



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 60 of 2012

ESPOSITO FRANCO ..... PETITIONER

AND

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ..... RESPONDENT

JUDGMENT

Introduction and background

1. The facts giving rise to the petition are not in dispute. The petitioner having been nominated by Narc-Kenya to contest the Magarini Constituency Parliamentary seat in Kilifi County presented his nomination papers to the returning officer on 1<sup>st</sup> February 2013. The returning officer rejected his nomination papers. Consequently, the petitioner avers that his political rights protected under **Article 38** have been infringed and consequently he seeks relief from this Court.

Petition No. 78 of 2012

2. The genesis of the petitioner's case can be traced back to a previous case he filed being; *Nairobi Petition No. 78 of 2012, Esposito France v Independent Electoral and Boundaries Commission*. In that case he sought intervention of the High Court in the interpretation of the following questions;

a. **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.**

b. **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.**

3. Upon the answers sought being given the petitioner sought 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.**

4. The matter was duly heard and dismissed by Honourable Justice Lenaola by a judgment delivered on 11<sup>th</sup> January 2013. In relation to the main issue being the interpretation of **Article 99(2)(c)**, he held that, “[14] *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....*”

5. The petitioner, being dissatisfied with the decision, lodged a notice of appeal and intends to prosecute his appeal in due course. The main issue for determination presented by the petitioner is whether he is entitled to vie as a candidate in the forthcoming election in light of the provisions of **Article 99(3)**. The petitioner legitimately expects that he is not disqualified until all possibility of appeal in the matter of the decision made in **Petition No. 78 of 2012** is exhausted.

**The arguments**

6. **Article 99** 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. [Emphasis ours]**

7. The petitioner's case is simply that since he has evinced his intention to lodge an appeal and the appeal is still pending, he is entitled to the benefit of **Article 99(3)** until the process of appeal is completed. According to his counsel, Ms Ogotu, the petitioner contends that his rights to contest the election will be violated if his nomination is rejected as he is entitled to contest the election while pursuing the appeal he has lodged.

8. Mr Muigai, who represented interested parties who are voters and supporters of the petitioner, supported the petition. He submitted that the petitioner had contested the election before and had a large following and therefore the voters' right to have a representative of their choice and that their rights will be violated if the petitioner is not allowed to participate in the forthcoming elections. Mr Muigai argued that the Constitution could not take away accrued rights and the petitioner having contested election before was entitled to do so. As regards **Article 99(3)**, counsel contended that it applies to an appeal from a decision disqualifying any person under the provisions of **Article 99(2)** and in so far as an appeal was pending, the petitioner was entitled to contest the elections.

9. The 2<sup>nd</sup> respondent, the IEBC, opposed the petition on the basis that the present matter had now been determined by the decision of the High Court in **Petition No. 78 of 2012** and is therefore *res-judicata*. In essence the petitioner is seeking the same relief which would entitle him to qualify as a candidate and therefore the case can only be an abuse of the court process. Counsel for the IEBC, Mr Kipkorir, contended that if the petitioner needed any relief he ought to have moved the appellate court as **Article 99(3)** does not supplant the appellate process.

### **Determination and disposition**

10. We think the only issue for determination is whether the petitioner is entitled to contest the election by virtue of **Article 99(3)** in light of the pending appeal from the judgment in **Petition No. 78 of 2012**.

11. We must point out that the decision in **Petition No. 78 of 2012** was declarative of the petitioner's qualification and an authoritative pronouncement of the legal position concerning **Article 99(2)(c)**. As the issue was determined in a case between the same parties, it cannot be re-litigated between the same parties to achieve the same end. As this matter is *res-judicata*, we decline to entertain any arguments on the merits of the case as the issues were dealt with in the previous case.

12. We now turn to the heart of the petitioner's case. We re-emphasise that **Article 99(3)** which provides, "**A person is not disqualified under clause (2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted.**" Although clause (3) of **Article 99** seems to refer to whole of clause (2), the disqualification must refer to a sentence or decision contemplated under **Article 99**.

13. Only **Article 99(2)(g)** and **(h)** refer to a process undertaken which leads to disqualification of a person hence reference to "**sentence**" and "**found**" in these provisions. The other provisions do not contemplate a process that leads to a decision or sentence that leads to disqualification from which a person is entitled to appeal. In our view therefore **Article 99(3)** only applies to **Article 99(2)(g)** and **(h)**.

14. An examination of the judgment in **Petition No. 78 of 2012** shows that the petitioner was not disqualified by virtue of the judgment but rather the decision was merely declarative of the law. His status

was clear and fell within **Article 99(2)(c)**. This finding is buttressed by the fact that the petitioner had already been informed by the Chairperson of the IEBC in a letter dated 21<sup>st</sup> February 2012 that, “[Y]ou will not be cleared to run for office of Member of Parliament, as you would not have satisfied the requirements of Article 99(2)(c) of the Constitution, requiring you to have been a Kenyan citizen for ten years to run for office, seeing as you were a naturalized as a Kenya citizen on August 4<sup>th</sup> 2003.”

15. We do not think that the provisions of **Article 99(3)** would apply to the other provisions of **Article 99(2)** apart from (g) and (h). To extend this argument would mean that a person disqualified under **Article 99(2)(a), (b), (d), (e) and (f)** would contrive a suit to challenge his status and by lodging an appeal the person becomes entitled to contest election notwithstanding that he or she would be unqualified thereby negating the whole purpose of **Article 99(2)**.

### **Disposition**

16. We find and hold that the provisions of **Article 99(3)** apply only to proceedings contemplated under **Article 99(2)(g) and (h)**. In the circumstances, the petition must fail and it is dismissed. We make no order as to costs.

**Dated and Delivered at Nairobi** this 7<sup>th</sup> February 2013

**D.S. MAJANJA**

**JUDGE**

**E. OGOLA**

**JUDGE**

**G. V. ODUNGA**

**JUDGE**