



REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI  
PETITION 198 of 2011

HON. JOHNSON MUTHAMA, M.P ..... 1<sup>ST</sup> PETITIONER

VERSUS

MINISTER FOR JUSTICE AND CONSTITUTIONAL AFFAIRS.....1<sup>ST</sup> RESPONDENT

THE HON ATTORNEY GENERAL .....2<sup>ND</sup> RESPONDENT

AS CONSOLIDATED WITH PETITION NO. 166 OF 2011 AND 172 OF 2011

JUDGMENT

Introduction

1. This Judgment is in respect of Petitions No 198 of 2011-Hon. Johnson N. Muthama MP-v- The Attorney General & Others; Petition No. 172 of 2011-Alexander Muthengi Muchee & Another –v-The Attorney General and Others; and Nandalwe Moses Wanjala & Another –v- The Minister for Justice & Constitutional Affairs-Petition No. 166 of 2011.

2. In their respective petitions, the petitioners impugn the provisions of the Elections Act, and in particular Sections 3(1), 22(1)(b), 22(2), 23(1)(b), 24(1)(b), 26(1) and 78 thereof, which they say are unconstitutional and violate their rights under various Articles of the Constitution but in particular Articles 10, 27, and 38.

3. In the Petition dated 5<sup>th</sup> of October 2011 which is supported by the affidavit of the Petitioner, Hon, Johnson Muthama, of the same date, the petitioner seeks the following orders:

(a) **A DECLARATION that the Elections Act, 2011 read as a whole but more particularly Sections 3(1), 22(1)(b), 22(2), 23(1)(b), 24(1)(b) and 26(1) are inconsistent and in conflict with constitution more particularly the preamble to the constitution, Articles 1,2,10,19,20,21,22,23,24,27,28,**

**38,55,57,81,82,83,93,94, 95 and 96 of the Constitution and thus null and void.**

(b) **A DECLARATION that the Elections Act, 2011 reads as a whole is inconsistent and in conflict with the constitution more particularly the preamble to the constitution, articles 1,2,10,19,20,21,22,23,24,27,28,38,55,57,81,82,83,93,94, 95 and 96 of the Constitution and thus null and void.**

(c) **A DECLARATION that the Elections Act, 2011 read as a whole but more particularly Sections 3(1), 22(1)(b), 22(2), 23(1)(b), 24(1)(b),25(1)(b) and 26(1) denies, contravenes, violates, infringes and threatens the petitioner’s constitutionally protected rights to equality and freedom from Discrimination, the Political Rights as enshrined under article 27 and 38 of the Constitution of**

the Republic of Kenya.

(d) **A DECLARATION that the Elections Act, 2011 reads as a whole but more particularly Sections 3(1), 22(1)(b), 22(2),23(1)(b), 24(1)(b) and 26(1) are inconsistent with Article 1,2,7,8,21 and 29 of the Universal Declarations of Human Rights, 1948, Articles 3(a),(b),(c) and 26 of the International Covenant on Civil and Political Rights, 1966, the African Charter on Human and People's Rights.**

(e) **A DECLARATION that the Elections Act, 2011 read as a whole but more particularly sections 3(1), 22(1)(b),22(2), 23(1)(b), 24(1)(b) and 26(1) offends, violate and derogate from international law, principles of international law and emerging constitutional international law.**

(f) **A DECLARATION that the Elections Act, 2011 read as a whole but more particularly Section 3(1), 22(1)(b), 22(2), 23(1)(b), 24(1)(b), 25(1)(b) and 26(1) are in breach of the doctrines of legitimate expectation, reasonableness, rationality, proportionality, and the principles of democracy.**

(g) **Any other further orders, declarations, writs and directions that this Honourable court shall deem fit in the circumstances to issue.**

Similar prayers are sought in Petition No. 166 and 172 of 2011.

4. The petitioner in Petition No. 198 of 2011, Hon. Johnson Muthama, is the current Member of Parliament for Kangundo Constituency. He states that he is desirous of vying for future political elective positions and describes himself as a pious family man and a successful business man who is respected in political circles and who believes that he has served his constituents with dedication and honour and exhibited exemplary leadership skills and qualities as a Member of Parliament.

5. Hon. Mutham states further that he is apprehensive that his ambitions to vie for elective office may be curtailed by certain provisions of the Elections Act, 2011. Some of his leadership positions and business directorships are enumerated in his affidavit.

6. The petitioner depones that he attended Kyamulendu Primary School between 1963 and 1970 but could not get the benefit of secondary school education because of lack of school fees. He has however, attended further educational training at the Gemological Institute of America and is a graduate Gemologist and Diamond Grading Programme.

7. He avers that the provisions of the Elections Act are discriminatory and promote inequity and inequality and is inconsistent with the constitution and he impugns in particular Sections **3(1), 22(1)(b), 22(2), 23(1)(b), 24(1)(b), 25(1)(b) and 26(1).**

8. In Petition No. 166 of 2011, **Nandalwe Moses Wanjala** and **Samuel Muigai Nganga** state that they are all aspiring to vie for various elective positions but their ambitions are curtailed by the provisions of the Elections Act. They, too, challenge the provisions of Sections 22(1) and 22(2) of the Elections Act.

9. The Interested Parties, who are all Councilors in various local authorities in Kenya, have filed an affidavit in support of the petition. The deponent, **Nteri Merikobo Kipaika**, states that he is a Councilor of Olkejuado County Council. The Interested Parties argue that their functions as councilors is to identify community needs and in carrying out their functions, they rely on experts as Councils have in-house lawyers, surveyors and architects among others. They argue that the election of councilors who understand the needs of the community is far more important than emphasizing educational qualifications.

10. **Alexander Muthengi Muchee and Daniel Kipchirchir Sang**, the petitioners in **Petition No. 172 of 2011**, at paragraph 8,9 15, and 16 in particular challenge the constitutionality of sections 22(1) (b), 26, and 78 of the Elections Act as being in violation of Articles 27 and 38 of the Constitution.

11. The Attorney General filed Grounds of Opposition while the Independent Electoral and Boundaries Commission (IEBC) filed a replying affidavit sworn by **Praxedes Tororey** on the 16<sup>th</sup> of November, 2011.

12. At the hearing of the matter on the 21<sup>st</sup> of May 2012, Dr. Khaminwa, Mr. Ondieki and Mr. Kabiru presented the case for the petitioners and Interested Parties while Mr. Kuria and Mr. Nyamodi presented the respondents' case. In this judgment, I shall, for the sake of convenience, refer to all the petitioners and the Interested Parties as 'the petitioners.'

### **The Petitioners' Case**

13. The petitioners' case as it emerges from the oral and written submissions is that Section 22 – 26 inclusive and 78 of the Elections Act should be struck out as being unconstitutional. The provisions of these articles violate the Constitution, the petitioners' fundamental rights and freedoms, and are in breach of international human rights law and legal principles.

14. Dr. Khaminwa submitted that the provisions of the Elections Act violate the sovereign will of the people contained in **Article 1** as they tend to limit the people's exercise of such power through democratically elected representatives. The provisions grossly curtail the people's right to choose their leaders by imposing unreasonable restrictions by limiting the number of people who can vie for leadership positions to those who have post secondary qualifications, ethical and moral attributes. They argue that the right to choose the educational and leadership attributes of a leader are purely the preserve of the electorate.

15. The provisions also violate the provisions of **Article 10** on the national values and principles of governance; that by providing that only persons with post secondary qualifications can vie for elective office, the Elections Act also violates the non-discrimination provisions contained in Article 27 of the Constitution, as well as the right to political participation contained in Article 38 of the Constitution.

16. The petitioners contend that statistical information available from the Kenya Bureau of Statistics shows that very few people are able to attain post primary school education. It would therefore be unreasonable to limit the right of the majority of Kenyans without educational qualifications to vie for elective posts. This would amount to denying the majority their right and reserving elective posts to a select few, which would be discriminatory.

17. In his submissions, Mr. Ondieki argued that while Parliament had power under the Constitution to set out educational qualifications for those aspiring to political office, Section 22(1) (b) with its requirement of post-secondary education leaves the discretion to returning officers in deciding who qualified to vie for political office; that the requirement of post secondary education was contrary to the provisions of Article 27(2) and (4) as read with Article 10; that Kenya was developing in a gradual manner and to come up with a common criteria would be unfair as some communities in Kenya who had limited access to education would be prejudiced, and that the sections would violate the provisions of Article 38 which guarantees the right to political participation without unreasonable restraint.

18. Mr. Ondieki The petitioners referred the court to the constitutions of the US, Canada, and Japan and submitted that there were no educational qualifications for election to political office required and representation of the people must be left to the people.

19. The petitioners were also aggrieved by Section 23 and 24 (2) (c) of the Act which Mr. Ondieki submitted were unconstitutional, particularly the requirement that one needed to have been a citizen for a period of at least 10 years in order to qualify for nomination. Mr. Ondieki submitted that this restriction of 10 years was unreasonable. They also contended that Section 26 was unconstitutional for disqualifying those who participated in *harambees* for a period of 5 months.

20. Finally, Mr. Ondieki submitted that Section 78(2)(a) was unconstitutional for requiring the deposit of sums of money in court in order to file a petition and argued that this violates the right of access to

justice as the amounts required to be deposited are not reasonable.

21. Mr. Kabiru for the Interested Parties supported the petition and associated himself with the submissions of Dr. Khaminwa.

### **The Respondents' Case**

22. The position taken by the respondents is that all the provisions of the Elections Act impugned by the petitioners derive their legitimacy and validity from **Articles 99(1)(b), 180(2), 193(1)(b), 193(2)(g)** and **Chapter 6 of the Constitution** and the Court has no jurisdiction to interfere with the constitutional discretion conferred on the legislature to enact legislation and stipulate the educational threshold to be met by persons seeking to be elected to various offices under the Constitution. Parliament had exercised the discretion diligently, legally and reasonably and there was no basis to interfere.

23. According to the respondents, Article 99(1)(b) sets out the qualification for election. The threshold for qualification is to be found in the Constitution, and the test for the court in determining this matter is whether Parliament had exercised the power conferred on it by the Constitution to enact legislation under Article 99 reasonably in enacting the impugned provisions of the Elections Act.

24. Mr. Kuria submitted that the term 'post secondary education' is any qualification after fourth form, for instance a computer course; that Article 99 of the Constitution had given Parliament power to enact legislation that is discriminatory in effect; that Article 38 provides for political participation, a right that was also provided for in international covenants, but that the right to vote and the right to participate in elections are two distinct rights, and Section 22 is consistent with and in harmony with Article 21 of the Universal Declaration of Human Rights, UDHR, Article 13 of the African Charter on Human and People's Rights; that political rights are not absolute under Article 25 so they can be limited by legislation. He relied on the case of *Debreczny -v- Netherlands comm. 500/92 (1995)* in which the determination of **Article 25 of the International Covenant on Civil and Political Rights (ICCPR)** was to the effect that limitation of the rights under Article 38 are permissible so long as they are not discriminatory or unreasonable.

25. With regard to Section 26, Mr. Kuria submitted that it was predicated on Chapter 6 of the Constitution and bans fundraising 5 months prior to election. It is in similar terms to Section 13 of the Public Officers' Ethics Act and the intention is to bar public officers from receiving gifts and nothing in its provisions goes outside Chapter 6 of the Constitution.

26. With regard to the education levels required by the Act, Mr. Kuria conceded that there are disparities in education but submitted that the measures set out in Article 27(8) were progressive rights that will be realized over time.

27. Mr. Nyamodi for the IEBC submitted that the ultimate will of the people of Kenya is found in the Constitution. At Article 99(2)(b), the people of Kenya had envisaged, in passing the Constitution, that a person would not be eligible to run for certain offices if they did not meet the criteria set by Parliament. While the Constitution does not set an educational criteria, it imposes a duty on Parliament to enact legislation setting the criteria, and this is what is done in the Elections Act.

28. Mr. Nyamodi submitted further that the provisions of Section 22 of the Act were enacted by Parliament pursuant to the provisions of Article 99(1)(b) of the Constitution. This Article envisages a situation where Parliament prescribes an educational threshold for those who seek to be elected as Members of Parliament; that the issue of disparity in education was dealt with by lowering the provision in section 22 from a degree to a post secondary qualification which is attainable by all in Kenya. What the Court is required to determine is whether that requirement is reasonable.

29. On the petitioners' argument that the country was developing gradually and that therefore the provisions of Article 99(1)(b) are to be applied gradually, Mr. Nyamodi's response was that this has not been provided for in the Constitution; the golden thread passing throughout the Constitution is to achieve

reform, and the requirement for educational qualifications is consistent with the golden thread in order to achieve constitutional reform.

30. Mr. Nyamodi agreed with Mr. Kuria that Section 26 of the Elections Act was a mirror image of section 13 of the Public Officers' Ethics Act; that sitting members of Parliament are bound by section 13 and section 26 of the Elections Act simply extends the regulatory regime to aspirants so that no one gets an unfair advantage in the run-up to election so that there can be free and fair elections.

31. On the petitioners' complaints with regard to section 78, Mr. Nyamodi took the view that the alleged impecunious petitioners had, in petitions filed in the last five years, been awarded huge amounts by the court which had been paid out of public funds; that it is open to any party in civil proceedings to apply for security for costs; that Section 78 is consistent with the emerging jurisprudence and its requirements do not constitute hindrance to justice for those aggrieved by the conduct of elections in this country.

### **Determination**

32. In bringing this matter for determination, the petitioners have demonstrated the concern of citizens in ensuring that the rights enshrined in the Constitution translate into reality, and that the organs of state entrusted with the duty of implementing the requirements of the Constitution do so in a manner that is faithful to the letter and the spirit of the Constitution.

33. This matter is concerned with the exercise of sovereign power by the citizen and with the protection of the citizens' democratic right to participation in their governance. Whilst the power of passing legislation is vested by the people in the legislature, such power must be exercised in a way that is consonant with the Constitution.

34. The Constitution did not arise in a vacuum. It is the expression of the wishes and aspirations of the people of Kenya with regard to their governance. In enacting any legislation required under the Constitution therefore, Parliament is deemed to have been conscious of the milieu in which the legislation was to operate, and make due consideration of the social circumstances and the context within which it will be applied. Before embarking on an analysis of the issues raised in this matter, therefore, I will first consider the socio-economic context in which the Elections Act was enacted and within which it is to operate.

### **Context**

35. The Elections Act, Act No 24 of 2011, received Presidential Assent on 27<sup>th</sup> August 2011 and came into force on the 2<sup>nd</sup> of December 2011. It was enacted pursuant to the requirements of Article 99 of the Constitution of Kenya which provides as follows:

**(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.'**

36. A similar provision is contained in Article 193 of the Constitution with regard to members of County Assemblies. The Constitution thus mandates Parliament to enact legislation requiring that those who seek elective office should have certain educational, moral, and ethical qualifications.

37. In mandating Parliament to prescribe certain educational, moral and ethical qualifications and making them a prerequisite for election to office, the people of Kenya must have had good and cogent reasons for these requirements, such reasons doubtless informed by the social and historical context in

which they enacted the Constitution.

38. In the **Final Report of the Committee of Experts on Constitutional Review** dated 11<sup>th</sup> October 2010, at paragraph 7.5.2, the Committee noted that the people of Kenya had expressed the desire for there to be a statement on the educational qualifications of Members of Parliament. The Committee had included the statement but had not fixed the qualifications. Its position was that **‘..an Act of Parliament should set the qualifications for senators and Members of Parliament as these could change over time.’**

39. Thus, the people of Kenya were clear that they needed to have people with some level of education. What this level of education would be was left to Parliament, and as expressed by the Committee of Experts, such educational qualifications would change over time. It was left to Parliament, to whom the people of Kenya had vested power to make legislation, to set the educational level required for elective office.

40. No direct guidance was given on how such educational qualifications would be arrived at. In my view, however, in setting the educational qualifications for those aspiring to be people’s representatives, Parliament needed to bear in mind the socio-economic circumstances prevailing in Kenya and the extent to which opportunities for education were available for the majority of citizens.

41. What is the socio-economic context in which the majority of Kenyans live? The explosion in primary school enrolment at the introduction of free primary education in Kenya, which is common knowledge, is perhaps a pointer to the difficulties encountered by many in society in accessing education. Socio-economic indicators show that more than 46% of the population lives in extreme poverty, with rural populations being worse off than urban populations. According to a report titled **‘The State of Kenya Population 2011 Kenya’s 41 Million People: Challenges and Possibilities’** prepared by the **National Coordinating Agency for Population and Development, (NCAPD)**, nearly 18 million out of Kenya’s population of 40 million are living in poverty. The report notes that **‘Poor people are poor because of inadequate access to schools, health services, roads, market opportunities, ...and so on. These are in turn typically associated with inadequacies of voice or influence both in the shaping of policies and in its effective implementation.’**

42. In enacting the new Constitution and in including in it the provisions of Articles 1, 10, 27, 38 among others, I believe that the people of Kenya were trying to create a future in which all would have an equal opportunity and an equal voice, regardless of status. They did give the legislature the power to determine educational criteria for one to qualify for elective office, but such criteria needs to be such as takes into account the specific social context in which it will be applicable.

## **The Law**

43. The respondents have argued that the limitation of rights, including the rights under Article 38, is permissible, provided that the limitation is not discriminatory and is reasonable. At Article 24 of the Constitution, it is provided that

**(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)....**

44. Thus, the Constitution itself does allow for legislation to limit the enjoyment of certain rights, provided that the limitations meet certain set criteria. Judicial precedents indicate that it is also recognized that differentiation in the application of legislation is permissible, provided that certain criteria are again met. An analysis of decisions from various jurisdiction, including Kenya, gives some idea of the extent to which classification and differentiation is permissible, and the test to be applied in determining whether particular provisions offend the anti-discrimination provisions in the Constitution.

45. In the case of **Jacques Charl Hoffmann –v-South African Airways, CCT 17 of 2000**, the Constitutional Court of South Africa stated as follows:

**“This court has previously dealt with challenges to statutory provisions and government conduct alleged to infringe the right to equality. Its approach to such matters involves three basic enquiries: first, whether the provision under attack makes a differentiation that bears a rational connection to a legitimate government purpose. If the differentiation bears no such rational connection, there is a violation of Section 9(1). If it bears such a rational connection, the second enquiry arises. That enquiry is whether the differentiation amounts to unfair discrimination. If the differentiation does not amount to unfair discrimination, the enquiry ends there and there is no violation of Section 9(3). If the discrimination is found to be unfair, this will trigger the third enquiry, namely, whether it can be justified under the limitations provision. Whether the third stage, however, arises will further be dependent on whether the measure complained of is contained in a law of general application.”**

46. In the case of **Malaysian Bar & Another –v- Government of Malaysia 1988 (LRC) 428**, in determining whether a law that barred lawyers of less than seven years’ standing from sitting on the Bar Council and Bar Committees was discriminatory and in violation of Article 8(1) of the Constitution of Malaysia which guaranteed equality before the law and the equal protection of the law, the Supreme Court held that

**‘The test applicable under Article 8(1) was whether the law was discriminatory; if it was, the law was still good if it was founded on intelligible differentia having a rational relation to the object sought to be achieved by the law.’**

47. The court went on to set the standard for validity under Article 8 of the Constitution as follows:

*(a) The first question to be asked is, is the law discriminatory, and that the answer should then be – if the law is not discriminatory, it is good law, but if it is discriminatory, then because the prohibition of unequal treatment is not absolute but is either expressly allowed by the constitution or is allowed by judicial interpretation, we have to ask the further question, is it allowed? If it is, the law is good, and if it is not the law is void.*

*(b) Discriminatory law is good law if is based on “reasonable” or “permissible” classification, provided that:-*

*(i) The classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and*

*(ii) The differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.’*

*(c)....*

48. In the case of **Community Awareness and Advocacy Trust & Others-v-The Attorney General Petition No. 243 of 2011**, Justice Majanja observed as follows:

‘I am persuaded to adopt the interpretation given to a similar provision contained in **section 8(1)** of the provisions of the South Africa Interim Constitution in the case of *Prinsloo van der Linde* 1997 (3) SA 1012 (CC) para 25 where the Constitutional Court of South Africa stated, *“The purpose of this aspect of equality is to ensure that the state is bound to function in a rational manner ..... Accordingly, before it can be said that mere differentiation infringes section 8 ..... it must be established that there is no rational relationship between the differentiation in question and government purpose preferred to violate it. In the absence of such rational relationship, the differentiation would infringe section 8.”*

49. From the provisions of our Constitutions and culling from the decisions set out above, I would consider the constitutionality of Sections **3(1), 22(1)(b), 22(2), 23(1)(b), 24(1)(b), 24(2)(c) 26(1)** and **78** of the Elections Act on the basis of the following criteria:

**i) Do the impugned provisions make a differentiation that bears a rational connection to a legitimate purpose?**

**ii) Do the differentiation amount to unfair discrimination?**

**iii) Can they be justified under the limitations provision?**

#### **Section 3(1)**

50. This section provides as follows:

***‘An adult citizen shall exercise the right to vote specified in Article 38 (3) of the Constitution in accordance with this Act.’***

51. This provision, being what I would refer to as an introductory provision is not, in and of itself, discriminatory. It makes provision with regard to the exercise of political power as envisaged in Article 38 of the Constitution.

#### **Section 22(1) (b)**

52. At Section 22, the Elections Act provides as follows:

(1) A person may be nominated as a candidate for an election under this Act only if that person—

(a) is qualified to be elected to that office under the Constitution and this Act; and

(b) holds a post secondary school qualification recognised in Kenya.

53. Applying the test set out above, this provision of the Elections Act is, in my view, discriminatory and offends the provisions of Article 27 of the Constitution which provides that:

**27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.**

**(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.**

**(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.**

**(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.**

**(5) A person shall not discriminate directly or indirectly against another person on any of the**

grounds specified or contemplated in clause (4).

**(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.**

(7).....

**(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.**

54. By excluding everyone who does not have a ‘**post secondary qualification,**’ a term which is not defined in the Act, from running for any elective office established under the Constitution, the Act discriminates directly on the basis of status and social origin, for almost invariably, and as noted from the analysis of the socio-economic context above, it is the poor in society, those 18 million Kenyans living in poverty, who will not get an opportunity to acquire an education, let alone a post secondary education.

55. It also indirectly discriminates on the basis of gender. As statistics on education indicate, for instance in the **NCAPD Report** 2011 (supra), while there is an increase in the enrolment of girls in primary school, the drop-out rate is high, and the transition to secondary school and beyond low. When to this is added the fact that in many communities in Kenya women do not get an education at all due to cultural gender biases, the gender implications of the law are obvious.

56. The provision also violates the Constitution and international law by limiting the exercise of the rights set out under Article 38 (2)(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.**’ At paragraph 15 of **General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) : . 07/12/1996.CCPR/C/21/Rev.1/Add.7, General Comment No. 25. (General Comments)** which is a comment on Article 25 of the International Covenant on Civil and Political Rights, it is observed as follows:

***‘The effective implementation of the right and the opportunity to stand for elective office ensures that persons entitled to vote have a free choice of candidates. Any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective and reasonable criteria. Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation.***

57. The next issue to consider is whether the provision makes a differentiation that bears a rational connection to a legitimate purpose, and whether it can be justified under the limitations provision of the Constitution. My view with regard to Section 22(1) (b) is that it fails on both accounts. Looked at from the functions that members of the legislature perform in representing their constituency, and the harm and concern that the citizenry has had with regard to poor governance, the differentia does not meet the test set out above. Further, it is common knowledge that the problem that bedevils elections in Kenya and which elections law needed to address as the bane of the citizenry has been, not uneducated elected leaders, but corrupt and unethical leaders.

58. By requiring post secondary educational qualifications and omitting to make more explicit provisions with regard to moral and ethical qualifications required under the Constitution, the legislature missed what has for long been the real case of the problem in Kenya’s governance. I agree with the petitioners that the harm that the legislature seeks to address in enacting legislation as required under the Constitution is lack of leaders with integrity. That is why the Constitution requires the legislature to enact legislation that sets moral, ethical and educational qualifications. A requirement for a post secondary qualification does not address the real concern of the citizenry; indeed it violates the provisions of the Constitution by excluding many who may not, through no fault of their own, have been able to achieve post secondary education.

59. The provisions of Section 22(1)(b) also fail the test of constitutionality as they do not accord with the national values and principles, and usurp the sovereign powers of the people of Kenya. They cannot also meet the provisions of Article 24 as being ***‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.’***

### **Section 22(2)**

60. The petitioners have also impugned the provisions of Section 22(2) of the Elections Act with regard to the nomination for election as President, Deputy President, Governor and Assistant Governor. The section provides as follows:

“(2) Notwithstanding subsection (1)(b), a person may be nominated as a candidate for election as President, Deputy President, county Governor or deputy county Governor only if the person is a holder of a degree from a university recognised in Kenya.’

61. In considering the above provision in light of the test set out above and the constitutionally permitted limitations, I take the view that the educational requirements for the positions are reasonable and justifiable. The number of positions required is reasonably small, the nature of the duties and functions to be performed by those holding the positions is such as would require higher educational qualifications and skills and wider exposure which higher education allows a person to acquire. I therefore find and hold that the provisions of Article 22(2) are not in violation of the petitioners’ rights or inconsistent with the Constitution.

### **Section 24(1)(b)**

62. Section 24(1)(b) provides that

**“Unless disqualified under subsection (2), a person qualifies for nomination as a member of parliament if the person .... satisfies any educational, moral and ethical requirements prescribed by the Constitution and this Act.”**

63. Like Section 22(1)(b), Section 24(1)(b) of the Elections Act is also discriminatory and unconstitutional in so far as those nominated would be required to have the post secondary education prescribed under Section 22(1)(b). In my view, the provisions for nomination are intended to allow persons representing special interests to participate in the national and county legislatures. Such persons may include women and persons with disabilities who may not have had an opportunity to acquire post secondary education.

64. I am however unable to agree with the criticism levelled against Section 24(2)(c). The section provides as follows:

**2) A person is disqualified from being elected a member of Parliament if the person—**

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

65. A provision that makes certain limitations with regard to exercise of political rights by those who acquire citizenship is, in my view, reasonable and in accord with the Constitution. Limiting eligibility for election as Members of Parliament to those who have been citizens for at least ten years can properly be said to bear a rational connection to a legitimate purpose.

### **Section 26**

66. The petitioners challenge this section which provides that

“(1) A person who directly or indirectly participates in any manner in any or public fundraising or harambee within eight months preceding a general election or during an election period, in any other

case, shall be disqualified from contesting in the election held during that election year or election period.”

67. My analysis of this provision against the provisions of the Constitution and the test set out above does not indicate any violation. As the respondents correctly point out, the bar on the conduct of harambees has been in our statute books for years, and its intentions are in line with the attempt to bring in ethics in the conduct of elections.

### **Section 78**

68. The provisions of Section 78 of the Elections Act are impugned on the basis that they violate the right of access to justice as the amounts required to be deposited are not reasonable. The section requires the deposit of Kshs 1 million, five hundred thousand and one hundred thousand to challenge the election of a President, Member of Parliament and a Member of a County Assembly respectively. Failure to deposit the amount may lead to the petition being struck out.

69. Provision for payment of costs by a party coming before the court does not, in my view, violate any provision of the Constitution. It is a common practice in civil proceedings intended to safeguard the interests of the party against whom a claim is brought and to prevent abuse of the court process. Given the nature of elections, it serves a useful and rational purpose of ensuring that only those who have a serious interest in challenging the outcome of an election do so.

70. For the above reasons, I find and hold that Sections 22(1)(b) and Section 24(1)(b) of the Elections Act 2011 which bar persons not holding a post secondary school qualification from being nominated as candidates for elective office or for nomination to Parliament to be unconstitutional and in violation of the petitioners’ rights under the Constitution.

71. Given the public interest nature of this matter, I make no order as to costs. I am grateful to the parties for their well researched submissions in the matter.

**Dated, Delivered and Signed at Nairobi this 29<sup>th</sup> day of June 2012**

**MUMBI NGUGI**

**JUDGE**