



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Petition 12 of 2013**

**BISHOP DONALD KISAKA**

**MWAWASI.....PETITIONER**

**AND**

**THE ATTORNEY**

**GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....2<sup>ND</sup>  
RESPONDENT**

**THE COMMISSION ON IMPLEMENTATION OF THE CONSTITUTION.....3<sup>RD</sup>  
RESPONDENT**

**JUDGMENT**

**Introduction**

1. The issue for determination in this petition is whether a person who holds dual citizenship is qualified under the Constitution to contest elective office.
2. It is not in dispute that the petitioner is a citizen of Kenya by birth and of United States of America by naturalization. He became a citizen of the United States of America on 20<sup>th</sup> July 2012. On 17<sup>th</sup> December 2012, he was nominated by Agano Party to vie for the Taita Taveta County Senate and he intends to present his nomination papers to the Independent Electoral and Boundaries Commission (“IEBC”).

**Background**

3. This petition was triggered by a notice issued by the IEBC dated 4<sup>th</sup> January 2013 (“the notice”), setting out the qualifications and requirements for nomination of candidates for various elective positions. The notice stated that for a person to qualify for election as a senator, the person;

- (1) *Must be a citizen of Kenya at least 10 years before the elections.***
- (2) *Must not hold dual citizenship.***
- (3) *Must not owe allegiance to a foreign state***
- (4) *Must be a registered voter.***

**(5) Must be nominated by a political party or is an Independent candidate.**

4. It is the petitioner's contention that the IEBC unlawfully prescribed the qualifications relating to the prohibition of dual citizenship and allegiance to a foreign State given that the Constitution does not impose such prohibition in respect of any office save that of the President and Deputy President and in the circumstances, his rights and fundamental freedoms under **Article 38** are violated.

### **Issues for determination**

5. The 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the petition. Grounds of opposition and written submissions dated 22<sup>nd</sup> January 2013 were filed on the 1<sup>st</sup> respondent's behalf while the 2<sup>nd</sup> respondent filed a replying affidavit sworn by its Director Legal and Public Affairs, Ms Praxedes Tororey. The 3<sup>rd</sup> respondent, though served with the petition, did not take part in the proceedings.

6. When this matter came up for directions on 17<sup>th</sup> January 2013, I directed the parties to agree on issues for determination as the issues raised were really matters of law. Consequently the parties agreed on the following issues;

a) *Whether **Article 99** is exclusive or exhaustive as to the qualification and disqualifications of candidates for Parliamentary elections.*

b) *Whether substantive provisions of the Constitution bear out the definition of members of Parliament as State officers under **Article 260**.*

c) *How the court should resolve any apparent or perceived conflict between **Article 99** and interpretation provisions under **Article 260**.*

d) *Whether the definition of State officer or State office under **Article 260** violates the petitioner's right under **Article 10** and **38**.*

### **Arguments**

7. Mr Mungai, counsel for the petitioner, submitted that the effect of the notice issued by IEBC was to effectively disqualify the petitioner from contesting the position of senator of Taita Taveta County as he holds dual citizenship and owes allegiance to a foreign state. It is the petitioner's assertion that disqualifications on account of citizenship and allegiance to a foreign state are not provided for in **Article 99**. **Article 99** sets out the qualifications and disqualifications for elections as Member of Parliament and it provides as follows;

#### **Qualifications and disqualifications for election as Member of Parliament.**

**99. (1) Unless disqualified under clause (2), a person is eligible for election as a Member of Parliament if the person—**

**(a) is registered as a voter;**

**(b) satisfies any educational, moral and ethical requirements prescribed by this Constitution or by an Act of Parliament; and**

**(c) is nominated by a political party, or is an independent candidate who is supported—**

**(i) in the case of election to the National Assembly, by at least one thousand registered voters in the constituency; or**

**(ii) in the case of election to the Senate, by at least two thousand registered voters in the county.**

**(2) 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;**

**(b) has, at any time within the five years immediately preceding the date of election, held office as a member of the Independent Electoral and Boundaries Commission;**

**(c) has not been a citizen of Kenya for at least the ten years immediately preceding the date of election;**

**(d) is a member of a county assembly;**

**(e) is of unsound mind;**

**(f) is an undischarged bankrupt;**

**(g) is subject to a sentence of imprisonment of at least six months, as at the date of registration as a candidate, or at the date of election; or**

**(h) is found, in accordance with any law, to have misused or abused a State office or public office or in any way to have contravened Chapter Six.**

**(3) A person is not disqualified under clause (2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted.**

8. Mr Mungai argued that for purposes of qualification and disqualifications, the provisions of the Constitution dealing with elections and **Elections Act, 2011** are exclusive and exhaustive and therefore IEBC acted in excess of its powers by implying other provisions of the Constitution. Counsel contrasted **Article 99** with **Article 137** which provides for the qualifications of the President and Deputy President. **Article 138 (2)(a)** provides that a person is not qualified for nomination as a presidential candidate if the person, *“owes allegiance to a foreign state”* and therefore candidates for the position of President are specifically prohibited from being dual citizens and owing allegiance to another state.

9. Mr Mungai further contended that reading the Constitution as a whole would require the court to consider the position of the President and Deputy President vis-a-vis that of other offices. Counsel noted that the petitioner’s case was underpinned by the fact that under the **Third Schedule** to the Constitution it is only the President and Deputy President who take the *“Oath or Solemn affirmation of allegiance of the President/Acting President and the Deputy President”* which commits them to defending the sovereignty of Kenya.

10. The respondents relied on the case of *Federation of Women Lawyers of Kenya and Others v Attorney General and Another* [2011] eKLR as authority for the argument that, *“it is important that the Constitution be read as a whole and all provisions having a bearing on the matter be considered together as an integral whole.”* In the circumstances they contend that **Article 99** cannot be read in isolation and must be read as part of the entire Constitution therefore **Article 78** is germane to the determination of any qualification or disqualification and contains an express provision which must be given effect. The respondents’ position is that members of Parliament are State officers as provided under **Article 260** and therefore the provision of **Article 78** are applicable not only to members of Parliament but to prospective members of Parliament. **Article 78** which falls under **Chapter Six** of the Constitution titled *“Leadership and Integrity”* provides as follows;

**78. (1) A person is not eligible for election or appointment to a State office unless the person is a citizen of Kenya.**

**(2) A State officer or a member of the defence forces shall not hold dual citizenship.**

**(3) Clauses (1) and (2) do not apply to—**

**(a) judges and members of commissions; or**

**(b) any person who has been made a citizen of another country by operation of that country's law, without ability to opt out.**

11. In response to the respondent arguments referring to **Article 78**, the petitioner avers that **Chapter Six** is incorporated in the qualifications and disqualification of members of Parliament under **Article 99(2)(h)** and apart from this specific provision no other qualification or disqualification can be implied from **Chapter Six**. Thus where no finding has been made that a candidate has been found guilty of misuse or abuse of State office, then **Article 78** is inapplicable and the IEBC has no authority to include this provision as a disqualification.

12. The other ground upon which the petitioner contends that **Article 78** is not applicable to the eligibility for election as Member of Parliament is that the definition of State officer in **Article 260** is not an exclusive definition. Mr Mungai argued that the definition of State in international law refers to a fixed population within a defined territory which has a government and therefore State Officer for purposes of qualification is limited to the person representing the State in international law; that is the President. Counsel submitted that this position is confirmed by the provisions of **Article 138(2)(a)** which contain the specific prohibitions on the President and his deputy holding dual citizenship. Counsel further argued that since Kenya is part of the international community and international law is applicable under **Article 2**, then it follows, that the term 'State officer' for purposes of the exclusion under **Article 78 (2)** only applies to a person who represents Kenya as State. Mr Mungai maintained that **Article 260** is merely a definition section which must give way to the substantive rights of the petitioner.

13. Both Mr Kakoi and Mr Gumbe, counsel for the Attorney General and the IEBC respectively, rebuffed the reference to international law as a means of interpreting the Constitution in the manner suggested by the petitioner. They contended that **Article 260**, as the definition section of the Constitution is exhaustive of the definition of State officer and there was no need for recourse to international law to discern the meaning of State officer. Furthermore, they contended, whatever the meaning of State under international law, international law was subordinate to the Constitution as the Constitution is the supreme law in accordance with **Article 2**.

14. Mr Mungai further argued that the right to vote and stand for elections protected under **Article 38** are corollary rights and that the notice issued by IEBC is an interference with the right and fundamental freedom. Counsel also emphasized that the issue in this case fundamentally concerns the rights of citizenship which are guaranteed under **Article 12** which provides;

**12. (1) Every citizen is entitled to —**

**(a) the rights, privileges and benefits of citizenship, subject to the limits provided or permitted by this Constitution; and**

**(b) a Kenyan passport and any document of registration or identification issued by the State to citizens.**

**(2) A passport or other document referred to in clause (1) (b) may be denied, suspended or confiscated only in accordance with an Act of Parliament that satisfies the criteria mentioned in Article 24.**

15. Counsel for the petitioner noted, that as a citizen by birth, the petitioner's rights, privileges and benefits of citizenship, which include the rights to vote and to stand for elections guaranteed under **Article 38** are inalienable and the action by the IEBC effectively violates his fundamental rights and freedoms.

16. The respondents' position is that in interpreting the import and extent of the petitioner's rights and fundamental freedoms, the Constitution should be read in harmony, and as a whole and in this particular case **Article 38** could not be considered to be absolute.

### **Determination**

17. I have given due consideration to the parties' pleadings, depositions and submissions and I take the view that this case must be determined by reading the Constitution as a whole as it deals with the rights of a citizen, political rights and specific qualifications for elections (See ***Federation of Women Lawyers of Kenya and Others v Attorney General and Another (Supra)***). Thus, all the provisions of the Constitution with a bearing on a specific issue must be read together and given full effect. This is the principle of harmonisation was elucidated in the case of ***Olum v Attorney General of Uganda [2002] 2 EA 508*** where the Supreme Court of Uganda stated thus, *'the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. Constitutional provisions must be construed as a whole in harmony with each other without insubordinating any one provision to the other.'*

18. **Article 16** reserves the rights to dual citizenship and it provides that, **"a citizen by birth does not lose citizenship by acquiring the citizenship of another country."** Like all citizens, persons holding dual citizenship are entitled to the rights, privileges and benefits of citizenship as provided in **Article 12**. It should be noted that **Article 12** permits limitation to the rights, privileges and benefits of citizenship by the Constitution. For example, **Article 99(2)** disqualifies a person from being elected Member of Parliament if the person, though a citizen, has not been a citizen of Kenya for at least the ten years preceding the date of the election (see ***Esposito Franco v Independent Electoral Boundaries Commission & Another Nairobi Petition No. 78 of 2012 (Unreported) per Lenaola J.***)

19. Similarly political rights are not absolute and may be limited either by the law, which must comply with the limitations contained in **Article 24** or by the Constitution itself. **Article 38 (3)** provides as follows;

**38(3) 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 mine]**

20. The ***Kenya Citizenship and Immigration Act, 2011(No. 12 of 2011)*** enacted pursuant to **Article 18** of the Constitution provides for rights and duties of citizens. Under **Section 8**, a dual citizen is entitled to all the rights appurtenant to citizens. These rights may however be limited by the Constitution. **Section 22** stipulates various rights accruing to citizens including the right;

**... to participate in free, fair and regular elections based on universal suffrage and subject to the Constitution, to vote and vie for—**

**(i) any elective body or office established under the Constitution;**

**(ii) any office of any political party of which the citizen is a member;**

**(iii) vote in any referendum.**

21. Although **Article 99(2) (h)** makes the reference to **Chapter Six**, this reference is in respect of a finding of misuse or abuse of office by a State officer found liable in accordance with the procedures and mechanisms prescribed by the legislation contemplated under **Article 80**. The mechanisms and

procedures for implementation of **Chapter Six** are to be found in the *Leadership and Integrity Act (Act No. 19 of 2012)*. This would seem to negate the fact that the rest of **Chapter Six** is inapplicable but this is not the end of the matter as **Article 78** contains a specific reference to election, that is, “**A person is not eligible for election ....**” This reference implies that **Article 99** is not necessarily exhaustive as to the qualifications and disqualifications for Member of Parliament.

22. The right to vote and stand for elections is given practical effect in **Chapter Seven** titled “**Representation of the People.**” The IEBC is created under **Article 88** as the body responsible for conducting or supervising referenda and elections. It is also the body charged with the regulation of the process by which parties nominate candidates for elections and in doing so, it is required to exercise its powers and perform its functions in accordance with the Constitution and national legislation. It is pursuant to this authority that the IEBC issued the notice prescribing the qualifications and disqualification of prospective candidates for members of Parliament. In so doing, like any other State organ, it must address itself to the provisions of the Constitution as a whole.

23. I agree with the respondents that the definition of State officer under **Article 260** is exhaustive and there is no need to look outside the Constitution for another meaning to validate the petitioner’s claim. Such an argument flies in the face of the principle of supremacy of the Constitution clearly articulated in **Article 2**. Under **Article 1** all sovereign power belongs to the people of Kenya exercisable either directly or through their democratically elected representatives and is delegated to the various state organs. A Member of Parliament is a State officer and a prospective Member of Parliament must be alive to the proscriptions enacted in the Constitution. Subject to specific exceptions for judges and members of commissions, **Article 78** prohibits a State officer from holding dual citizenship and this prohibition cannot be circumvented by implying a notion of the definition of State in international law where the Constitution provides a specific definition. The petitioner’s argument is therefore rejected.

24. I find and hold that the **Article 78(2)** which prohibits a state officer from holding dual citizenship, disqualifies a prospective candidate from consideration for nomination. **Section 22(1)** of the *Elections Act, No. 24 of 2011* is categorical that a person can only be nominated as a candidate for an election if the person *inter alia*, “**(a) is qualified to be elected to that office under the Constitution and this Act...**” That means that prospective candidates must in the first place be qualified under law to be elected to the posts for which they wish to contest. In our case, that person who is a dual citizen cannot be qualified to be Member of Parliament in view of the wall erected by **Article 78**. As the IEBC is the body responsible for conducting and supervising elections and is mandated by law to regulate the conduct of nominations by Parties and carry out voter education, it is entitled to spell out the fact of disqualification in the notice it issued. In the circumstances the notice issued, in so far as it relates to qualification of dual citizens not being able to stand for elections, is not *ultra vires* or illegal.

### **Conclusion and Disposition**

25. In light of what I have stated above, I will now proceed to answer the questions framed for determination.

*Whether **Article 99** is exclusive or exhaustive as to the qualification and disqualifications of candidates for Parliamentary elections.*

26. The Constitution must be read as a whole and the provisions of **Article 99** are neither exclusive nor exhaustive as to the qualification and disqualifications of candidates for Parliamentary elections. **Article 78** contains a specific prohibition against a category of State officers from holding dual citizenship, it must be given effect by the IEBC as the body charged with conducting and supervising election.

*Whether substantive provisions of the Constitution bear out the definition of members of Parliament as State officers under **Article 260**.*

27. The definition of a State officer under **Article 260** to include members of Parliament is an exhaustive definition.

*How the court should resolve any apparent or perceived conflict between **Article 99** and interpretation provisions under **Article 260**.*

28. There is no conflict between the provisions of **Article 99** and **260**.

*Whether the definition of State officer or State office under **Article 260** violates the petitioner's right under **Article 10** and **38**.*

29. First, the provision of one part of the Constitution cannot violate another. **Article 2(3)** clearly stipulates that the validity or legality of the Constitution is not subject to challenge by or before any court. By extension, it follows that a constitutional provision cannot be challenged as being 'invalid' or 'illegal' or unconstitutional for violating other rights under the same Constitution. Second, the Court must give effect to the Constitution as whole and last, **Article 38** admits limitations provided in the Constitution including the limitation that a person holding dual citizenship cannot hold State office as provided in **Article 78**.

30. The effect of my findings on the issues framed for determination is I find and hold that the IEBC, by virtue of its constitutional authority is entitled to prescribe and notify the public, in accordance with the Constitution, the qualifications and disqualification of candidates vying for the position of Member of Parliament. I also find and hold that by virtue of **Article 78(2)**, a person who holds dual citizenship cannot run for elective office as a Member of Parliament.

31. The petitioner's case be and is hereby dismissed with no orders as to costs.

**DATED** and **DELIVERED** at **NAIROBI** this 28<sup>th</sup> day of January 2013.

**D.S. MAJANJA**

**JUDGE**

Mr K. Mungai instructed by Kinoti and Kibe Advocates for the petitioner.

Mr Kakoi, Litigation Counsel, instructed by State Law Office for the 1<sup>st</sup> respondent

Mr Gumbo instructed by Gumbo and Associates Advocates for the 2nd respondent.