



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO. 78 OF 2012

ESPOSITO FRANCO.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL&BOUNDARIES COMMISSION.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. In his petition dated 2nd March 2012, the Petitioner, Esposito Franco seeks the intervention of this Court in the interpretation of the following questions;

(i) Whether Article 99(2)(c) of the Constitution has prospective effect and only affects persons who become citizens of Kenya after the effective date or whether it has retrospective effect thereby affecting persons who become citizens of Kenya before the effective date.

(ii) Whether Article 99(2) (c) of the Constitution purports to limit the fundamental right and freedom of Kenyan citizen who has become a citizen for less than ten years to be elected to the National Assembly without such limitation being justifiable or meeting the test set by Article 24 of the Constitution.

2. Upon the answers sought being given, the Petitioner seeks the following orders;

(a) A Declaration that Article 99 (2) (c) of the Constitution has prospective effect and only applies or affects persons who obtain Kenya citizenship after the effective date of the Constitution.

(b) A Declaration that the Petitioner having attained Kenyan citizenship prior to the effective date of the Constitution and having participated in the 2007 Parliamentary elections as a candidate is entitled to participate as a candidate in the forthcoming General Elections.

(c) A Declaration that Article 99(2) (c) of the Constitution is unconstitutional.

3. The Petition is supported by an affidavit sworn by the Petitioner on 12th March, 2012. In response to the Petition, the 1st Respondent filed an affidavit sworn by Praxedes C. Tororey, the Legal and Public Affairs Director of the 1st Respondent on 15th May 2012 and the 2nd Respondent also filed a replying affidavit sworn by Gichira Kibara the Acting Permanent Secretary in the Ministry of Justice and Constitutional Affairs on 18th June 2012. All the parties filed their written submissions thereafter.

Petitioner's case

4. The Petitioner is originally from Italy and came to Kenya in 1964 to work as an engineer with the Italian San Marco project on the space research on the strength of an agreement between the Kenyan and the Italian government. In the year 2000, applied for 2000 applied for Kenyan citizenship and he was granted the citizenship in the year 2003. He was subsequently, registered as a voter and issued with an Electors Card No. 0436017235. He alleged he has since participated twice in the general elections to the National Assembly as a candidate for the Magarini Constituency including the recently concluded general elections of 2007.

5. In his Petition, the Petitioner stated that **Article 99(2)** of the Constitution is discriminatory in nature for what he claims classifies citizens into categories of sets who are first among equals. It is also his contention that **Article 99(2)(c)** is in contradiction with **Article 20(4)** and in particular with regard to equality among all citizens and or/individuals in the Bill of Rights. He thus alleges that the ten (10) year requirement stipulated by **Article 99(2)(c)** is unjustified, unreasonable because it creates two categories of citizens and this is against the spirit of the Constitution.

6. It is also the Petitioners contention that **Article 99(2)(c)** is in conflict with **Article 13(1)** of the same Constitution. Accordingly, the Petitioner claims that having been a Parliamentary candidate before (in the 2007 general elections) he ought to enjoy the same rights and freedoms even with the promulgation of the Constitution. He avers that he has a right to be elected to the National Assembly and submits that the Constitution 2010 did not take away his rights (*to vote or to voted for*) that had accrued to him. He thus opines that **Article 99(2)(c)** ought to be construed with prospective effect and applies to persons who applied and became citizens after the effective date of the Constitution, 2010 and the rights of those who applied and acquired citizenship under the previous Constitution cannot be affected. To this effect he relied on the Supreme Court of the United States case of **Fletcher v Peck (never provided its citation)** that a legislature could repeal or amend its previous Acts, but could not undo actions that legally accrued under previous Acts.

1st Respondent case

7. The Independent, Electoral and Boundaries Commission (IEBC) and the 1st Respondent, made a straight forward response to the Petition. It was its position that the Petition is not tenable for various reasons. Firstly, a constitutional provision cannot be unconstitutional. Secondly, the Constitution is self contained on amendments and a reference to this Court is not one of them. And lastly that the Petitioner has failed to establish a violation of any of his alleged acquired rights.

8. In addition to the above, it was also the 1st Respondents contention that any qualifications for elective position can never be discriminatory if they set the thresh-hold applicable to all. In any event, if the Petitioner is aggrieved his remedy is administrative and of a statutory nature and his complaint can never amount to an issue capable of determination in a Constitutional Petition. It was thus the 1st Respondent's position that this Petition ought to be dismissed with costs.

2nd Respondent's Case

9. The Attorney General and the 2nd Respondent herein, opposed the Petition in its entirety. It was their submission that the Petitioner's claim lacks basis because it amounted to a of questioning the legality of a constitutional provision. While agreeing that this Court has jurisdiction to interpret the Constitution, the 2nd Respondent nonetheless, contends that this Petition seeks to amend the Constitution even though that is a preserve of the National Assembly. He argues that this Court cannot now usurp the role of the National Assembly.

10. In response to the Petitioner's claim that **Article 99(2)(c)** applies to people who acquired citizenship after the promulgation of the Constitution, the 2nd Respondent opines that the wording of **Article 99(2)(c)** is clear and specific; that there can never be two interpretation. According to the Attorney General, the only plausible meaning of this Article is that as at the time of election; an aspiring candidate for the

position of Member of National Assembly must have been a citizen for at least ten (10) years.

11. In regard to the Petitioner's allegation that **Article 99(2)(c)** violates his rights to equal opportunities as it is discriminatory and a limitation of his rights, the 2nd Respondent claims that this Article does not indicate any violation or threat to any of the Petitioner's rights or freedom. In any event, it was the 2nd Respondent's opinion that the limiting of eligibility for election as Member of Parliament to those who have been citizens of Kenya for at least ten (10) years has a rational connection to a legitimate purpose.

12. The 2nd Respondent also took the same position as the 1st Respondent that this Court has no power to amend the Constitution in exercising its interpretative jurisdiction. But he also adds that **Article 2(3)** of the **Constitution** prohibits any challenge to the validity or legality of the Constitution before any Court or other organ. He also submitted that the Constitution is the Supreme Law of the Land and binds all persons and state organs at all levels of government (including the Court) as per the provisions of **Article 2(1)**. He further states that any act or omission which contravenes the constitution is invalid as provided for by **Article 2(4)** of the Constitution.

13. It was also the 2nd Respondent's contention that the Repealed Constitution at **Section 34** allowed the Petitioner to contest for a Parliamentary seat as it only required the Petitioner to be a citizen. Unlike the repealed Constitution, the Constitution 2010 at **Article 99(2)(c)** has stipulated that one must be a citizen for at least ten (10) years immediately preceding the date of election for such a person to be eligible to run for elections.

The Respondent's for the above reasons urge that the Petition be dismissed with cost.

Determination

14. Having set out elsewhere above the issues that the Petitioner seeks this Court's interpretation, I will now deal with each of them. The petitioner takes issue with **Article 99(2)(c)** of the **Constitution**. This Article provides as follows;

“A person is disqualified from being elected an MP if the person-

(a) ...

(b) ...

(c) has not been a citizen of Kenya for at least ten(10) years immediately preceding the date of election”.

In my view, this provision is clear and requires no more than a literal interpretation. **Article 99(2)(c)** of the Constitution disqualifies any person who has not been a Kenyan citizen for a period of at least “ten (10) years immediately preceding the date of election.” (Emphasis Mine). The simple and plain meaning of this provision is clear to my mind; that a person must have been a citizen at least for ten (10) years before the date of election. I would not attribute any other meaning to this provisions. The Submissions by the Petitioner that **Article 99(2)(c)** has prospective effect and only affects persons who become citizens of Kenya after the effective date of the Constitution cannot be true. Had that been the intention of the drafters of the Constitution, then it is my view that nothing would have been easier than for them to say so. I need say no more.

15. However, this is not the end of the matter. Because of the submissions made by the Petitioner, that **Article 99(2)(c)** of the **Constitution** is in conflict with **Article 13(1)** of the **Constitution**, I have to address my mind to that issue. It is obvious that the Petitioner is aggrieved by **Article 99(2)(c)** because it has denied him rights to participate in the upcoming General Elections of March 2013 while he participated in the 2007 Elections. It is the right which had accrued to him in 2007 that he alleges cannot be taken away from him. For clarity purposes, the provisions relating to qualifications and disqualifications from election as an Member of Parliament were to be found in Section 34 of the

Repealed Constitution which read thus,

' Section 34 subject to subsection 35, a person shall be qualified to be elected as a member of the National Assembly if, and shall not be qualified unless at the date of his nomination for election-

(a) he is a citizen of Kenya who has attained the age of twenty-one years, and

(b)..."

16. Clearly, the difference between the Repealed and current Constitution in so far as qualifications for election to the National Assembly is concerned is that the repealed constitution provided for qualification to participate in an election as a candidate as long as one was a Kenyan citizen and had attained the age of twenty one (21) years at the date of the election. However, the current Constitution provides that one has to have been a citizen for at least ten (10) years immediately preceding the date of election. This is the Law and the difference in the meaning is obvious.

17. I now turn to examine the argument by the Petitioner that **Article 99(2)(c)** is in conflict with **Article 13(1)** of the **Constitution**. Sadly; I am not satisfied that the Petitioner can sustain this argument for obvious reasons to be seen shortly. However, I go there, it is imperative to read **Article 13(1)** which states thus;

“13 (1) Every person who was a citizen immediately before the effective date retains the same citizenship status as of that date.”

18. Again, this Article requires a literal interpretation as it is plain and simple. It deals with the status of citizenship and what happens to the citizenship acquired before the promulgation of the current Constitution. It is clearly worded that after promulgation of the Constitution any person who had Kenyan citizenship retained the same despite the coming into force of a new Constitution.

For the reasons stated elsewhere above, I do not find any conflict as between **Articles, 99(2)(c)** and **13(1)** of the **Constitution**. Accordingly, this argument by the Petitioner must fail as well.

19. Having answered the first question as framed for interpretation as above, I must now interpret the second question. Looking at it again, the Petitioner is seeking an answer as to whether **Article 99(2)(c)** limits the fundamental rights and freedoms of a Kenyan citizen who has been a citizen for less than ten (10) years preceding the date of the General Election and whether such limitation is justifiable and meets the test set by **Article 24** of the **Constitution**.

20. To answer this question, I will address my mind to the provisions of **Article 24** which provides;

24 “(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.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(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.

(4) The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance

(5) Despite clause (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service—

(a) Article 31—Privacy;

(b) Article 36—Freedom of association;

(c) Article 37—Assembly, demonstration, picketing and petition;

(d) Article 41—Labour relations;

(e) Article 43—Economic and social rights; and

(f) Article 49—Rights of arrested persons.”

21. On a causal reading of this Article, it is clear that a right of a fundamental freedom in the Bill of Rights shall not be limited except by law. The Constitution itself at **Article 99(2)(c)** limits the qualification of a person to be elected as a member of National Assembly to a person who has been a citizen for at least ten (10) years immediately preceding the date of the general election. The Petitioner then takes issue with this limitation for what he argues is against the spirit of the Constitution. He alleges that the spirit of the Constitution is derived from its preamble which states among other things that;

“Recognizing the aspirations of all Kenyans for a based on the essential values of human rights, equality, freedom, democracy, social justice and the Rule of Law.”

It is thus the Petitioner's position that **Article 99(2)(C)** of the Constitution violates this spirit of the Constitution by failing to recognise the aspirations of all citizens.

22. My position in regard to this argument is quite simple. A valid Constitutional provision cannot violate another valid provision of the same Constitution. This Court has no power to declare a Constitutional provision anchored in the Constitution as unconstitutional. I am not aware of any law or power which grants this Court such power. It would be absurd and chaotic to do so. Indeed the provisions of **Article 2(3)** of the Constitution are clear in this regard. This Article reads; Thus;

“The validity or legality of this Constitution is not subject to challenge by before any Court or other State organ”

23. That is the law as I understand it and therefore agree with the sentiments of Mohammed A.J in S V Acheson (1991) 2 SA 805 (NM) where he observed that;

“The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a 'mirror reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion”.

24. The Constitution is the legal and legitimate expression or reflection of our collective will and aspiration. Being the Supreme Law, it lays the frameworks and foundation for a democratic society. The people of Kenya have stated in the Constitution the manner in which their affairs have to be conducted and governed by the Legislature, the Executive and the Judiciary. The Constitution must thus be upheld at all times and the Courts must respect and comply with the provisions of the Constitution as it reflects the will of the people, the 'mirror' of the people.

I thus reiterate my earlier sentiments in the case of Charles Omunga vs IEBC & Anor, Petition No.2 of 2012 that;

“... the judiciary, like other organs of government, must remain alive to the fact that its authority is derived from the people, (the governed) and must interpret the Constitution in a manner that is reflective of that principle”

25. Lastly, as in addressing my mind as to whether the ten year limitation period under **Article 92 (2) (c)** is justifiable and reasonable, I will be guided by the reasoning of Khanna J in the case of State of Kesata & Anor v N. M. Thomas & Others 1976 AIR 490, 1976 SCR(17906 where he stated as follows;

“The principle of equality does not mean that every Law must have universal application for all persons who are not by nature, attainment or circumstances in the same position and the varying needs of different classes of persons require special treatment. The Legislature understands and appreciates the need of its own people, that its Laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds. The rule of classification is not a natural and logical corollary of the rule of equality, but the rule of differentiation is inherent in the concept of equality. Equality means parity of treatment under parity of conditions. Equality does not connote absolute equality. A classification in order to be constitutional must rest upon distinctions that are substantial and not merely illusory. The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category.”

I could not have put it better and these words are now applied to this case as if they were mine.

26. From the foregoing it is clear that the Petition before me lacks merit and must fail. However, I am grateful to the Counsels in this matter for their concise and well thought out arguments.

27. As to the issue of the costs, the Petitioner may well argue that he was involved a public interest litigation. However, I am in agreement with the 2nd Respondent that, the fact that the Petitioner sought a declaration that he be allowed to participate as a candidate in the upcoming March 2013 General Election is a clear indicator that he sought to interpret the said Article for self interest and to suit his wishes. I shall therefore order that he bears the costs in this Petition.

28. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 11TH DAY OF JANUARY, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court Clerk

Mr. Mambo for 2nd Respondent

Mr. Okonyo holding brief for Mr. Wena for 2nd Respondent

No appearance for other parties.

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE