REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Petition 290 of 2011

PARTY OF INDEPENDENT CANDIDATES OF KENYA...PETITIONER

VERSUS

ATTORNEY GENERAL..1ST RESPONDENT

REGISTRAR OF POLITICAL PARTIES...2ND RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....................3RD RESPONDENT

JUDGMENT

1. In its petition dated 29th November 2011, the petitioner, a political party duly registered under the provisions of the Political Parties Act 2007, challenges various provisions of the Political Parties Act 2011 and the Elections Act, 2011. It alleges that section 7(2)(a) and (f), 10(2) and (3), 12(2), 25(1), (2) and (3), 28(6), 33(6), 45 and 51(1)a of the Political Parties Act 2011 (here after the Act) and section 22 of the Elections Act 2011, are unconstitutional and asks the Court to declare the said provisions unconstitutional and unjustified in a free and democratic society.

2. At the hearing of the petition on the 16th of July 2012, Mr. Omwanza indicated that in light of the Court's decision with regard to section 22 of the Elections Act in **High Court Petition No. 198 of 2011, Johnstone Muthama –v- The A.G**. with regard to the provisions of Sections 22 of the Elections Act, the petitioner's submissions would be confined to the provisions of the Political Parties Act, 2011, specifically sections 7(2) (a) and (f) thereof.

3. The petitioner therefore seeks the following orders, prayers (ix) and (x) of which are omitted as they pertain to the provisions of Section 22 of the Elections Act:

(i) A declaration that Sections 7(2)9a) and (f)(1) is null and void

(ii) A declaration that Sections 10(2)(3) of the Political Parties Act, is unconstitutional for purporting to limit and set timelines to associate politically contrary to Articles 36(1)(3),38,91 and 92 of the constitution, is undemocratic and not justified in a democratic society.

(iii) A declaration that section 25(1)(2)(3), of the Political Parties Act, is unconstitutional by purporting to exclude on the members and supports of political parties that fail to meet the threshold of section 25(1)(a)9b),(2)9a) and (30 from playing a meaningful role in the electoral process. This legislative restriction on their receipt of funding interferes with the capacity of the members and supports of political parties that fail to meet the threshold to play a meaningful role in the electoral process and is not justified in a democratic society.

(iv) A declaration that section 28(6) and 51(1)(a) of the Political Party Act is unconstitutional for creating retroactive offences, contrary to Article 52(2)(n) of the constitution.

(v) A declaration that Section 35(d), of the Political Parties Act, is unconstitutional for subjecting a candidate for the office of Registrar to a body of persons who may not be Kenyans and therefore derogates from Article 1 of the constitution.

(vi) A declaration that Section 33(6), of the Political Parties Act, is unconstitutional by providing for the qualification for the Registrar of a political party in a vague, overbroad and undefined manner and does not subscribe to a body or person whom recognizes such a degree in Kenya.

(vii) A declaration that section 45(2),(3) and (4) of the Political Parties Act, is unconstitutional for purporting to create a crime of association ad hominem, which is unconstitutional.

(viii) A declaration that section 45(6), of the Political Parties Act, is unconstitutional for contravening Articles 99(c) and 105 of the constitution by purporting to derogate from the qualification for election to an elective office and donating judicial authority through a proclamation and adjudication through an act of Parliament.

(ix) …..

(x) …..

(xi) That the Honourable Court to pass such order and further orders as may be deemed necessary on the facts and in the circumstances of the case.

4. The petition is opposed. The 1st respondent has filed grounds of opposition dated 29th December 2011. The grounds are that the petitioner has not met the threshold test for constitutional applications, that the rules of constitutional interpretation militate against the grant of the orders sought, that the provisions as captured in the Act, are reasonable and justifiable in an open and democratic society and that the petition is an abuse of the Court process.

5. The 2nd and 3rd respondents also oppose the petition and have also filed Grounds of Opposition dated 26th March 2012 and submissions dated 2nd July 2012. In the Grounds of Opposition the 2nd and 3rd respondents argue that sections 7(2)(a),(f)(i), 10(2)(3) and 35(d) of the Act are consistent with the letter and spirit of the Constitution; that sections 28(6) and 51(1)(a) of the Act do not create retrospective offences as the Act envisages fresh registration even for existing political parties; that the challenges to section 33(6),45(2),(3),(4) and 25(1)(2)(3) of the Act are vague and unsustainable as they do not state what provisions of the Constitution are offended by the provisions of the Act and that section 45(6) of the Act is consistent with the provisions of the Constitution pertaining to the election of national representatives.

Basis of Interpretation

6. The petitioner has called into question the constitutionality of various provisions of the Act, on the basis that they infringe its rights under the Constitution. This calls for interpretation by the Court of the provisions of the Act against the constitutional rights they are alleged to infringe, and the meaning and implication of the rights alleged to have been infringed. I must of necessity start with certain paramount considerations that will guide in the interpretation of the impugned provisions, key of which are the

guidelines provided by the Constitution itself.

Constitutional Provisions

7. **Article 259** of the Constitution sets out the basis on which the Constitution is to be interpreted by providing as follows:

(1) This Constitution shall be interpreted in a manner that—

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance.

8. In interpreting any provision of the Constitution, one is also required to have regard to the national values and principles of governance set out in Article 10 of the Constitution. Article 10 provides as follows:

(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

Limitation of Rights

9. The second important consideration is the express recognition in the Constitution that, apart from the rights specified in Article 25, the other rights and freedoms set out in the Bill of Rights may be limited in certain circumstances. Article 24 provides in this regard 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.

Constitution to be Read as a Whole

10. A third critical factor is the need to consider the Constitution as a whole in determining whether or not there has been an infringement of any of its provisions by a statute. In this regard, I agree with the words of the High Court in the case of **Federation of Women Lawyers Kenya and 8 others -v- Attorney General and Another Petition No. 102 of 2011** when it stated:

"It is important that the Constitution be read as a whole and all provisions having a bearing on the subject matter be considered together as an integral whole."

Context and Parliamentary Intention

11. Finally, I must take into account the political context and history in which the Act was enacted, and the legislative intent in enacting the Act.

12. The petitioner argues that in determining this petition, the Court should take into account the history of political parties in Kenya. Such history, according to the petitioner, included a period in which the formation and registration of political parties, which were registered under the provisions of the Societies Act, was at the whim of the Registrar of Societies, and where political participation by running for elective office was limited by section 34 of the repealed constitution to those who were nominated by a political party in the manner prescribed by the law. The Registrar of Societies could refuse to register, or could deregister a political party, depending on the political circumstances at the time; the Registrar could also use the discretion conferred on the office to deny registration to any party whose political participation was deemed to be against the interests of the then ruling party, **KANU.**

13. The petitioner argues that this undesirable position has now changed and that, under Article 99 (1), a person is eligible for elections if amongst other things, he or she is nominated by a political party, or is an independent candidate who is supported by 1000 voters or 2000 voters for elections to the National Assembly and Senate respectively.

14. The respondents also agree that the historical context needs to be taken into consideration, but they view this context from a different perspective: they urge the court to consider this case against the history of the country and the diversity of the people of Kenya that is recognized in the Constitution; that the Constitution was enacted against a backdrop of divisions on the basis of ethnic and regional differences; that parties were formed on the basis of ethnic origin, and that elections were held against these sectoral divides is common knowledge. They submit that the history of political parties in Kenya was one in which parties were formed on the basis of narrow, parochial, ethnic and regional considerations; that they were weak and unstable, and that Kenyans expressed a desire in the run-up to the promulgation of the new Constitution for a Constitution in which provision would be made for the growth and sustenance of strong, stable, national parties whose agenda would cut across the nation; that the political instability and violence that has characterized past elections in the country have been a result of an unstable political environment characterized by parties that pursued narrow ethnic as opposed to national agenda.

15. The truth, in my view, lies in a mix of the two scenario presented by the parties in this petition. The

scenario painted by the petitioner is all too real and familiar: Kenya has had a history of undemocratic governance for most of its history. In the post-independence era, the persecution of citizens because of their political opinion was rife; for a lengthy period in the seventies, Kenya was a *de facto* single party state, while from 1982 to 1991, with the amendment and introduction of section 2A into the Constitution, Kenya became a *de jure* one party state. The repeal of Section 2A of the Constitution in 1991 to allow multi-party politics, while it brought in a degree of freedom for the citizen to participate politically through the formation of political parties, also brought in the scenario presented by the respondents in their submissions: the chaotic political party scenario that has characterized much of the last two decades. That political parties have been vehicles of convenience, with individuals jumping on and off as the circumstances suited them; that they were formed often on the narrowest of agenda, with no ideology beyond the desire to win a parliamentary seat in the next elections; that they were often regional or ethnic based is not disputable.

16. The constitutional provisions with regard to the formation and governance of political parties and the enactment of the Political Parties Act in line with the requirements of the Constitution are clearly an attempt to bring some form of sanity to an admittedly chaotic political parties scenario; to find some balance between the restrictive scenario preceding the multi-party era and the ungoverned scenario that followed it.

17. The need to forge national unity and enhance political activity on the basis of nationalism as opposed to narrow ethnic, regional or sectarian interests is a core purpose of the provisions of the Constitution that underpin the provisions of the Act, and it explains the legislative intent in enacting the Act. This need is clearly expressed in the provisions of Article 91 of the Constitution:

(1) Every political party shall—

(a) <u>have a national character as prescribed by an Act of Parliament;</u>

(b) have a democratically elected governing body;

(c) <u>promote and uphold national unity;</u>

(d) abide by the democratic principles of good governance, promote and practise democracy through regular, fair elections

(e) respect the right of all persons to participate in the political process, including minorities and marginalised groups;

(f) respect and promote human rights and fundamental freedoms, and gender equality and equity;

(g) <u>promote the objects and principles of this Constitution and the rule of law</u>; and

(h) subscribe to and observe the code of conduct for political parties.

(2) <u>A political party shall not—</u>

(a) <u>be founded on a religious, linguistic, racial, ethnic, gender or regional basis or seek to engage in advocacy of hatred on any such basis</u>;

(b) engage in or encourage violence by, or intimidation of, its members, supporters, opponents or any other person;

(c) establish or maintain a paramilitary force, militia or similar organisation;

(d) engage in bribery or other forms of corruption; or

(e) except as is provided under this Chapter or by an Act of Parliament, accept or use public resources to promote its interests or its candidates in elections.

18. At Article 92, Parliament is required by the Constitution to enact the legislation necessary to, among other things, give effect to the provisions of Article 91 with regard to:

(c) the regulation of political parties;

(d) the roles and functions of political parties;

(e) the registration and supervision of political parties;

(f) the establishment and management of a political parties fund;

(g) the accounts and audit of political parties;

(h) restrictions on the use of public resources to promote the interests of political parties; and

(i) any other matters necessary for the management of political parties.

19. In light of the factors and considerations set out above, and the constitutional provisions that underpin the Political Parties Act, do the provisions of the Act impugned by the petitioner have the effect of violating the rights set out in the Constitution with regard to political participation?

Section 7(2) (a) and (f)

20. The Act provides at section 7(2) (a) as follows:

(2) A provisionally registered political party shall be qualified to be fully registered if —

(a) it has recruited as members, not fewer than one thousand registered voters from each of more than half of the counties;

(b) the members referred to in paragraph (a) reflect regional and ethnic diversity, gender balance and representation of minorities and marginalised groups;

(c) the composition of its governing body reflects regional and ethnic diversity, gender balance and representation of minorities and marginalised groups;

(d) not more than two-thirds of the members of its governing body are of the same gender;

(e) it has demonstrated that members of its governing body meet the requirements of Chapter Six of the Constitution and the laws relating to ethics;

(f) it has submitted to the Registrar-

(i) a list of the names, addresses and identification particulars of all its members;

(ii) the location of its head office, which shall be a registered office within Kenya and a postal address to which notices and other communication may be sent; and

(iii) the location and addresses of the branch offices of the political party, which shall be in more than half of the counties; and

(g) it has undertaken to be bound by this Act and the Code ***of Conduct set out in the First Schedule.***

21. The petitioner argues that these provisions violate the constitutional rights to freedom of association and of political participation under Article 36 and 38 of the Constitution. Article 36 of the Constitution provides that;

36. (1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.

(2) A person shall not be compelled to join an association of any kind.

(3) Any legislation that requires registration of an association of any kind shall provide that—

(a) registration may not be withheld or withdrawn unreasonably;

22. Article 38(1) provides that

'Every citizen is free to make political choices, which includes the right—

(a) to form, or participate in forming, a political party;

(b) to participate in the activities of, or recruit members for, a political party; or

(c) to campaign for a political party or cause.

23. Do the above provisions of the Act limit or restrict the enjoyment of the right to association and political participation guaranteed in Article 36 and 38? If they do, are the restrictions in conformity with the constitutional test for such limitations set out in Article 24 of the Constitution, and are they permissible in a free and democratic society? The petitioner alleges that the requirements are arbitrarily as the Constitution did not impose the requirement for 1000 members in half the counties and that a party can have a national outlook without necessarily having branch offices or 1000 members in half of the counties.

24. The petitioner argues further that it would cost a party no less than Kshs.19, 517, 490 to recruit members, establish and maintain branch offices, and that this is an amount that youth, minority, or marginalized groups of this country cannot afford; that therefore the minimum membership number and branch offices requirement locks out marginalized and minority communities from political participation and relies on the case of **Republican Party of Russia –v- Russia** ***(Application No. 12976/07)***and the Zambian case of ***Mulundika & 7 Others versus The People S.C.Z. APPEAL NO. 95 of 1995*** where the court dealt with the issue of whether the impugned provision was arbitrary and if so, whether it was rationally connected to the legitimate objective it was intended to serve.

25. On their part, the 2nd and 3rd respondents submit that Sections 7(2) (a) of the Act is in conformity with Articles 24, 91 and 92 of the Constitution. The limitation is in accord with Article 24 given the **nature of the right limited,** as there is no limitation of the right contained in Article 38(1) (a) and (b), and there is no restriction or limitation of other democratic freedoms such as the freedom of association. Further, given the i**mportance of the purpose of the limitation,** the provision is justifiable as itgives effect to Articles 4(2) and 91 (1)(a), (c), (e) of the Constitution; the Act is meant to promote the values of Article 10 of the Constitution, including national unity; and the limitations in the Act have been informed and necessitated by the electoral history of cyclical ethnic violence after every general election in Kenya; that the **nature and extent of the limitation** is justifiable as the Act limits the registration of political parties by making regulations for the purposes of sponsoring candidates in elections, and benefitting from public funding of political parties. It requires that a party makes an effort to recruit 1000 members from at least half of the counties.

26. The respondents argue further that the individual interest is limited in favour of the public interest: the right of individuals to form a parochial political party has been limited in favour of the wider public interest for inclusion, national unity and security. Finally, the respondents contend that the limitations

meet the criteria for a limitation to have a close nexus with the object of the limitation. In this case, the limitation compels political parties to pursue a political agenda that promotes national unity and inclusivity, by appealing to a broader constituency of voters, and there is **no less restrictive means** of ensuring this and ensuring conformity with the provisions of Article 91 of the Constitution.

27. Given the provisions of Article 91 of the Constitution and the clear legislative intent in enacting the Act, I agree with the respondents that the impugned provisions of the Act, while limiting to some extent the rights guaranteed under Articles 36 and 38, do not violate the provisions of the Constitution on the right to association and political participation. The provisions of Section 7(a) and (f) are an expression of the legislature's intent in meeting the requirements of Article 91 and 92 of the Constitution. They are an expression of the desire of Kenyans to have parties that are national in outlook and that do not cater only for limited regional and sectarian interests.

28. In this regard, the argument that the cost of establishing offices and recruiting members is beyond the financial ability of the youth and marginalised groups cannot hold: the Constitution clearly does not contemplate a situation in which a political party will be formed solely by the youth and marginalised groups. The requirement at Article 91 that '***Every political party shall 'have a national character as prescribed by an Act of Parliament', 'promote and uphold national unity,' 'respect the right of all persons to participate in the political process, including minorities and marginalised groups'*** and '***respect and promote human rights and fundamental freedoms, and gender equality and equity'*** presupposes, in my view, a party that is inclusive of all, that recruits nationally, has youth, the elderly, women, persons with disabilities and minority groups among its members.

29. The provisions of the Act with regard to membership from and branch offices in all counties appear to me to be reasonable means, in the circumstances, of achieving the objects of the Constitution with regard to party politics. While one has the freedom of association and political participation as provided under Article 36 and 38, one must enjoy these rights, in so far as they relate to membership of a political party, within the parameters set by the Act, which are themselves ordained by the Constitution. The provisions cannot be read in isolation but must be read together with the rest of the Constitution and interpreted within its aims, object and purpose. They must also be read within the context of Kenya and the prevailing socio-political circumstances that informed the provisions in the Constitution.

Section 10 (2) and (3)

30. The petitioner alleges that Sections 10(2) and (3) of the Act are unconstitutional as they purport to limit and set timeline to associate politically contrary to Articles 36(1), (3), 38, 91 and 92 of the Constitution; that the said provisions are undemocratic and not justified in an open and democratic society. The petitioner argues further that the attempt to limit the time within which a coalition can be formed is arbitrary and a violation of freedom of association; that one should be at liberty to associate by forming a coalition at any time and any Act or provision of the law that purports to limit the time in which a political party can form a coalition is arbitrary and a violation of the freedom of association.

31. According to the respondents, however, the petitioner's claim with regard to section 10 (2) and (3) of the Act are totally unfounded. These provisions of the Act are in conformity with Articles 36, 38, 91 and 92 of the Constitution. The limitation imposed by these sections is only to the extent that coalitions are to be recognised for the purpose of forming government, and the provisions require adherence to the rules for depositing the coalition agreements with the Registrar of Political Parties within the timelines provided in the Act. This, according to the respondents, is in conformity with the wishes of Kenyans as expressed during the constitutional review process to build stable, transparent and integrity-driven institutions of governance; that the deposit of coalition agreements with the Registrar of Political Parties three months before elections secures the legitimate expectations of the electorate that they are voting for a political party whose political associations are transparent and known by voters, to enable transparent elections.

32. Section 10 (2) and (3) of the Act provides as follows:

10. (1) Two or more political parties may form a coalition before or after an election and shall deposit the coalition agreement with the Registrar.

(2) A coalition agreement entered into before an election shall be deposited with the Registrar at least three months before that election.

(3) A coalition agreement entered into after an election shall be deposited with the Registrar within twenty-one days of the signing of the coalition agreement.

33. My reading of the above provisions does not reveal anything that in any way violates the constitutional rights of the petitioner or of in any other person. The provisions are an extension of the freedom of association and of political participation through the formation of political parties. More than this, however, they are an expression of the need to deal with the limitations and shortcomings of the past: that Kenyans were desirous of a stable and certain political scenario has been recognized by all parties, including the petitioner. That Kenyans would desire to know well in advance of elections what political machinery they were putting in place cannot be doubted. It does not, in any way or form, limit the rights set out in Article 36 and 38 to require parties that enter into coalitions to deposit such agreements with the Registrar.

Section 25(1) (2) and (3)

34. The petitioner also challenges the provisions of section 25 of the Act for providing that a political party shall not be entitled to access the Political Parties Fund if it does not secure at least 5% of the total number of votes at the preceding general elections. The petitioner contends that allocating funds to political parties which garner not less than 5% of the total votes cast is discriminatory of small parties because vote-based eligibility to receive funds is manifestly disadvantageous to small parties, especially when having regard to the voting culture and degree of ethnicity in Kenya.

35. Mr. Omwanza relied on the case of **Figueroa -v- Canada (Attorney General)** ***(Application No. 203/*****99)** in support of the argument that legislation that confers a benefit to one party or one citizen as against another cannot be justifiable in a free and democratic society.

36. The respondents, in response to this argument contend that the provisions of this section are in conformity with the constitutional requirements set out in Article 24; that there is no specific right that has been shown to be violated by this provision; and in particular, no violation of the rights set out in Articles 27, 36 and 38 has been demonstrated. The section, in the view of the respondents, differentiates between political parties for reasons that are reasonable and justifiable: public funds are finite and cannot be allocated to any and all political parties that are registered under the Act; the threshold of securing at least 5% of the total number of votes in a general election is aimed at promoting political competition and values and principles of governance set out in Articles 10, 91 and 92, by encouraging political parties to be broad-based and have national agenda so as to secure at least 5% of votes in a General Election; and for public funds to be used as much as possible on agenda that benefits as broad-based a constituency of voters as possible.

37. The respondents rely on the case of **Magoun -v- Illinois Trust & Savings Bank 170 US 283 (1898)** and **Bayside Fish Floor Co. -v- Gentry 297 US 422 (1936)** to support the proposition that when a court is determining whether a law offends against the equal protection provision, the question for the court to determine is not whether the law has resulted in an equality, but whether there is some difference which bears a just and reasonable relation to the object of the legislation. They also rely on the case of **Kedar Nath -v- State of W.B (1953) SCR 835 (843)** for the proposition that mere differentiation or inequality in treatment does not amount to inequality unless the differentiation is ***unreasonable or arbitrary and has no rational basis having regard to the objects of the legislation in question.***

38. In the case of **Jacques Charl Hoffmann –v-South African Airways, CCT 17 of 2000** the Constitutional Court of South Africa observed 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.”

39. A similar observation was made in the case of **Malaysian Bar & Another –v- Government of Malaysia 1988 (LRC) 428** where the Supreme Court of Malaysia 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.’

40. In the case of **Bayside Fish Floor Co. –v- Gentry (supra)** referred to by the respondents, the Court also observed as follows:

It never has been found possible to lay down any infallible or all- inclusive test by the application of which it may be determined whether a given difference between the subjects of legislation is enough to justify the subjection of one and not the other to a particular form of disadvantage. A very large number of decisions have dealt with the matter; and the nearest approach to a definite rule which can be extracted from them is that, while the difference need not be great, the classification must not be arbitrary or capricious, but must bear some just and reasonable relation to the object of the legislation.

41. The conclusion that one arrives at from an analysis of the above decisions is that the critical issue to consider is whether the provisions of the law that are under challenge on the basis of being discriminatory are founded on intelligible criteria having a rational connection to the object of the legislation, and are not arbitrary or capricious. The question that this Court must ask itself therefore is whether the provisions of the Act with regard to the allocation of funds from the Political Parties Fund are discriminatory and disadvantageous to small parties. If they are, are they based on intelligible criteria bearing a rational connection to the object of the Act?

42. In my view, the petitioner, albeit unwittingly, supplies the answer to the issue that it raises with regard to the allocation of funds from the Political Parties Fund when it submits that

‘…..allocating funds to political parties which garner not less than 5% of the total votes cast is discriminatory of small parties because a vote-based eligibility to receive funds is manifestly disadvantageous to small parties, especially when having regard to the voting culture and degree of ethnicity in Kenya.

43. The object of the Act, it seems to me, is to build and strengthen political parties that are based on ideology; that are national in outlook and orientation; and that do not pander to narrow parochial interests. The spirit of inclusiveness that runs throughout the Constitution is required to find expression also in the political parties through which citizens shall exercise their right to political participation. It would, in my view, be to defeat the very purpose of the provisions of the Constitution with regard to building national based parties, and to encourage the culture of nationhood and inclusiveness, if, at the same time, Parliament was to enact legislation that would provide funds for small parties in order to take into account the ***‘voting culture and degree of ethnicity in Kenya.’*** The differentia provided in Section 25 is intended, as the respondents correctly submit, to enhance the development of broad based national parties and to ensure that finite national resources are not spread too thin among small parties with narrow ethnic, regional or sectarian agenda. Such differentia, as the courts in the cases cited above observed, is

reasonable and justifiable given the objects of the legislature in enacting the provision in question.

Section 33(6)

44. The petitioner also challenges the provisions of section 33(6) of the Act on the basis that it offends the principle of legality. The provision requires that a person shall be qualified for appointment as Registrar or as an Assistant Registrar if the person holds a degree from a university recognized in Kenya. The petitioner argues that this provision is so vague as to be meaningless or so overly broad that the provision does not provide sufficient guidance for legal debate as to what qualification is proscribed. It argues that the provision is so vague that its application amounts to a derogation of fundamental freedom of association, and political rights.

45. The petitioner has not indicated in what way this provision of the Act violates or derogates from its fundamental rights, or those of any other party. To require that an officer holds a particular qualification recognized in Kenya does not, in and of itself, derogate from any right. The respondents argue, and this is in my view a clear answer to the petitioner, that the provisions of the Act must be read together with those of other legislation, and that the system of accreditation of universities is adequately provided for in other legislation in Kenya. The Act cannot be read in isolation, and the fact that the qualifications required for appointment as the Registrar of Political Parties are not set out in more detail does not in any way violate or in any way limit constitutional rights.

Section 45

46. The petitioner alleges that this section violates its right to freedom of association by providing that where a political party commits an offence under the Act, then its principal officers, directors and secretary general shall also be deemed to have committed the offence; that this violates rights and is unconstitutional by purporting to create a crime of association **ad hominem**.

47. It is not clear from the petitioner's pleadings and submissions exactly how this section is in violation of the provisions of the Constitution with regard to the right to freely associate. To my mind, the section, read together with the rest of the provisions of that section, is intended to extend liability for commission of offences to the natural persons through whom a political party as a legal person acts. Section 45(2) and (3) provide as follows:

(2) Where a political party commits an offence under this Act, every principal officer of that political party shall also be deemed to have committed the offence.

(3) Where an offence under this Act is committed by a body of persons other than a political party—

(a) in the case of a body corporate other than a partnership, every director and the secretary of the body corporate shall also be deemed to have committed the offence; and

(b) in the case of a partnership, every partner shall be deemed to have committed the offence.

48. I agree with the respondents' submissions that a political party, which acquires corporate status upon full registration as provided under section 16(1) of the Act, can only act through its officers. There is therefore no violation of the Constitution for the Act to impose liability on the principal officers of a political party.

Section 28(6)

49. The petitioner also challenges the provisions of Sections 28(6) and 51(1) of the Political Parties Act. The relevant parts of section 28, including section 28(6), are as follows:

(1) A political party which receives funds from a non-citizen contrary to section 27 (1) *(c)* commits an offence.

(2) Subject to subsection (6), no person or organization shall, in any one year, contribute to a political party an amount, whether in cash or in kind exceeding five percent of the total expenditure of the political party.

(3) …
(4) ….

(5) A political party that receives an amount exceeding the amount specified in subsection (2) commits an offence and shall, in addition to the penalty imposed by this Act, forfeit that amount to the State.

(6) Subsections (2) and (5) shall not apply to any contribution or donation whether in cash or kind, made by any founding member of the political party as his contribution to the initial assets of the party within the first year of its existence.

(7)…..

50. It is not clear from the submissions and pleadings of the petitioner precisely in what way the provisions of Section 28(6), which pertain to contributions to the funds of a political party, are in violation of any of the rights of the petitioner.

Section 51(1)

51. This sectionprovides that a political party existing immediately before the commencement of the Act shall be required to comply with the provisions of the Act within 180 days. The petitioner contends that by having the effect of deregistering an already fully registered political party, the Act was retroactively punishing parties already registered under the Political Parties Act of 2007. It contends that it had been duly registered under the provisions of the Political Parties Act, 2007, and to require it to comply with the provisions of the 2011 Act for it to be fully registered is to have a law in force that has retrospective application which is to the detriment of political parties. The respondents argue that the impugned sections do not create any offences, so that the allegations by the petitioners are unfounded. They also contend that the requirement that political parties registered under the 2007 Act conform with the requirements of the 2011 Act is in line with the provisions of the Constitution.

52. Section 51(1)(a), which is in the transitional provisions of the Political Parties Act, provides as follows:

(1) Notwithstanding the provisions of this Act—

(a) a political party existing immediately before the commencement of this Act shall be required to comply with the provisions of this Act, within one hundred and eighty days from the commencement date; but shall be exempt from payment of the initial registration fees;

53. An inescapable fact about the new Constitution is that it is about change and transformation of all sectors of Kenyan Society. Section 7 of the Sixth Schedule to the Constitution provides that ***'All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.'*** Article 92 requires Parliament to enact legislation to bring into effect the constitutional provisions contained in Article 91 on political parties, while the Fifth Schedule requires that legislation to bring into force these provisions must be in force within one year from the date of promulgation. All laws and regulations existing prior to the promulgation of the new Constitution must change in order to conform to the requirements of the Constitution which has brought in principles and values that were hitherto unheard of in our political and social life and which are intended to transform the way Kenyans are governed.

54. It would be to defeat the intention and the push for change to enact legislation to regulate political

parties to bring them into conformity with the requirements of the Constitution, and yet not require political parties which are already registered to conform to those requirements. For the letter and spirit of the Constitution to become a reality, it is imperative that all Kenyans, including political parties, recognize that there is a change, and that they must conform to the change wrought by the Constitution. To hold the provisions of Section 51(1) to be unconstitutional is to effectively say that we have enacted a new Constitution, but we do not intend to be bound by it. This the Court cannot do.

55. The upshot of my findings in this matter is that the petition must fail. I therefore dismiss the same with no order as to costs.

56. I am grateful to counsel for the parties for their well-researched arguments and submissions in this matter.

Dated, Delivered and Signed at Nairobi this 28th day of September 2012

M. NGUGI
JUDGE
16/7/2012

28/9/2012

Before – Hon M. Ngugi J

Court Clerk – Kazungu

Mr. Nyamodi for the 2nd respondent

No appearance for the petitioner

Judgment delivered in open court in the presence of Mr Nyamodi for the 2nd respondent but in the absence of the petitioner and the 1st respondent.

M. NGUGI
JUDGE
28/9/2012