?

66. In my view, the intent behind these provisions was to lessen the considerable influence that public officers have historically yielded in public affairs which was deemed to give them an unfair advantage over others in the electoral context. While the section deals with resignation of a public officer, what must have been in contemplation was that a public officer would not vie for elective office until after six months from the date he or she **ceased** to hold public office, whether through resignation, retirement,

expiration of a term of appointment or, as in the present case, revocation of appointment.

Conclusion

67. I find therefore, and I so hold, that the provisions of section 43(5) of the Elections Act do apply to the circumstances of the petitioner. His appointment having been revoked on 7th April 2014 and effective from 1st March 2014, he is not eligible to vie as an independent candidate in the Mathare Constituency by-election.

68. As I have also found that the petition did not disclose any violation of the petitioner's rights under Articles 47 and 50(1) of the Constitution, this petition must fail in its entirety. It is hereby dismissed.

69. With regard to costs, Rule 26 of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** vests discretion with regard thereto in the court. I recognize that the main issue raised in this petition is new, has not been litigated before in our courts, and this petition therefore helps to advance jurisprudence in the area of political rights guaranteed in the Constitution. In the circumstances, I direct that each party bears its own costs of the petition.

70. In closing, I must express my gratitude to Counsel for the parties for their diligence in the preparation of their pleadings and submissions within very tight time constraints.

Dated, Delivered and Signed at Nairobi this 4th day of August 2014

MUMBI NGUGI

JUDGE

Mr. Miyare and Mr. Atonga instructed by the firm of Atonga Miyare & Associates for the Petitioner

Mr. Mukele instructed by the firm of Mukele Moni & Co. Advocates for the Respondent

Mr. Otieno and Mr. Orwenjo instructed by the firm of Otieno Ogola & Co. Advocates for the Interested Party.