



REPUBLIC OF KENYA  
 IN THE HIGH COURT OF KENYA AT NAIROBI  
 CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION 2 OF 2012

CHARLES OMANGA.....1<sup>ST</sup> PETITIONER

PATRICK NJUGUNA.....2<sup>ND</sup> PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT

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

UNION OF KENYA CIVIL SERVANTS.....INTERESTED PARTY

**J U D G M E N T**

**1. Introduction**

The Petition dated 6<sup>th</sup> January 2012 seeks this Court’s intervention in the determination of the following questions;

***“(1) Whether the provisions of Section 43(5) of the Election Act, 2011 requiring the resignation of State officers seven (7) months prior to the elections while at the same time excluding other categories of State of public officers is discriminatory, accords an unfair advantage to some, breaches the requirement for fairness, equality and proportionality and therefore unconstitutional***

***(2) Whether the requirement under Section 43(5) of the Constitution impacts or affects the exercise of the right of the Kenyan citizens to a free and fair elections where the electorate including the Petitioner can fully and without let or hindrance exercise the political rights under Article 38 of the Constitution.***

***(3) Whether the 1<sup>st</sup> Respondent herein; the Independent Electoral and Boundaries Commission can properly exercise its mandate as an impartial arbiter or referee of the elections as envisaged under Articles 81 and 88(4) of the Constitution under the circumstances in which some of the prospective candidates deemed to be in public service are required to resign seven (7) months prior to the elections.”***

2. Upon the answers sought being given, the following final Orders are sought;

***“(a) A declaration that the provisions of Section 43(5) of the Election Act, 2011 requiring the resignation of State officers seven (7) months prior to the elections while at the same time excluding other categories of State or public officers is discriminatory, accords an unfair advantage to some, breaches the requirement for fairness, equality and proportionality and therefore unconstitutional.***

***(b) A declaration that the requirement under Section 43(5) of the Election Act, 2011 impacts or affects the exercise of the right of the Kenyan citizens to a free and fair elections where the electorate including the Petitioners’ can fully and without let or hindrance exercise the political rights under Article 38 of the Constitution.***

***(c) A declaration that the 1<sup>st</sup> Respondent herein; the Independent Electoral and Boundaries Commission cannot properly exercise its mandate as an impartial arbiter or referee of the elections as envisaged under Articles 81 and 88(4) of the Constitution under the circumstances in which some of the prospective candidates deemed to be in public service are required to resign seven (7) months prior to the elections.***

***(d) An Order of Injunction permanently suspending the operations or implementation of Section 43(5) of the Elections Act, 2011 and restraining the 1<sup>st</sup> Respondent from enforcing the requirement for State officers/public officers to resign seven (7) months prior to elections if they intend to take up or participate in parliamentary or other elections under the current Constitution.”***

### **3. Case for the Petitioners**

The Petitioners have styled themselves “*individual ordinary Kenyans*” and members of an entity known as the “*Kenya Youth Parliament*” whose business is “*in educating and empowering Youth and Kenyan citizens on issues concerning the Constitution and Constitutional implementation*”, *inter-alia*.

4. They further state in their Petition that **Section 43(5)** of the **Elections Act, 2011**, requires that a public officer who intends to contest an election under the Attorney General shall resign at public office at least *seven (7) months* before the election date and to their minds, “*this would affect the exercise of their rights under Article 38 of the Constitution to vote in a free and fair, even playing field [and] to vote for a candidate or candidates of their choice and be voted for if they wish to vie for positions (sic)*”.

5. It is also their case that when **Article 43(6)** excludes certain State and public officers from the provisions of **Article 43(5)** aforesaid, then the latter is rendered punitive and discriminatory. The same is also said to be unreasonable and disproportional to the mischief the Law was intended to address.

6. The Petitioners have also invoked **Articles 2(1), 3, 25 and 26** of the International Covenant for Civil and Political Rights as read with **Article 2(5) and (6)** of the **Constitution** to argue that **Section 43(5)** amounts to a violation of all the rights enshrined in the covenant including non-discrimination, equality before the Law and freedom from unreasonable restrictions.

### **7. Case for the 1<sup>st</sup> Respondent**

The Independent Electoral and Boundaries Commission (IEBC) while agreeing that all persons are entitled to the fair enjoyment of the principles of fairness, equity and equality enshrined in **Article 81** of the **Constitution**, nonetheless opposes the Petition on the following grounds;

8. That **Article 27** grants certain rights and freedoms but those rights are not absolute and can be limited and qualified in circumstances set out under **Article 24(1)** of the **Constitution**. That **Section 43(5)** falls under the **Limitation Clause** and does not in any way derogate from the core and essential contents of the principles of governance as set out in **Article 10(2)** of the **Constitution** particularly human dignity, equality, social justice, inclusiveness, human dignity and non-discrimination.

That the Petition should therefore be dismissed.

## **9. Case for the 2<sup>nd</sup> Respondent**

The Attorney General takes the same position as IEBC but adds that the provisions of **Section 43(5)** are reasonable and are intended to ensure that public officers are non-partisan and render service to the public without political bias. In any event, that the right to participate freely in the political processes is not impeded once a public officer voluntarily resigns to contest an elective office.

## **10. Case for the Interested party**

The Union of Kenya Civil Servants was enjoined as an Interested Party and its case is that **Section 43(5)** aforesaid is unconstitutional and also completely unnecessary and superfluous. This is so, it is argued, because **Sections 43(1), (a), (b), (c) and (d), (2), (3) and (4)** were enacted to “gag” public officers and create severe penalties for those who breach the **Act** and so the restriction in **Section 43(6)** is rendered completely inoperative.

11. The Union largely agrees with the case for the Petitioner and prays that the Orders sought be granted.

## **12. Issues for Determination**

Firstly, the Petitioners should be lauded for being vigilant and ensuring that whenever an opportunity arises, they should place before this Court important constitutional questions for interpretation. Our nascent Constitution requires warriors of constitutionalism and crusaders for its implementation.

Secondly, I need to reiterate that whenever a statute or part of it is brought before the High Court for interpretation under **Article 165(3)** of the **Constitution**, it should not be seen as if there is a contest between the Legislature and the Judiciary. Each is obligated by the Constitution, the giver of their twin authorities, to conduct its affairs within set parameters and with respect for each other and their respective constitutional territories. That also goes for Executive actions that often attract Judicial Sanction. I say so because in Submissions, the advocate for the Respondent argued that “*Courts should not impede the explicit Constitutional Legislative authority of the Kenya National Assembly*” ... and that “*the National Assembly is best placed to debate issues of national interest and to decide whether to amend the Law in issue or not.*” This was made in reference to the time frame envisaged by **Section 45(3)**.

13. While in principle agreeing with the above Submission, the doctrine of separation of powers and checks and balances which runs throughout our Constitution deliberately obligates the High Court to determine “*any question whether any Law is inconsistent with or in contravention of the Constitution*”. The Legislature and the Executive have no such mandate in spite of feeble attempts from certain quarters to do so. The doctrine of deference can only be invoked so long as it does not include the ceding of Constitutional mandate on the part of the Judiciary. In exercising its mandate, 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.

14. I therefore agree therefore with the Statement of Mohamed, A.J. in S vs. Acheson 1991 2 (SA) 805 (NM) when he submitted 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.”***

I agree and I shall be guided by that sound and important finding.

15. Thirdly, I have elsewhere above set out the issues that the Petitioners seek this Court's interpretation. Looking at them again; they can be condensed into one wholesome issue; whether **Section 43(5)** of the **Elections Act** is inconsistent with **Article 27** of the **Constitution**. For avoidance of doubt, **Section 43(5)** and **(6)** of the **Elections Act** provide as follows;

*“Participation in elections by public officers;*

- (1) ...
- (2) ...
- (3) ...
- (4) ...

*(5) A public officer who intends to contest an election under this Act shall resign from public office at least seven months before the date of election.*

*(6) This section shall not apply to-*

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

16. The provisions above are clear and require no more than a literal interpretation. **Article 27** of the **Constitution** then provides as follows;

*“(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) Any measure taken under Clause (6) shall adequately provide for any benefits to be on the basis of genuine need.*

*(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.”*

17. Because of Submissions made by the Respondents, it is important to read **Article 27** alongside **Article 25** of the **Constitution**, which provides as follows;

**“Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—**

- (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;**
- (b) freedom from slavery or servitude;**
- (c) the right to a fair trial; and**
- (d) the right to an order of habeas corpus.”**

18. Again, the plain and simple meaning that can be attributed to **Article 25** is that the rights to “equality and freedom from discrimination” are not some of the rights that cannot be limited, but that is not the end of the matter because **Article 24** provides as follows;

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

- (a) the nature of the right or fundamental freedom;**
- (b) the importance of the purpose of the limitation;**
- (c) the nature and extent of the limitation;**
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and**
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.**

**(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.”*

19. This is where I must start from because, there is no doubt that *prima facie* and on a casual reading, **Section 43(5) and (6)** would seem to create inequality between public officers (*including State officers*) who may wish to contest an election. The category listed in **Sub-section (6)** are exempt from the **seven-month Rule** and that is the gravamen of the Petitioner’s complaint.

20. In answering that issue, I wholly agree with the decision of the Supreme Court of India in Hambardda Wakhana vs. Union of India Air [1960] AIR 554 where the learned Judges stated as follows;

***“In examining the constitutionality of a statute it must be assumed the Legislature understands and appreciates the needs of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a Legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is therefore, in favour of the constitutionality of an enactment.”***

21. The above holding is in line with my earlier holding regarding respect for institutional and organic mandate without ceding the same to another organ of government. In addition, it is also a Rule of Interpretation as I understand it, that the “*context*” of a Statutory Provision must be explored to get its real meaning – see S vs. Makwangane & Others CCT/3/94 (Constitutional Court of South Africa). That context includes the purpose and scope of a Statute and within certain limits, its background (e.g. parliamentary material like the Hansard).

22. The context also includes what is contained in **Article 24** and in that regard, **the next question to answer is whether the apparent limitation of the right to equal treatment as set out in Section 43(5) and (6) is reasonable and justifiable?** That test was well set out in the case of State of Kerala & Anor vs. N. M. Thomas & Others 1976 AIR 490, 1976 SCR(1) 906 where Khanna, J. 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.”***

23. I wholly agree and it is upon the State or a person seeking to justify the limitation to show that such a limitation is reasonable and justifiable (**Article 24(3)**). The burden therefore shifts to the Respondents in a reverse application of the maxim that “*he who asserts must prove*” – see NTN Pty Ltd. and NBN Ltd. vs State [1988] LRC (Constitution) 333. **Have the Respondents satisfied that test?**

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

25. I have considered the rival arguments and it does not take much persuasion for me to agree with the Respondents. I say so, with respect to the Petitioners and the Interested Parties, because the purpose of the two Sections are obvious to me. For the Government at the national and devolved levels to function

during an election period, certain functions cannot be suspended including those of the President and County Governor, otherwise there would be chaos. **How would the government function without the Head of State and other such Officers?** The same Constitution in any event also differentiates between elected officials and other public officials because the former have specific time frames within which they must serve – invariably for five years.

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

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

27. In the Kenyan arena now and for a long time to come, whether one runs for elective office as an independent candidate or a nominee of a political party, election campaigns are a must. This includes movements around the elective area to popularize oneself with the electorate. It cannot be the intent of the Law that such a candidate should also be pursuing his public service duties and obligations during the campaign period.

28. I should now turn to one other issue which no other party, save the Respondent touched on; whether the period of seven months’ period in **Section 43(5)** is reasonable. From what I have said above, I am certain that taking into account the requirements of the Constitution and the Elections Act as well as related legislation like the **Political Parties Act, 2011**, I am convinced that the period is sufficient for a candidate to prepare himself for an election and in any event, it is only a cut-off point and one may voluntarily choose to resign earlier as is the case in all employment situations.

29. I have deliberately refused to address the issue whether the Petitioners will be prejudiced if the Law remains in our books and also whether any public servant will also be prejudiced. I have taken that decision because my answer to the one question I framed for determination also answers that issue.

30. Having said above, I shall conclude by quoting the decision of Kapi, D.C.J. in the Papua New Guinea Case of NTN Pty Ltd (Supra) where the Learned Judge in addressing the same issues as I have done above, stated as follows;

***“What is reasonably justifiable in a democratic society is not a concrete or precise concept. It entails different policy and executive considerations. Traditionally, Courts are kept out of this field. This is a new field of intrusion by the Constitution. The Court is to be careful in saying what it is. I do not think it is a concept which can be precisely defined by the Courts. There is no legal yardstick. What has been decided by Courts can only be a guide as to the nature of this illusive principle. However, the fundamental thread which runs through all this is that it must have regard for a “proper respect for the rights and dignity of mankind”. It is this context that I adopt what I said in Supreme Court Reference of 1982, In Re Organic Law On National Elections[1982] PNGLR 214. I have one correction to make. After I discussed the proper principles, I stated that proper test was a subjective one. The test really is an objective one. What I should have said was the Application of the proper test must be considered within the context of the subject matter on circumstances of each case.”***

31. I have applied the reasonability test to the circumstances of this case and I am fully satisfied that the Respondents have met the test and the Petitioners’ complaints to the contrary cannot be sustained.

32. **Conclusion**

I am cognizant that this matter is of considerable interest to public officers who may wish to run for elective positions. Let this judgment sound as a preparatory gong to them; they cannot have one leg in public service and another at their elective area. The Law was designed to aid them make up their minds on where they want to maximize their energies. Seven months before the election date is sufficient time for them to prepare themselves to meet their fate at the election box. A longer period would be unreasonable and a shorter period would be more unreasonable.

33. As for the Petition before me, the same was well presented and argued; the responses were concise and well thought out but to my mind, the petition does not meet the test I have elsewhere set out above and must fail.

34. As to costs, the Petitioners may well argue that they were involved in public interest litigation and although the Respondents may have incurred costs, this is one of those matters where a Court would be at pains to penalize a constitutionally vigilant person with the burden of costs.

35. The Petition dated 6<sup>th</sup> January 2012 is dismissed with the further Order that each party will bear its own costs.

36. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 2<sup>nd</sup> DAY OF AUGUST, 2012**

**ISAAC LENAOLA  
JUDGE**

**In the presence of:**

*Irene – court clerk*

*Mr. Oluoch and Mr. Kuloba for Applicants*

*Mr. Ojwang hold brief for Mr. Munyi for 2<sup>nd</sup> Respondent*

*Mr. Gikera hold brief for Mr. Lubullelah for 1<sup>st</sup> Respondent*

*Mr. Odhiambo for Interested party*

**Order**

*Judgment duly read.*

**ISAAC LENAOLA  
JUDGE**

**By Consent**

*Leave to appeal is granted and copies of the judgment to be supplied.*

**ISAAC LENAOLA  
JUDGE**

**2/8/2012**