



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 268 & 398 of 2012

MICAH KIGEN

HASSAN OMAR HASSAN

ELIUD OWALO

(Suing in their capacity as Chairman, Deputy and Secretary General of
the Friends of Raila – ([FORA] 2012) **PETITIONERS**

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION 2ND RESPONDENT

COMMISSION FOR THE IMPLEMENTATION

OF THE CONSTITUTION 3RD RESPONDENT

AND

PARTY OF NATIONAL UNITY 1ST INTERESTED PARTY

ALLIANCE PARTY OF KENYA 2ND INTERESTED PARTY

CONSOLIDATED WITH

BETWEEN

COMMISSION FOR THE IMPLEMENTATION

OF THE CONSTITUTION PETITIONER

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION 2ND RESPONDENT

AND
KENYA PARAPLEGIC

ORGANISATION INTERESTED PARTY

JUDGMENT

Introduction

1. This case concerns representation of special interests in the National Assembly and the issue for consideration is what constitutes representation of special interests for the purpose of **Article 97(1)(c)** of the Constitution and whether section 39(4) of the *Elections Act (Act No. 24 of 2011)* is unconstitutional for permitting the political parties to include candidates for the position of President and Deputy President in the party list for nomination.

Background

2. The two petitions are consolidated as they deal with common issues of law. The first petition, *Petition No. 268 of 2012* is brought by the petitioners in their own right. They are also part of a political lobby group committed to the election of Hon. Raila Odinga as President of the Republic of Kenya.

3. The second petition is brought by the Commission for the Implementation of the Constitution (CIC) which is the body tasked with inter alia, monitoring, facilitating and overseeing the development of legislation and administrative procedures required to implement the Constitution. It is incorporated under **section 5(6)** of the **Sixth Schedule** to the Constitution and **Article 253**.

4. The representation of special interests in the National Assembly has been a feature of the former Constitution. **Section 33** of the former Constitution provided for the nomination of twelve members to the National Assembly by the President to represent special interests. This power was seen as part of the President's patronage and special interests were subordinate to the President's desire to reward his political cronies. **Section 33** of the former Constitution was amended in 1997 as part of the IPPG Reform Package (*Constitution of Kenya (Amendment) Act No. 9 of 1997*) to provide for the appointment by the President of twelve members nominated by the respective parties in proportion to their strength in Parliament taking into account the principle of gender equality.

5. A similar provision providing for the nomination of persons to represent special interests is to be found in **Article 97**. **Article 97** sets out membership of the National Assembly as follows;

Membership of the National Assembly.

97. (1) *The National Assembly consists of—*

(a) two hundred and ninety members, each elected by the registered voters of single member constituencies;

(b) forty-seven women, each elected by the registered voters of the counties, each county constituting a single member constituency;

(c) twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers; and

(d) the Speaker, who is an ex officio member.

(2) Nothing in this Article shall be construed as excluding any person from contesting an election under clause (1) (a). [Emphasis Mine]

6. **Article 90** stipulates the manner in which the twelve seats shall be distributed. It states as follows;

Allocation of party list seats.

90. (1) *Elections for the seats in Parliament provided for under Articles 97(1) (c) and 98 (1) (b), (c) and (d), and for the members of county assemblies under 177 (1) (b) and (c), shall be on the basis of proportional representation by use of party lists.*

(2) The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) and shall ensure that—

(a) each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided for under clause (1), within the time prescribed by national legislation;

(b) except in the case of the seats provided for under Article 98 (1) (b), each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed; and

(c) except in the case of county assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya.

(3) The seats referred to in clause (1) shall be allocated to political parties in proportion to the total number of seats won by candidates of the political party at the general election.

7. **Section 34** of the **Elections Act (Act No. 24 of 2011)** makes provision for the process of nomination of members of the persons through the party lists. The provision as originally published provided;

34. (1) *The election of members for the National Assembly, Senate and county assemblies for party list seats specified under Articles 97 (1) (c) and 98 (1) (b) (c) and (d) and Article 177 (1) (b) and (c) of the Constitution shall be on the basis of proportional representation and in accordance with Article 90 of the Constitution.*

(2) A political party which nominates a candidate for election under Article 97 (1) (a) and (b) shall submit to the Commission a party list in accordance with Article 97 (1) (c) of the Constitution.

(3) A political party which nominates a candidate for election under Article 98 (1) (a) shall submit to the Commission a party list in accordance with Article 98 (1) (b) and (c) of the Constitution.

(4) A political party which nominates a candidate for election under Article 177 (1) (a) shall submit to the Commission a party list in accordance with Article 177 (1) (b) and (c) of the Constitution.

(5) The party lists under subsection (2), (3) and (4) shall be submitted in order of priority.

(6) The party lists submitted to the Commission under this section shall be in accordance with the constitution or nomination rules of the political party concerned.

(7) The party lists submitted to the Commission shall be valid for the term of Parliament.

(8) A person who is nominated by a political party under subsection (2), (3) and (4) shall be a person who is a member of the political party on preceding the date of submission of the party list by the political party.

(9) The party list may not contain a name of any Presidential or Deputy Presidential candidate nominated for an election under this Act.

(10) A party list submitted for purposes of subsection (2), (3), (4) and (5) shall not be amended during the term of Parliament or the county assembly, as the case may be, for which the candidates are elected.

[Emphasis Mine]

8. The petitioners' grievances specifically relates to **section 34(9)** of the **Election Act** (the Act) and **Legal Notice No. 142 of 2011** where the Attorney General, in exercise of his powers under the **Revision of Laws Act (Chapter 2 of the Laws of Kenya)**, promulgated the **Laws of Kenya (Rectification) Order, 2011** which rectified **section 39(4)** of the Act by deleting the word "**not**" in the said section. After the deletion, the section now reads as follows, "**34(9) The party list may contain a name of any Presidential or Deputy Presidential candidate nominated for election under the Act.**"[Emphasis Mine]

9. I am satisfied that the rectification effected by the Attorney General was in accordance with the intention of the legislature as evidenced by the legislative debates in the Hansard.

Agreed issues for determination

10. As there were no contested facts, I directed the parties to agree issues on issues for determination. The following issues were agreed upon by the parties;

a) *Whether **section 34(9)** of the **Election Act** is amended by **Legal Notice No. 142 of 2011** is inconsistent with various provisions of the Constitution.*

b) *Whether **section 34(9)** of the **Election Act** contravenes fundamental rights or freedoms of the petitioner as pleaded in the petition in **Petition No. 268 of 2012**.*

c) *Whether the National Assembly and the Attorney General are under a constitutional duty to coordinate with and consult the Commission on the Implementation of the Constitution pursuant to **section 5(6) of the Sixth Schedule** to the Constitution.*

d) *Whether there is a dispute for determination by the court and in absence of a dispute does the court have jurisdiction to interpret the Constitution.*

e) *Who should bear the costs of the petitions.*

11. I think the first two issues (b) and (c) form the basis of the determination of this case and I shall determine these issues first.

Validity of section 34(9) of the Election Act

The Submissions

12. Counsel for the petitioners and one of the interested parties, Kenya Paraplegic Organisation, have argued that the special interests represented must be limited to those groups which the Constitution has given special protection. This argument, they state is grounded in the history and context of the Constitution which requires that marginalised and vulnerable groups secure representation in the National Assembly in order to promote and secure their rights. This argument is specifically grounded in **Articles 19, 20 and 21 of Part 1** of the Bill of Rights and the provisions of **Part 3** of the Bill of Rights which elaborates application of rights and fundamental freedoms to certain group of persons; children, persons with disabilities, youth, minorities and marginalized groups and older members of society. The petitioners

also submit that the provisions of **Article 97(1)(c)** must be read in order to promote affirmative action for marginalized and vulnerable groups entrenched in **Article 27**.

13. Ms Kilonzo, counsel for the CIC, submitted that by introducing the provision that the Presidential and Deputy Presidential candidates may be included in the list of nominated members, the legislature was undermining one of the key pillars of the Constitution, that is, to protect and promote the rights of minorities and vulnerable people deserving of protection and representation. Counsel further argued that the right to representation for these special groups have crystallised and ought to be given effect notwithstanding that the provisions of **Article 100** as read with **Article 261(1)** and the **Fifth Schedule** to the Constitution required Parliament to enact legislation within a period of five years from the effective date.

14. The CIC also argues that the inclusion of candidates nominated for election to posts of President and Deputy President by political parties in the parties list of persons to be nominated to represent special interests groups under the Constitution is a differentiation without a rational connection to a legitimate purpose under the Constitution. Counsel relied on the decision in the case of *Hon. Johnstone Muthama v Minister of Justice and Constitutional Affairs Nairobi Petition No. 198 of 2011 (Unreported)* where the court held that in determining whether the differentiation is constitutional, the court should consider the following criteria; First, whether the provision makes a differentiation that bears a rational connection to a legitimate purpose. Second, whether the differentiation amounts to unfair discrimination. Third, can the differentiation be justified under the Constitution? Counsel concluded that **section 34(9)** of the Act failed this test.

15. Ms Kilonzo submitted that the term '*special interests*' contained in **Article 97(1)(c)** must be read *ejusdem generis* to the other interests set out in the Article that is, '*including the youth, persons with disabilities and workers*' in order to give effect to the broad objects of the Constitution in order to ensure that the vulnerable and minority groups are protected and promoted.

16. Mr Oluoch, counsel for the petitioners in *Petition No. 268 of 2012*, supported the positions taken by Ms Kilonzo. He further submitted that legislative authority was limited as **Articles 93** and **94** required the legislature to perform its functions in accordance with the Constitution and therefore **Article 100** which required Parliament to make legislation to promote the representation of women, minorities, youth and other ethnic communities must be given effect in construing **Article 97(1)(c)**. This provision, I understood counsel to mean that Parliament could not replace these special interests so defined by including the persons contesting for the position of President and Deputy President as envisaged in **section 34(9)** of the *Election Act*.

17. Counsel for the Kenya Paraplegic Organisation, Mr Chigiti, argued that the Court has an obligation to protect and promote the rights of persons with disabilities and that **section 34(9)** of the Act was clearly intended for this purpose. Counsel emphasized that Kenya also had international obligation to promote the rights of persons with disabilities through conventions such as the *Convention of the Rights of Persons with Disabilities*, *Universal Declaration of Human Rights* and the *International Convention on Civil and Political Rights*.

18. Ms Osoro, for the IEBC, opposed the petitions and contended that the Commission had no jurisdiction to qualify the provisions of the Act and that it had no role in enacting these provisions. Counsel further contended that the petitions did not disclose any violation of the petitioners' rights and fundamental freedoms by the IEBC and therefore the petitions should be dismissed.

19. Mr Mwangola, counsel for the political parties, opposed the petition. The thrust of Mr Mwangola submission was that Kenyans are entitled to be represented by any person of their choice and the issue for consideration is not who the person represents but what interests the person represents and that persons who were candidates for the position of President and Deputy President are capable of representing special interests. Counsel further submitted that under the provisions of **Article 261** as read with the **Fifth Schedule**, the legislature had five years from the effective date to effect the provisions of **Article 100** and therefore these petitions were premature and pre-emptive.

20. Mr Bitta, counsel for the Attorney General, submitted that there was no requirement that the list contemplated by **Article 97(1)(c)** should not contain any reference to special groups rather what was required to be represented were special interests and in light of **Article 38**, the political party was such a vehicle for the representation of special interests and that the political party was entitled to define the nature and extent of special interests. Furthermore, **Article 90** which governs the allocation of seats is through the vehicle of political parties.

21. Mr Bitta further argued that the definition of special interests is dynamic and not static and therefore **Article 97(1)(c)** should not prevent a person nominated to contest for the position of President or Deputy President from being nominated to represent special interests in Parliament after losing the election. Counsel also noted that the term used in is not ‘special groups’ but ‘special interests.’ Mr Bitta, contended that the petitioners’ arguments if taken to their conclusion would lead to an absurdity as it is not necessary that a person who is from a special group represent that group.

General principles

22. I agree with the petitioners that the Constitution gives a special place to minorities and vulnerable persons. Indeed, this is the thread running through the entire Constitution. The preamble to the Constitution, the Bill of Rights and the provisions concerning representation all stress the rights of persons who live margins of society; those who are vulnerable and have suffered historical injustices are to be treated with dignity and to be recognized through representation in State organs and other bodies.

23. This case is about the right to representation in the legislature and the specific provisions set out in **Chapter Eight** of the Constitution and in interpreting these provisions, the court must give effect to the language of the specific articles in manner that promotes the Constitution and its purposes, value and principles, advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights, permits development of the law and contributes to good governance as required by **Article 259(1)**. (See also **FIDA-K and Others v Attorney General and Others Nairobi Petition No. 102 of 2011 (Unreported)**). As the Supreme Court observed in **Re Matter of the Interim Independent Electoral Commission, Constitutional Application No. 2 of 2011 (Unreported)**, ‘*Interpreting the Constitution, is a task distinct from interpreting the ordinary law. The very style of the Constitution compels a broad and flexible approach to interpretation.*’ (See also **Minister for Home Affairs and another v Fisher and Another [1979] 3 All ER**).

24. All provisions of the Constitution bearing upon a matter should be considered together; this is the principle of *harmonization*. Where the Constitution contains several provisions relating to an issue, all these provisions must be looked at as a whole. As was held in **Olum v Attorney General of Uganda [2002]2 EA 508**, ‘*the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. Constitutional provisions must be construed as a whole in harmony with each other without insubordinating any one provision to the other.*’

25. In dealing with this matter I also adopt the sentiments of Justice Lenaola in **Charles Omanga and Another v Independent Electoral And Boundaries Commission and Another Nairobi Petition 2 of 2012 (Unreported)**, ‘*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...*’

Analysis and determination

26. The petitioners have, in essence, argued that **section 34(9)** of the **Election Act** is unconstitutional in as far as it allows for Presidential and Deputy President candidates to occupy the party list of nominated candidates which has the effect of limiting or diluting the representation of special or vulnerable groups.

27. The petitioners’ argument is premised on the assumption that the Presidential and Deputy

Presidential candidates cannot in themselves fall under the category of the special groups, i.e., women, persons with disabilities or even the youth under **Article 97(1)(c)** or represent special interests. The nature and extent of what constitutes special interests is defined by the party nominating the candidates and in this respect, I agree with counsel for the Attorney General, that a reading of the **Article 97(1)(c)** as proposed by the petitioners would be too restrictive. The provision refers to a broader term “interests” rather than a more restrictive term “groups.” The nature of special interests requiring representation is infinite and various and a political party must be permitted to define those interests from time to time. As the Constitution must be read broadly, I think reading special interests *ejusdem generis* with the youth, persons with disabilities and workers as contended by Ms Kilonzo would be too restrictive to take into account any special interests that may emerge in future and which the political party may consider require representation.

28. My reasoning is further buttressed by the fact that the Constitution makes detailed provision for representation of special and vulnerable groups. **Article 97(1)(b)** provides for representation of women through single member constituencies in the National Assembly. The membership of the Senate provided in **Article 98(1)(b)(c)** and **(d)** provides for representation of women, the youth and persons with disabilities. **Article 177(1)(c)** also provides for representation of marginalized groups including persons with disabilities and the youth, prescribed by an Act of Parliament in the County Assembly. In addition to **Article 90**, which sets out the manner in which the allocation of seats is to be done, requires that the party list must have alternates between male and female candidates in the priority in which they are listed. **Article 90(2)(c)** provides that each party list must reflect regional and ethnic diversity.

29. Taking all these into provisions into account means that ‘*special interests including*’ must have a broad and expanded meaning to cover interests identified by the political parties and not restricted to the categories of interest or groups identified by the Constitution. Where the Constitution has provided for the representation of specific groups or interests it has explicit provisions for these specific groups and interest to be represented. It would be inconsistent with the Constitution to limit the right of any special interests identified by political parties to be represented in the National Assembly.

30. I also take the view that the **Article 90(2)**, whose provisions I have set out earlier in this judgment, bestow upon the IEBC the responsibility of ensuring that the party lists meet certain criteria set out in the Constitution and legislation. The Political Parties themselves, just as any other person or State organ, are bound to observe all provisions of the Constitution including those that require that the rights of minorities, youth and persons with disabilities be promoted and protected.

31. **Articles 97(1)(b), 98(1)(b),(c)** and **(d)**, which I have considered above, provide a baseline or Constitutional minimum for the representation of women, persons with disabilities, the youth, minorities and marginalized people within Parliament. **Article 100** also requires Parliament to enact legislation to promote the representation in Parliament of women, persons with disabilities, youth, ethnic and other minorities and marginalized groups. Under **Article 261(1)** and the **Fifth Schedule**, the legislation contemplated by **Article 100** should be enacted within a period of five years from the effective date.

32. The provisions of **Article 97(1)(c)** must also be seen in the context of Constitution which gives primacy to political parties as vehicles for exercising and realizing the political right to vote and the right to representation. **Chapter Seven** on the representation of the people at **Article 90** provides for the manner of allocation of seats by political parties. **Part 3** thereof deals with Political Parties and details specific provisions which they must comply with. **Article 91** requires political parties to respect the right of all persons to participate in the political process, including minorities and marginalized groups. **Article 38** which protects political rights, also emphasizes this right in the context of the political party. **Article 38(1)** provides;

38. (1) 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.

33. The architecture of the Constitution contemplates that political parties will play a significant role in governance. Political parties are a key component in the legislative process. **Article 108** provides that there shall be a leader of the majority party and a leader of the minority party. The leader of the majority party shall be the person who is the leader in the National Assembly of the largest party or coalition of parties while the leader of the minority party shall be the person who is the leader in the National Assembly of the second largest party or coalition of parties. It is therefore envisaged that the political parties will originate policies and legislation that will govern the country.

34. The Constitution envisions the promotion of democracy through political parties and it is the Court's role consistent with **Article 259(1)** to strengthen and not weaken political parties as vehicles for exercise of political rights, representation and governance. In this context therefore, inclusion of the Presidential and the Deputy Presidential candidates to represent legitimate and indeed special interests from the political party's point of view is within the Constitution. More often than not it is the leaders of the parties who provide the leadership of the political parties and a political party must have the requisite space to include its candidates for the Presidency and Deputy Presidency on the nomination list in the event the candidate fails to get elected as President or Deputy President.

35. In my view, the special interest of the political party and the need to promote party based democracy is a legitimate purpose to be which serves the Constitutional objectives I have explained above. Providing for the nomination of the persons who were candidates as President and Deputy President does not of itself undermine the rights and protections afforded to special groups taking into account the already existing provisions that provide for representation of special groups and interests.

36. Ms Kilonzo argued that that **Articles 131(3)** and **147(4)** prohibit the President and Deputy President respectively from holding any other state or public office and in the circumstances they cannot contest for the positions while being on the nomination list. This argument lacks merit as these provisions relate the holding of office upon election. I have not found any provision in the Constitution that bars a Presidential or Deputy Presidential candidate from being on the party nomination list.

37. It is therefore my finding that **section 34(9)** of the **Elections Act** is not inconsistent with **Article 97(1)(c)** of the Constitution and the Bill of Rights. I also find and hold that the special interests referred to in **Article 97(1)(c)** are not limited to a particular group of people or particular interests but rather concerns special interests defined by the political party nominating the candidates. I further find that the party list for purposes of **Article 97(1)(c)** may contain a name of any Presidential or Deputy Presidential candidate nominated for election and therefore **section 34(9)** the **Election Act** falls within the provisions of the Constitution.

Conclusion

38. My findings above have substantially dealt with the issues in controversy and in view of my findings in issues (a) and (b), I do not think it is necessary to make any finding on the rest of the issues save for costs.

39. I decline to grant the declarations in the petitions. **Petition No. 268 of 2012** and **Petition No. 389 of 2012** are therefore dismissed. Given the nature of the matters and the fact that they were brought in public interest, I will not award costs.

40. Finally, I thank the advocates who appeared in the matter for their detailed oral and written submissions and if I did not refer to them it is not because they were not relevant.

DATED and DELIVERED at NAIROBI this 15th day of November 2012.

D. S. MAJANJA
JUDGE

Mr A. Oluoch instructed by A. T. Oluoch Advocates for the petitioners in ***Petition No. 268 of 2012.***

Ms K. Kilonzo instructed by Kilonzo and Company Advocates for the Petitioners in ***Petition No. 389 of 2012.***

Ms Osoro instructed by V. A. Nyamodi and Company Advocates and Murugu Rigoro and Company Advocates for the Independent Boundaries and Electoral Commission.

Mr Mwangola instructed by Humphrey and Company Advocates for the Party of National Unity and Alliance Party of Kenya.

Mr Bitta, Principal Litigation Counsel, instructed by the State Law Office, for the Attorney General.