Njiru v Attorney General & 2 others; Chama Cha Uzalendo (Interested Party) (Petition E431 of 2021) [2025] KEHC 7996 (KLR) (Constitutional and Human Rights) (5 June 2025) (Judgment)

Neutral citation: [2025] KEHC 7996 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E431 OF 2021

LN MUGAMBI, J

JUNE 5, 2025

BETWEEN

JANE FLORENCE NJIRU ..... PETITIONER

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

REGISTRAR POLITICAL PARTIES ..... 2ND RESPONDENT

PARLIAMENT OF KENYA ..... 3RD RESPONDENT

AND

CHAMA CHA UZALENDO ..... INTERESTED PARTY

JUDGMENT

Introduction

1. The Petition dated 18th October 2021 was amended on 21st November 2022 and is supported by the Petitioner's affidavit in support.

2. The Petition challenges the stringent requirements for the registration and retention of a political party that are contained in the *Political Parties Act*, 2011 as unconstitutional and discriminative. The Petitioner contends that these provisions are contrary to the tenets of a multiparty democracy in that they limit the citizens' rights under Article 38 of the *Constitution*.

3. For this reason, the Petitioner seeks the following relief against the Respondent:

A. A declaration that the provisions of Section 7 of the *Political Parties Act*, 2011, is in contravention of Articles 4, 10, 24, 27, 36, 38 of the *Constitution* and hence null and void. Further and in particular:

   a. A declaration that Articles 24 and 259 of the *Constitution* were not followed in enactment of Section 7 of the *Political Parties Act*, 2011.

   b. A declaration that any limitation of any right and fundamental freedom provided for in the *Constitution* must abide with provision of Article 24 of the *Constitution* otherwise it is unconstitutional, illegal, irregular, null and void.

   c. A declaration that the right to form political parties is not a preserve of Kenyans of economic means.

B. A declaration that Section 7(2)(f)(iii) of the *Political Parties Act*, 2011 and Regulations 17 and 18 of the Political Parties Registration) Regulations, 2019 are discriminatory in so far as they require each registered political party to maintain at least 24 county offices.

C. A declaration that any measures that could privilege some political forces and discriminate others through the imposition of high costs on the registration and maintenance of political patties is discriminatory and unnecessary in a democratic society.

D. A declaration that Section 25 of the *Political Parties Act* 2011 is unconstitutional in so far as it prescribes a threshold for funding of political parties without taking into consideration the number of votes received by a political party where the political party does not have an elected representative.

E. An order of injunction restraining the 2nd Respondent from enforcing Section 7 of the *Political Parties Act*, 2011 and or deregistering political parties that do not comply with the said section of the law.

F. A mandatory order to the 3rd Respondent directing it to ensure that the *Political Parties Act* 2011 is amended to cure the anomalies.

G. The costs of this Petition be borne jointly and severally by the Respondents.

Petitioner's Case

4. The Petitioner states that she is the vice –Chairperson of the Forum for Republican Democracy (FORD – Asili) and an active party member and leader within the Party's National Executive Committee.

5. She avers that the *Political Parties Act* which came in operation on 1st November 2011 under Section 7 introduced prohibitive requirements which threaten to stifle the formation, maintenance and sustainability of political parties with the 2nd Respondent being mandated to ensure that these requirements are upheld by each political party.

6. She singled out the requirement of Ksh.600,000/- as registration fees and setting up of offices in at least 24 counties, claiming that it favours the rich to the disadvantage of ordinary Kenyans. She stated as a result, the 2nd Respondent has embarked on an exercise to ascertain that every registered party has these 24 offices failure to which, the party will be deregistered.

7. In addition, each political party is required to submit additional sums as outlined in the Petition, amounting to Ksh.19,165,000/-, throughout the year.

8. Equally, a political party is required to have its accounts audited and a statement of the audited accounts published in two national newspapers. The Petitioner states that given that political parties are non-profit making bodies, they rely on the kindness of few individuals within the party.

9. In her case, she depones that her party struggled to raise the registration fee in 2012 as well as set up the offices in the 24 counties. As a result, the Party ended up submitting their documentation on the day of the deadline, 30th April 2012.The 2nd Respondent is said to have declined to register their party causing them to lodge their grievance with the Political Parties Disputes Tribunal. The Tribunal found in their favour and so the 2nd Respondent proceeded to register their party. She depones that the party continues to struggle to maintain the party due to financial constraints. She posits that, many political parties have also been finding it difficult to comply with the stringent provisions which have caused an enormous financial burden.

10. Furthermore, she asserts that Section 25 of the *Political Parties Act* discriminates against political parties with regard to the principle of equality of vote where every vote should count as provided under Article 81 (d) of the *Constitution*.

11. As such, the Petitioner contends that this Section imposes a high threshold that is only attainable by few political parties which may not even be met by a political party that has participated in the preceding elections.

12. Additionally, the Petitioner contends that the *Political Parties Act*, interprets Article 91 and 92 of the *Constitution* in a mechanical manner that restricts constitutional rights in relation to registration and existence of political parties.

13. On this basis, she contends that her rights and those of other Kenyans are at risk of being violated by the impugned provisions of the *Political Parties Act* hence the need for this Court's intervention.

1st Respondent's Case

14. In reply, the 1st Respondent filed grounds of opposition dated 18th July 2022 on the grounds that:

    i. The Petition discloses absolutely no cause of action or claim against the 1st Respondent herein.

    ii. It is improper for the Court to make general declarations regarding the exercise of constitutional and statutory power without reference to specific actions done or not done by the 1st Respondent herein.

    iii. The Petition is not justiciable on account of lack of ripeness as the proceedings are not based on a concrete controversy arising from a prevailing factual matrix but on abstract and hypothetical scenarios.

    iv. The budget breakdown in paragraph 15 of the Petition has no documentary backing, and the same is mere estimation, which cannot be verified.

    v. The impugned Section 7 of the *Political Parties Act* was enacted in exercise of the authority granted under Article 92 of the *Constitution*, and the same gives effect to Article 91 of the *Constitution*.

    vi. The constitutionality of Section 7, specifically Section 7(2)(a)and (f), whose content is similar to what has been relied on in paragraphs 14 and 15 of the Petition, was challenged in Party Of Independent Candidates Of Kenya V Attorney General & 2 Others [2012]eKLR and the

Court held the said provisions to be constitutional as they serve to provide order for political parties.

vii. The prayers sought, specifically prayer D, if granted, would be in violation of the Principle of separation of powers since the 1st Respondent does not have any mandate to compel the legislative body, to amend a law.

viii. The 1st Respondent is neither the legislative body nor a member of the legislative body; and has therefore been improperly sued as a Respondent in the proceedings herein.

ix. There is neither a factual nor legal basis for the claim for costs against the 1st Respondent in the Petition.

x. The Petitioner is essentially seeking prayers that would violate the trite principle of separation of powers.

2nd Respondent's Case

15. In reaction to the Petition, the 2nd Respondent filed Grounds of Opposition dated 18th July 2022 on the basis that:

i. The Petition has not appreciated the history, import and the context of Articles 91 and 92 of the *Constitution*.

ii. The Petition has not appreciated the substance of the Political Parties (Amendment) Act, 2022 with respect to various elements including the criteria of distribution of the Political Parties Fund and publications of financial statements.

iii. Section 25 of the *Political Parties Act*, 2011 does not amount to discrimination.

iv. The limitations, if any, under the *Political Parties Act*, 2011 satisfy the elements of Article 24 of the *Constitution*.

v. The Petition does not appreciate the spirit and substance of the *Constitution* with regard to access to services and devolution.

vi. The Petitioner has not demonstrated with specificity and clarity on how the impugned sections are unconstitutional as set out in the case of Anarita Karimi Njeru v Republic [1979]eKLR.

vii. The Petition creates room for the possibility of collision among the provisions of the *Constitution* contrary to what was observed in the case of Institute of Social Accountability & Another vs. National Assembly & 4 Others [2015]eKLR.

viii. The impugned Sections actually advance enjoyment of political rights and do limit the same.

ix. The Petition does not advance the substance and spirit of the *Constitution* and thus fails the test of public interest hence should be dismissed with costs for being an abuse of the court process.

x. The Petition seeks to circumvent the due process in terms of how decisions of the 2nd Respondent are challenged.

xi. The Petition does not appreciate the doctrine of separation of powers.

3rd Respondent's Case

16. The 3rd Respondent filed its Replying Affidavit by the Clerk of the National Assembly, Samuel Njoroge, sworn on 6th March 2024.

17. On the onset, he avers that the Petition fails to meet the threshold set out in the Anarita Karimi Njeru case (supra) as the Petitioner fails to demonstrate with clarity and specificity how the impugned provisions of the Act are in contravention of the cited provisions of the *Constitution*. Furthermore, he states that the constitutionality of the impugned Sections 7, 25 and 29(2) of the *Political Parties Act* in so far as the funding of political parties is concerned have been addressed by the subsequent amendments in Political Parties (Amendment) Act, 2022 thus, the issue is moot.

18. He avers that during the enactment of the Political Parties (Amendment) Act, the public was invited to submit their views. It is said that the Petitioner at this point could have aired her views on the cited areas, however failed to do so. In the same manner, the Petitioner is argued to have failed to exercise her right under Article 119 of the *Constitution*. In light of this, he states that the Petition is an abuse of the Court process.

19. On the substantive issues, he asserts that the Petitioner has intentionally failed to appreciate that funding of political parties is legally provided for and managed under Sections 23, 24, 25 and 26 of the *Political Parties Act*.

20. It is stated that the *Political Parties Act* does not limit any citizens right within the ambit of Article 24 of the *Constitution* and enjoys the presumption of constitutionality. He notes that the Petitioner bears the burden of proving the Act's inconsistency against the *Constitution*.

21. He further avers that 3rd Respondent is empowered under Article 124 of the *Constitution* to make its Standing Orders for orderly conduct of its proceedings and its general business. In this way, he argues that the Court must allow the 3rd Respondent to carry out its mandate by rejecting an invitation to intervene, unless it is demonstrated that it has acted in contravention of the *Constitution*.

22. In like manner, he states that the 3rd Respondent is empowered under Article 92 of the *Constitution* to enact legislation to provide for regulation of political parties as envisaged under Article 91 of the *Constitution*. He informs that the stringent measures such as having offices in 24 counties is in tandem with Article 91 of the *Constitution* that is, a political party must have a national character that upholds national unity. It is asserted that the Petitioner had not demonstrated that the 3rd Respondent in enacting the *Political Parties Act* acted in contravention of the *Constitution*.

Interested Party's Case

23. The Interested Party's response to the Petition is not in the Court file or Court Online Platform (CTS).

Petitioner's Submissions

24. The Petitioner filed submissions dated 30th June 2023 and supplementary submissions dated 5th November 2024. The key issues were highlighted as: whether Section 7 of the *Political Parties Act*, 2011 is discriminatory in as far as it limits the enjoyment of political rights to persons of economic means and whether measures that privilege some political parties and discriminate others through the imposition of high costs of registration and maintenance of a political party is discriminatory and unnecessary in a democratic society and whether provision of a threshold for funding of political parties in a manner other than the votes garnered by a political party offends the constitutional provision on equality of the vote.

25. On the first issue, the Petitioner submitted that Sections 7, 21 and 25 of the *Political Parties Act* contradict the Articles 2(1), 10, 19(2), 20(4), of the *Constitution* and Article 4(2) of the *Constitution* which provides that the Republic of Kenya is a multi-party democratic state. The provisions are also argued to be discriminatory.

26. The Petitioner submitted that discrimination is often a barrier to essential services for certain groups of people. That, discriminatory laws, policies and practices may mean that these groups are also denied the right to work, the right to adequate housing and the right to a high standard of health and in this case, the right to form political parties. In this matter, the Petitioner argued the discriminatory factor is the aspect of Poverty.

27. Reliance was placed in Rose Wangu Mambo & 2 others v. Limuru Country Club & 17 others [2014] eKLR where it was held that:

> " Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by...sex whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured."

28. Like dependence was placed in Jacques Charl Hoffmann –v-South African Airways, CCT 17 of 2000.

29. In determining this question, the Petitioner also urged the Court to be guided by principles of interpretation and the various roles played by political parties in a democratic state. According to her, the conditions for registration and maintenance of political parties, coupled with the high threshold put in political funding is a threat to democracy, as only a handful of political parties benefit from the political parties' fund. Moreover, it was argued that, unlimited access to finance tends to give a party an unjust edge over other parties and turns the whole process into an auction where the highest bidder wins. As such, the Petitioner submitted that the purported richer political parties create an unhealthy playing ground which has a tendency of corrupting the process and the government.

30. To buttress this point reliance was placed in Olum and Another Vs Attorney General (2002)2 EA 508 where it was held that:

> " In order to determine the constitutionality of a statute, the court had to consider the purpose and effect of the impugned statute or section thereof. If the purpose was not to infringe a right guaranteed by the *Constitution*, the court had to go further and examine the effect of its implementation. If either the purpose or the effect of its implementation infringed a right guaranteed by the *Constitution*, the statute or section in question would be declared unconstitutional."

31. Additional reliance was placed in Mulundika & 7 Others Versus The People S.C.Z. Appeal No. 95 of 1995.

32. The Petitioner further argued that the provisions of the *Political Parties Act* seem to be motivated by proximate political concerns. According to her, it is an urge to cut political parties down to size through Section 27; put stringent conditions under Section 7 and Section 21(1)(i) and limit public funding of political parties to only those parties with an elected representative rather than number of votes garnered at the preceding election under Section 25(2)(c) of the Act.

33. On the equality of the vote, the Petitioner argued that the principle is one person one vote. Consequently, the Petitioner submitted that each vote should count with reference to the Political Parties Funding. In that, if a party does not participate in the elections, then the party would not be eligible for any funding as it would have 0% of the vote translating to 0% of the funds. But, if a party participates and garners 0.00005% of the vote, then the party would be entitled to 0.00005% of the funds, which would be negligible for the party. Considering this, a political party would then have to work harder in order to qualify for funds and this would enhance multiparty democracy in Kenya.

34. The Petitioner in addition submitted that the Petition contrary to the Respondents' arguments is not based on abstract and hypothetical scenarios. As deponed in her affidavit, the Petitioner reiterated that she is a member of the Forum for Republic Democracy Asili (FORD-Asili) which has encountered the highlighted challenges.

Respondents' Submissions

35. The 1st and 3rd Respondent's Submissions are not in the Court file or Court Online Platform (CTS).

2nd Respondent's Submissions

36. In support of its case, the 2nd Respondent filed submissions dated 30th October 2023 through their Counsel, Wafula Wakoko. Counsel sought to primarily discuss: the test to adopt in determining constitutionality of a statute, whether the payment of party registration fees, maintenance of county offices and publishing sources of funds is unconstitutional and discriminatory, whether Section 25 of the *Political Parties Act*, 2011 on distribution of the Fund is constitutional given that it does not consider all votes and whether the condition for full registration under Section 7(2) (a) of the Act is unconstitutional.

37. Counsel in the first issue relied in Law Society of Kenya v Attorney General and another (2021) eKLR where it was held that:

> " First, the objective which the limitation is designed to serve. Second, the means chosen to attain the objective must be reasonable and demonstrably justified. This is the proportionality test. Third, the effect of the limitation."

38. Turning to the second issue, Counsel submitted that the requirements stipulated under Section 7 and 29 of the *Political Parties Act* apply to all Kenyans equally and thus no one is granted any preferential treatment. In view of this, Counsel argued that the Petitioner's assertion of the rich and the poor, constructs a wrong interpretation of the Act as such categorization is not provided for in the Act.

39. Moreover, Counsel noted that the *Constitution* under Article 91(1)(a) is categorical that a political party must have a national character which thus envisions a party that accommodates all Kenyans. Counsel added that Section 28(2) of the Act also frowns upon the financial running of a political party by a few people.

40. Reliance was placed in Jacqueline Okeyo Manani & 5 others v Attorney General & another [2018] KEHC 9395 (KLR) where it was held that:

> " Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or have accorded privileges or advantages which are not accorded to persons of another such description...

> Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured."

41. Counsel reasoned that if at all the conditions set out in the *Political parties Act* are deemed to limit the enjoyment of the rights under Article 38 of the *Constitution*, then the limitation is geared toward actualizing the dictates of Article 91 of the *Constitution*, which demands that a political party must serve the interest of Kenyans not just a particular region.

42. Reliance was placed in Party of Independent Candidates of Kenya v Attorney General & 2 others [2012] KEHC 5853 (KLR) where it was held that:

> "In this regard, the argument that the cost of establishing offices and recruiting members is beyond the financial ability of the youth and marginalized groups cannot hold: the *Constitution* clearly does not contemplate a situation in which a political party will be formed solely by the youth and marginalized 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."

43. Counsel in the next issue submitted that Section 25 of the Act sets a threshold that a political party must meet so as to be entitled to the Political Parties Fund. It was contended that such a requirement was not novel and that Countries like South Africa provide a similar criterion.

44. Counsel stressed that this requirement is crucial as the Fund is drawn from the tax payers' money. Thus, adopting the Petitioner's averment would see the haphazard registration of political parties by persons with the key interest of receiving these funds. According to Counsel, the set threshold is a sound justification why a political party should not get access to public funding on account of a single vote under the ruse of equality of the vote.

45. Reliance was placed in the observation made in the Handbook on Political Finance: Funding of Political Parties and Election Campaigns as follows:

> It may seem fair to decide that all political parties and candidates should have access to public funds: in some countries, all registered political parties receive public funding. However, such an approach creates the risk that people will form parties or run for office simply to get state funding, and it may also be a significant waste of public resources to support parties and candidates that have no support among the electorate. Most countries therefore use a threshold of support that a party must have to gain access to public funding-normally a certain share of the vote in an election or of seats won.

46. On the final issue, Counsel submitted that Section 7(2) of the *Political Parties Act* serves to ensure that a political party does not recruit Kenyans from one constituency or county as a ploy to manipulate elections and have an early win before an election is called.

47. Counsel equally argued that the issue of setting of fees falls under the legislative arm of government hence a determination on the same would be touching on separation of powers.

Interested Party's Submissions

48. On 27th September 2023, the Interested Party in support of the Petition filed submissions through J.N. Muema and Company Advocates.

49. Counsel on economic and financial discrimination in relation to Section 7(2)(f)(iii) of the *Political Parties Act* submitted that the establishment and maintenance of a single county office is quite expensive and so the requirement to have this expense in at least 24 counties is financially strenuous on the political parties, particularly those that do not have regular funding.

50. In Counsel's view, the provisions of the *Political Parties Act* amount to economic discrimination, which discrimination cannot be explained other than disenfranchising the poor and ultimately relegating the political power of this country to the rich. Considering this, Counsel suggested that funding be imposed on the registered parties in the proportion to which the parties field candidates to a general election that is, rather than paying such punitive fees, the same be reduced and an annual subscription fees be payable by each registered party.

51. On publishing of audited reports of political parties in a newspaper of national circulation, Counsel submitted that newspapers have a wide reach in areas where electricity and internet connectivity is a challenge. It was stressed that in such areas, the purchasing power or the availability of newspapers is just as limited. Counsel submitted hence that it would be prudent for a copy of the audited report to be always available in the Party's official website and the physical documents be deposited with the 2nd Respondent.

52. In closing, Counsel submitted that *Political Parties Act* is one of the laws that should facilitate democracy instead of curtailing it. According to Counsel, its restrictive provisions bar the majority of the citizenry from being involved in the process of decision-making under the political sphere. As such, Counsel emphasized that this injustice can only be cured by this Court directing the 3rd Respondent to amend the Act.

Analysis and Determination

53. It is my considered view that the issues that arise for determination in this matter are as follows:

    i. Whether or not Section 7, 7 (2) (f) (iii), Section 25 of the *Political Parties Act* and Regulation 17 and 18 (Registration) Regulations are unconstitutional.

    ii. Whether the Petitioner is entitled to the relief sought.

Whether or not Section 7, 7 (2) (f) (iii), Section 25 of the *Political Parties Act* and Regulation 17 and 18 (Registration) Regulations are unconstitutional.

54. The principles of constitutional interpretation have been discussed severally by the Courts. The Court of Appeal in Ferdinand Ndung'u Waititu vs Independent Electoral & Boundaries Commission (IEBC) & 8 others [2014] KECA 615 (KLR) noted as follows:

> "I accept the proposition that the appellant has put forward, that the *Constitution* must be interpreted in a liberal, purposive and progressive manner, in order to give effect to the principles and values contained therein. This is found at Article 259 (1) of the *Constitution* which is framed as follows:
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> Article 259. (1) This Constitution shall be interpreted in a manner that—

i. promotes its purposes, values and principles;

ii. advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

iii. permits the development of the law; and

iv. contributes to good governance.

These principles have been reiterated time and again by our courts. In Njoya & 6 others -vs- Attorney General & 3 others No 2 [2008] 2 KLR (EP), this Court held that:

> The *Constitution* is not an Act of Parliament but the supreme law of the land. It is not to be interpreted in the same manner as an Act of Parliament. It is to be construed liberally to give effect to the values it embodies and the purpose for which its makers framed it."

55. Correspondingly, the Supreme Court in the Matter of the Interim Independent Electoral [2011] KESC 1 (KLR) guided as follows:

> "(86)" .....The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). the *Constitution* has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. the *Constitution* has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.

(87) In Article 259(1) the *Constitution* lays down the rule of interpretation as follows: "This Constitution shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance." Article 20 requires the Courts, in interpreting the Bill of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.

(88) These constitutional imperatives must be implemented in interpreting the provisions of Article 163(6) and (7), on Advisory Opinions. Article 10 states clearly the values and principles of the *Constitution*, and these include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.

(89) It is for these reasons that the Supreme Court, while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. 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."

56. On the other hand, there are a number of well-established principles for interpretation of Statutes. The Court of Appeal of Tanzania in Ndyanabo vs. Attorney General [2001] EA 495 being a restatement of the law in the English case of Pearlberg vs. Varty [1972] 1 WLR 534 stated that:

> "Until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, legislation should receive such a construction as will make it operative and not inoperative"

57. Another fundamental guiding principle was set out in R vs Big M Drug Mart Ltd 1985 CR 295 as cited with approval in Geoffrey Andare v Attorney General & 2 others [2016] KEHC 7592 (KLR) [2016] eKLR as follows:

> "Both purpose and effect are relevant in determining constitutionality, either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of legislation, object and its ultimate impact are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity."

58. This principle was also applied by the Constitutional Court of Uganda in Olum and another vs Attorney General [2002] 2 EA, where it was noted that:

> "To determine the constitutionality of a section of a statute or Act of Parliament, the court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the *Constitution*, the court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the *Constitution*, the impugned statute or section thereof shall be declared unconstitutional..."

59. Furthermore, the Court of Appeal in County Government of Nyeri & another v Ndungu [2015] KECA 1011 (KLR) stated as follows:

> "14. Alive to the fact that we are called upon to interpret the aforementioned provisions, we remind ourselves of the cardinal rule for construction of a statute; that is, a statute should be construed according to the intention expressed in the statute itself. Halsbury's Laws of England, 4th Edition (Reissue), Butterworths, 1995, Vol. 44(1), para 1372 provides:-
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> > "The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore the object in construing an Act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole in its context..."

15. The intention of a statute can be identified through a number of factors. In Cusack v Harrow London Borough Council (2013) 4 ALL ER 97, the Supreme Court observed:-

> "Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors."

Further, in Halsbury's Laws of England (supra):-

> "It is one of the linguisitic canons applicable to construction of legislation that an Act is to be read as a whole, so that an enactment within it is to be treated not as standing alone but as falling to be interpreted in its context as part of the Act. The essence of construction as a whole is that it enables the interpreter to perceive that a proposition in one part of the Act is by implication modified by another provision elsewhere in the Act..."

60. Equally, it is a set principle in law and practice that the burden of proving the unconstitutionality of a statute rests on the person who alleges so. In the persuasive authority of U.S. vs Butler 297 U.S. 1 (1936) as stated with approval in Mboya v Attorney General; National Employment Authority [2024] KEHC 2240 (KLR) the Court stated as follows:

> "When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the *Constitution* which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."

61. Furthermore, the Court in Council of County Governors v Attorney General & another [2017] KEHC 6395 (KLR) highlighted another significant principle as follows:

> "A law which violates the *Constitution* is void. In such cases, the Court has to examine as to what factors the court should weigh while determining the constitutionality of a statute. The court should examine the provisions of the statute in light of the provisions of the *Constitution*. When the constitutionality of a law is challenged on grounds that it infringes the *Constitution*, what the court has to consider is the "direct and inevitable effect" of such law. Further, in order to examine the constitutionality or otherwise of statute or any of its provisions, one of the most relevant consideration is the object and reasons as well as legislative history of the statute. This would help the court in arriving at a more objective and justifiable approach.

Thus, the history behind the enactment in question should be borne in mind. Thus any interpretation of these provisions should bear in mind the history, the desires and aspirations of the Kenyans on whom the *Constitution* vests the sovereign power, bearing in mind that sovereign power is only delegated to the institutions which exercise it and that the said institutions which include Parliament, the national executive and executive structures in the county governments, and the judiciary must exercise this power only in accordance with the *Constitution*."

62. In the present case, the Petitioner impugns the provisions of Section 7 and 25 of the *Political Parties Act* claiming that they are unconstitutional for placing overly restrictive conditions on political party funding which tend to favour larger or established parties at the expense parties that do not have strong financial base. The Petitioner cited the exorbitant registration fees demanded as well as the requirement that the party must maintain physical presence in at least 24 counties as some of these prohibitive conditions that are meant to drive out the weaker parties. Further, she took issue with the funding model where the funding is pegged on elected representatives instead of the number of votes that a political party is able to garner in an election.

63. In response, the Respondents countered that the conditions set out under Section 7 and 25 as limiting Article 38 were justified in that Section 7 which conditions that a political party should have a physical presence in at least more have of the Counties gives effect to Article 91 (a) that demands that political parties must have a national character thereby mitigating against the proliferation of regional or ethnic based political parties. Moreover, it was argued on behalf of the respondents that Section 7 sets out conditions to be met by political parties to qualify for funding and this is meant to guard public money from individuals keen on establishing political parties merely as ploy to attract funding under the guise of the equality of the vote.

64. Article 91 of the *Constitution* provides for the basic requirements for political parties among them, a national character as prescribed by an Act of Parliament, and must not be founded on a religious, linguistic, racial, ethnic, gender or regional basis or seek to engage in advocacy of hatred or any such basis.

65. Section 7 (2) of the *Political Parties Act* specifies the conditions of full registration of a political party as follows:

7 (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 special interest groups;

c. the composition of its governing body reflects regional and ethnic diversity, gender balance and representation of special interest 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

iv. the disaggregated data of its membership based on each of the components of the special interest groups; and

v. the address of the official website of the political party; and

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

66. Article 92 of the *Constitution* provides that Parliament shall enact legislation on Political Parties and proceeds to delineate what shall be contained in that legislation, of which Article 92 (f) provides for 'the establishment and management of a political parties fund.'

67. The Political Parties Fund is established under Section 23 of the *Political Parties Act* while Section 25 provides for its criteria of its distribution as follows:

25. Distribution of the Fund

(1) The Fund shall be distributed as follows—

a. seventy per cent of the Fund proportionately by reference to the total number of votes secured by each political party in the preceding general election;

b. fifteen per cent of the Fund proportionately to political parties based on the number of candidates of the political party from special interest groups elected in the preceding general election;

c. ten per cent of the Fund proportionately to political parties based on the total number of representatives from the political party elected in the preceding general election; and

d. five per cent for the administration expenses of the Fund.

(2) Notwithstanding subsection (1), a political party shall not be entitled to receive funding from the Fund under subsection (1) if—

(a) more than two-thirds of its registered office bearers are of the same gender;

(b) the party does not have, in its governing body, representation of special interest groups;

(c) the party does not have—

(i) an elected member of the National Assembly;

(ii) an elected member of the Senate;

(iii) an elected Governor; or

(iv) an elected member of a county assembly.

(2A) For purposes of this section, "office bearers" means national and county officials elected or nominated by a political party in accordance with the party constitution.

(3) For purposes of subsections (1)(a) and (2) (a), the total number of votes secured by a political party shall be computed by adding the total number of votes obtained in the preceding general election by a political party in the election for the President, members of Parliament, county governors and members of county assemblies.

68. Article 38 (1) a, b & c of the *Constitution* provides for political rights as follows:

> " Every Citizen is free to make political choices, which include 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.

69. The question therefore becomes; are the above provisions of the Act inconsistent with the *Constitution* or are the limitations within the bounds of proportionality and reasonableness in a democratic society envisaged under Article 24?

70. In my humble view, the requirements of Section 7 (2) of *Political Parties Act* are designed to not only ensure the Parties reflect a national character by ensuring that the Parties have national wide presence in at least half of the counties but also populated by special interest groups and people of diverse ethnic backgrounds. The Petitioner only faults this requirement on the basis that it is expensive to meet but, in my view, the fact that a legislation is difficult or expensive for a party to implement is not a ground for declaring it unconstitutional. This was also the holding of the Court in Mark Obuya, Tom Gitogo & Thomas Maara Gichuhi Acting for or on Behalf of Association of Kenya Insurers & 5 others v Commissioner of Domestic Taxes & 2 others [2014] KEHC 4336 (KLR) where the Court held:

> " 32. The legislature is the law-making organ and it enacts the laws to serve a particular object and need. In the absence of a specific violation of the *Constitution*, the court cannot question the wisdom of legislation or its policy object. The fact that the particular provision of the statute merely may be difficult to implement or inconvenient does not give the court license to declare it unconstitutional."

71. It was further contended by the petitioner Section 25 of the *Political Parties Act* is unconstitutional in view of the very high threshold requirement for funding which breeds discrimination given that only a handful of political parties can benefit from political party funding which is a threat to multi-party democracy as it give access of funds to a few bigger political parties by giving them an upper edge and creating an unhealthy playing ground.

72. Elaborating on what discrimination entails, the Supreme Court in Gichuru v Package Insurance Brokers Ltd [2021] KESC 12 (KLR) (Civ) held thus:

> "(47) This court had occasion to lay emphasis on the burden of proof in cases of discrimination in the case of Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] eKLR where the Supreme Court applied Section 108 of the *Evidence Act* in requiring the claimant to prove his claim

in a matter involving discrimination. The court also grappled with the issue of direct and indirect discrimination. The court observed thus:

(49) Section 108 of the *Evidence Act* provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

(50) This court in Raila Od*inga & others v Independent Electoral & Boundaries Commission & others, Petition No 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:

> "...a petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...."

(51) In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the superior courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent."

(48) Black's Law Dictionary, 10th Edition defines discrimination as "failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured." However, it must be appreciated that not all cases of distinction amount to discrimination. Learned author Robert K Fullinwider; in The Reverse Discrimination Controversy 11-12 (1980) states;

> "The dictionary sense of discrimination is neutral while the current political use of the term is frequently non-neutral, pejorative. With both a neutral and a non-neutral use of the word having currently, the opportunity for confusion in arguments about racial discrimination is enormously multiplied. For some, it may be enough that a practice is called discriminatory for them to judge it wrong. Others may be mystified that the first group condemns the practice without further argument or inquiry. Many may be led to the false sense that they have actually made a moral argument by showing that the practice discriminates (distinguishes in favor of or against). The temptation is to move from X distinguishes in favor of or against to X discriminates to X is wrong without being aware of the equivocation involved."

73. The Court went on further to observe that:

> " 50. In equal measure, we adopt the definition of discrimination in the High Court case of Peter K Waweru v Republic [2006] eKLR as follows:
>
> > " Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by race, tribe, place of origin or residence or other local conviction, political opinions, colour, creed, or sex, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.
> >
> > Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex .... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured."
>
> 51. From the above definitions, it is clear that discrimination can be said to have occurred where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race, sex disability etc or due to unfair practice and without any objective and reasonable justification."

74. It was not demonstrated by the Petitioner how her party has been discriminated against by dint of application of the provisions of Section 25 Act. This provision does not in any way provide for stratification of the politcal parties as between rich and poor political parties or bigger or smaller, all it does is to prescribe minimum conditions for funding that applies to all. It is again not clear what criteria the Petitioner used to come up with that classification.

75. The Petitioner complains that the conditions for funding are stringent and threshold is high. It must not be lost in mind the issue at hand is public funds and these conditions are deliberately meant to first and foremost protect public resources. These conditions guard against mushrooming of brief case political parties formed with the sole aim drawing off these public funds. It must be appreciated that political representation is the bedrock for the formation of political parties hence, those that seek to benefit from public coffers must demonstrate the capacity to compete and represent the electorate, otherwise there would be no point of funding moribund political entities just because they have participated in elections and got some votes. The requirement for political representation for a party to benefit from public funds is my view reasonable and justifiable in a democratic society and is consistent with prudent utilization of public resources, otherwise the political parties fund will be a cash cow for brief case political parties.

76. The wisdom of Parliament in enacting this law with its current conditions is unimpeachable and the Petitioner has not in any succeeded in demonstrating its unconstitutionality. As was held by the Supreme Court of India in Hamdard Dawakhana vs. Union of India Air (1960) AIR 554, 1960 SCR (2)671:

> " In examining the Constitutionality of a statute it must be assumed that the legislature understand and appreciates the need 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 enact 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."

77. The Petitioner has failed to provide cogent evidence as why the cited provisions of the *Political Parties Act* should be declared unconstitutional hence presumption of constitutionality of the said Act prevails.

78. The upshot is that this Petition is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF JUNE, 2025.

.....

L N MUGAMBI

JUDGE