



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 1 OF 2018

ISAAC ALUOCH POLO ALUOCHIER.....PETITIONER

VERSUS

COUNCIL OF GOVERNORS.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

JUDGMENT

1. The petitioner herein sued the respondents through the petition filed on 2nd January 2018 in which he sought orders that the court:

1. Declaration that the offices of all county governors in all 47 counties of Kenya are vacant.

2. Declaration that regulation 43(2) (i) of the Elections (General) Regulations, 2012 is void, for imposing an unreasonable restriction on adult citizens, contrary to Article 38(3) (c) of the Constitution, and for being inconsistent with the Articles 99(2) (a), 137(2) (b) and (3) and 193(2) of the Constitution.

3. Declaration that to be eligible to vie as a county governor, a person must be a Member of the County Assembly or be vying in an election as a member of the county assembly on the same date as that of an election for county governor.

4. Costs to the petitioner, on a compensatory basis, pursuant to Article 40(3) (b) of the Constitution.

2. The petitioner's case is that following the general elections of 8th August, 2017 and the swearing in of persons elected as governors across all the 47 counties in Kenya, the said governors currently hold those offices but that under Article 182(1) (c) of the Constitution, there is a provision that the office of the county governor becomes vacant if the holder of the said office ceases to be eligible to be elected County Governor under Article 180(2).

3. According to the petitioner, since Article 180(2) provides that to be eligible for election as county governor, a person must be eligible for election as Member of County Assembly, and Article 193(1) provides that a person is eligible for election as a Member of a County Assembly if the person is not disqualified under Article 193(2) (a) which stipulates that a person is disqualified from being a Member of County Assembly (MCA) if the person is a state officer and that it thus follows that a person holding a state office of governor, but is not a Member of the County Assembly is disqualified from being elected a member of the county assembly, and is consequently not eligible for election as a member of county assembly. The petitioner claims that by not being eligible for election as a Member of a County Assembly, the person is not eligible for election as governor and that consequently the office of all the county governors are vacant.

4. The petitioner argues that the moment a person is sworn into office as a governor, when that person is not a Member of County Assembly, the office of the governor becomes vacant upon that swearing in and that the only way to ensure that the office of governor does not become vacant immediately upon swearing in of a person is if the holder of the governor's office is also a Member of County Assembly.

5. It is the petitioner's case that the effect of the vacancies in all the governors offices is as provided for under Article 182(2) of the Constitution that requires deputy governors to assume the offices of county governors save that the said deputies must also be Members of the County Assembly which means that the offices of the governors will yet again become vacant upon the swearing of the deputies as governors thereby bringing in the operation of Article 182(5) of the Constitution requiring the Speaker of the County Assembly to assume office as acting governor pending an election to be held within 60 days.

6. The petitioner insists that in the said election held under Article 182(5) of the Constitution, only persons who are Members of County Assembly should be considered as eligible for county governor elections. It is the petitioner's further claim that for a person to vie for election as a county governor while he is a Member of County Assembly or while also vying for election on the same date to be a Member of County Assembly, regulation 43(2) (i) of the Election (General) Regulations, 2012 must be voided on the ground of unconstitutionality pursuant to Article 2(4) of the Constitution because whereas Articles 193(2) (a), 99(2) (a) and 137(3) of the Constitution contemplate that a person can vie for an executive office while holding a legislative office at the same level of government, or vie for a legislative office while holding another legislative office the said regulation 43(2) (1) prohibits acceptance of nomination papers of a person seeking office in more than a single electoral area.

7. At the hearing of the petition, the petitioner reiterated his position that only an Member of County Assembly qualifies to vie to be a governor and that currently, none of the governors is an Member of the County Assembly and that under Article 182(2) (c) eligibility criteria, a vacancy exists in all the 47 offices of county governors.

8. On constitutionality of Section 43(2) (1) of the Election (General) Regulations Act the petitioner submitted that since the said Section inhibits a person seeking election as governor from being a candidate for Member of County Assembly, and since the only way a governor can hold office is to be an Member of County Assembly, the said Section cannot supersede the constitution and should be declared unconstitutional.

1st respondent's case.

9. The 1st respondent opposed the petition through the Grounds of Opposition dated 26th January 2018 in which it set down the following grounds;

- 1. That the court at present is bereft of jurisdiction to hear and determine the matter as it is not the appropriate forum to deal with the issues being raised by the petitioner.***
- 2. That the instant petition has been filed contrary to provisions of Article 2(3) of the Constitution of Kenya 2010, in view of the fact that legality or validity of the Constitution is not subject to challenge by or before any court.***
- 3. That the instant petition fails to give accord the provisions of Article 88(4) (e) of the Constitution of Kenya, Section 4 of the Independent Electoral and Boundaries Commission Act No. 9 of 2011 and Section 74(1) of the Elections Act No. 24 of 2011.***
- 4. That it would be premature for this court to exercise its jurisdiction on matters that fall within the jurisdiction of other authorities.***
- 5. That in view of the orders sought by the petitioner, the instant petition and the proceedings herein constitute an Election Petition challenging the election of the 47 County Governors disguised as a constitutional petition.***
- 6. That the petition does not give accord to the tenets of fair hearing as the petitioner has not enjoined the parties against whom the petition is seeking orders contrary to provisions of Article 50 of the Constitution of Kenya.***
- 7. That the petitioner has not demonstrated which of his rights have been infringed upon by the respondents.***

10. The 1st respondent also filed a replying affidavit of its advocate, Jacqueline Mogeni, in which expounds on the grounds of opposition and the relevant constitutional and statutory provisions.

11. At the hearing of the petition, Mr Lawi, learned counsel for the 1st respondent submitted that the 1st respondent has been improperly enjoined in these proceedings which is basically specifically concerned with the election of the 47 governors who should have been enjoined in the suit so that they can set forth their individual cases.

12. Counsel also submitted that this court lacks jurisdiction to hear and determine this petition, being in the nature of an election petition as its genesis is the general election conducted on 8th August 2017 which under the provisions of Article 87 of the Constitution are to be handled under legislation to be enacted by Parliament, in this case the Elections Act which sets the timelines for the filing of election petitions. For this argument counsel cited the case of **Ferdinand Waititu Ndungu vs IEBC & Other [2013] eKLR** where the jurisdiction to determine election petitions was discussed.

13. Counsel further submitted that in interpreting the provisions of Articles 180(2) and 193 of the Constitution the said Constitution must be read as a whole and that nowhere in the constitution is it stated that a person had to contest to be a Member of County Assembly before vying to be a governor. Counsel urged the court to adopt a purposive interpretation of the Constitution as envisaged under Article 259 of the Constitution.

14. On the Constitutionality of Regulation 43 of the Election (General) Regulations, counsel submitted that Section 109 of the Elections Act grants the 2nd respondent the powers to make regulations for purposes of facilitating the provisions of the Elections Act and that there is a presumption on constitutionality of the said regulation.

The 2nd respondent's case.

15. The 2nd respondent opposed the petition through the grounds of opposition dated 26th March 2018 wherein the following grounds were set out:

- 1. That the court at present is bereft of jurisdiction to hear and determine the instant petition in view of the fact that the petition seeks to challenge the validity of the nomination and subsequent election of County Governors contrary to the provisions under the Constitution of Kenya, 2010 (hereinafter the Constitution) and the Elections Act.**
- 2. That the petition seeks to remove from office the county governors contrary to the laid down procedures provides under the Constitution and County Governments Act(No. 17 of 2012).**
- 3. That the petition is fundamentally defective in view of the fact that it seeks adverse orders against the individual county governors who have not been enjoined in the petition contrary to the dictates of Article 50 of the Constitution.**
- 4. That the petition fails to appreciate the principles of construing of the Constitution elucidated under Article 259 of the Constitution.**
- 5. That the petition is founded on misapprehension and/or misunderstanding of the provisions of Article 180(2) of the Constitution on the eligibility of election of county governors.**
- 6. That the petition is misdirected as it fails to appreciate the import of Article 177 of the Constitution on the constitution of the membership of the county assemblies.**
- 7. That the petition fails to appreciate the doctrine of separation of powers in respect of the functions of the county executives and county assemblies prescribed under Article 183(1) (a) of the Constitution.**
- 8. That the instant petition lacks merit is frivolous, embarrassing, scandalous, vexatious, abuse of the process of this court and is for dismissal with costs.**

16. At the hearing of the petition, Mr Juma, learned counsel for the 2nd respondent submitted that the instant petition is a blatant abuse of the court process as it proceeds from the petitioners lack of understanding of the provisions of Article 159 of the Constitution and his failure to understand and appreciate the principle of separation of powers in respect of county assemblies under Article 176 of the Constitution.

17. It was the 2nd petitioner's case that nowhere in the Constitution is it envisaged that county governors must first be Member of County Assembly. Counsel submitted that the instant petition is an indirect election petition as the said governors have already been elected, gazetted, sworn in, and that by dint of Article 87 of the Constitution as read with Section 76 of the Election Act, the timelines for removal of the governors has already lapsed.

18. Counsel maintained that in the circumstances of this case, the only procedure for removal of governors is the one found in Section 33 of the County Governments Act as read with Article 181 of the Constitution that provides for the removal of Governors by the Member of County Assembly's.

Determination

19. I have considered the instant petition, the respondent's responses and the rival submissions of the parties. I note that the main issues for determination are as follows:

- a) Whether this court has jurisdiction to hear and determine this case.**
- b) Whether the 1st respondent has properly been enjoined in these proceedings.**
- c) Whether the petitioner is entitled to the orders sought in this petition.**

20. On the 1st and 2nd issues which I find to be closely related, the respondents argued that since this petition challenges the election of all the 47 governors and seeks a declaration of vacancies in all the 47 county governors' offices, the petition is strictly speaking an election petition presented as a constitutional petition. The respondents therefore argues that this court lacks jurisdiction to entertain an election petition which under Article 87 of the Constitution, are to be determined under legislation to be enacted by Parliament, in this case, the Elections Act, that sets the timelines for the filing of such petitions. The 1st respondent also took issue with its joinder in these proceedings instead of 47 individuals governors whose election is the subject of challenge in this case.

21. On the issue of jurisdiction, the *locus classicus* is the celebrated case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion

that it is without jurisdiction.'

22. Having regard to the decision in the above cited case, I find that it is now trite law that the court must not entertain a matter where it finds that it lacks jurisdiction. In the instant case, I find that in view of the fact that this petition primarily challenges the election of all the 47 governors on grounds of their qualification and/or eligibility to contest as governors, this petition is, strictly speaking and as submitted by counsel for the respondents, an election petition which falls within the purview of an election court, in this case, the High Court, as envisaged under Article 87(2) of the Constitution which stipulates as follows:

23. On joinder of parties having found that the instant petition ought to have been filed before the High Court as an election petition, if goes without saying that the proper respondents in such a petition, besides the 2nd respondent herein, are and ought to be the respective individual 47 governors, whose election is the subject of the challenge.

24. I note the 1st respondent is been established under **Section 19 (1)** of the **Intergovernmental Relations Act** in the following terms; **“There is established a Council of Governors which shall consist of the governors of the forty-seven counties”**. **Section 20** then sets out the functions of the Council of the council of Governors as follows:

Functions of the Council

- (1) The Council shall provide a forum for—
- (a) consultation amongst county governments;
- (b) sharing of information on the performance of the counties in the execution of their functions with the objective of learning and promotion of best practice and where necessary, initiating preventive or corrective action;
- (c) considering matters of common interest to county governments;
- (d) dispute resolution between counties within the framework provided under this Act;
- (e) facilitating capacity building for governors;
- (f) receiving reports and monitoring the implementation of inter-county agreements on inter-county projects;
- (g) consideration of matters referred to the Council by a member of the public;
- (h) consideration of reports from other intergovernmental forums on matters affecting national and county interests or relating to the performance of counties; and
- (i) performing any other function as may be conferred on it by this Act or any other legislation or that it may consider necessary or appropriate.
- (2) The Council shall have powers to establish other intergovernmental forums including inter-city and municipality forums.
- (3) The Council may establish sectoral working groups or committees for the better carrying out of its functions.

25. Having regard to the clear functions of the 1st respondent as shown under the provisions of section 20 of the Intergovernmental Relations Act, I find that the nowhere in the said Act is it stated that the 1st respondent shall be liable to be sued as a party in an election petition challenging the election of any of its members and I therefore find that its inclusion in these proceedings was improper and misguided.

26. My above findings on the issues of jurisdiction and joinder of parties would have been sufficient to determine this petition but I am still minded to consider the issue of the interpretation of the Constitution in respect to the eligibility to contest for the position of the governor and whether Regulation 43(3) (i) of the Election (General) Regulation, 2012 is unconstitutional.

27. According to the petitioner, any candidate for the position of a county governor must first be a Member of County Assembly before he can qualify to contest for the position of county governor. To buttress his arguments on this point, the petitioner cited the provisions of Articles 180(2) 182(c), 193(1) and 193(2) (a) of the Constitution. The said Articles stipulate as follows:

Article 180(2)

“To be eligible for election as county governor, a person must be eligible for election as a member of the county assembly.”

Article 182(1) (c);

“The office of the county governor shall become vacant if the holder of the office;-

ceases to be eligible to be elected county governor under Article 80(2);
Article 193(1):-

1) Unless disqualified under clause (2), a person is eligible for election as a member of a county assembly if the person--

(a) is registered as a voter;

(b) satisfies any educational, moral and ethical requirements prescribed by this Constitution or an Act of Parliament; and

(c) is either--

(i) nominated by a political party; or
(ii) an independent candidate supported by at least five hundred registered voters in the ward concerned.

Article 193(2) (a);-

A person is disqualified from being elected a member of a county assembly if the person--

(a) is a State officer or other public officer, other than a member of the county assembly;

28. On interpretation of the Constitution I note that the Constitution itself, under Article 259(1), provides for the manner in which it ought to be interpreted. The said Article stipulates 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 the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance.

29. Article 10 of the Constitution, on the other hand, stipulates 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.

30. Various courts have also made pronouncements on the subject of the interpretation of the constitution and it is now trite that the provisions of the Constitution should be construed in a manner that harmonizes them and not bring them into conflict with each other. Some of the notable decisions on the interpretation of the Constitution are as follows:

31. The Constitutional Court of South Africa in the case of **S v Rens**, held that it was not to be assumed that provisions in the same constitution are contradictory and that the two provisions ought, if possible, to be construed in such a way as to harmonize with one another. The Supreme Court of Uganda has also held in **Paul Ssemogerere and Others vs. The Attorney General, Constitutional Appeal no. 1 of 2002 [2004] UGSC10** that It is a cardinal rule in constitutional interpretation that provisions of a constitution concerned with the same subject should, as much as possible, be construed as complementing, and not contradicting one another. The constitution must be read as an integrated and cohesive whole.

32. In **Ndyanabo vs. Attorney General [2001] 2 EA 485** the Tanzania Court of Appeal held that in interpreting the Constitution, the Court would be guided by the general principles that, (i) the Constitution was a living instrument with a soul and consciousness of its own, (ii) fundamental rights provisions had to be interpreted in a broad and liberal manner, (iii) there was a rebuttable presumption that legislation was

constitutional, (iv) the onus of rebutting the presumption rested on those who challenged that legislation's status save that, (v) where those whom supported a restriction on a fundamental right relied on a claw back or exclusion clause, the onus was on them to justify the restriction.

33. In **Kigula and Others vs. Attorney-General [2005] 1 EA 132** the Uganda Court of Appeal sitting as a Constitutional Court held that the principles of constitutional interpretation are as follows (1) that it is now widely accepted that the principles which govern the construction of statutes also apply to the interpretation of constitutional provisions and that the widest construction possible, in its context, should be given according to the ordinary meaning of the words used; (2) that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other; (3) that all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument; (3) that a Constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms are to be given a generous and purposive interpretation to realize the full benefit of the rights guaranteed; (4) that in determining constitutionality both purpose and the effect are relevant; and (5) that Article 126(1) of the Constitution of the Republic of Uganda enjoins Courts to exercise judicial power in conformity with law and with the values, norms and aspirations of the people. See also **Besigye and Others vs. The Attorney-General [2008] 1 EA 37** and **Foundation for Human Rights Initiatives vs. Attorney General HCCP NO. 20 of 2006 (CCU) [2008] 1 EA 120.**

34. Having regard to the dictum in the above cited cases and adopting a purposive approach to the interpretation of the above provisions of the Constitution relating to eligibility to be a candidate in the election as a county governor, I find that one cannot say that a person ought to be an Member of County Assembly before he can contest to be a county governor for the following reasons:

a) Firstly, and the most obvious reason is that the Constitution is very clear on the principle of separation of powers and the roles and functions of county governors as opposed to those of Members of County Assembly. While county governors perform the role of the executive at the county level, the Members of County Assembly are the legislative arm of the government at the county level and I find that logically, one cannot double as a Member of County Assembly and governor at the same time.

b) Secondly, I am of the humble view that if the makers of the Constitution intended that any candidate vying for the position of county governor must first be an Member of County Assembly, nothing would have been easier than for the same be specifically provided for in the Constitution.

c) Lastly, my understanding of the eligibility envisaged under Article 180(2) is eligibility to vie as a governor at the point that one seeks to be nominated to vie as a governor. The said eligibility criteria is, to my mind, a consideration only at the point of nomination to contest in the election as a county governor. If, for argument's sake, one was to consider the petitioner's argument that a person elected and sworn in as a governor must first be an MCA, then the critical question would be why a person would wish to be an MCA when he is already a county governor. My take is that the position taken and advanced by the petitioner in this case is misguided, self-defeating and contradictory because while on one hand, the petitioner claims that the offices of governors should fall vacant because upon being sworn in they become state officers and cannot therefore be eligible to be Member of County Assembly, in the same breath, he states that county governors (state officers) should at the same time be Member of County Assembly.

35. In my humble view, the petitioners argument that one ceases to be qualified to contest as a Member of County Assembly the moment they become governor because they become state officers is a twisted argument that reflects the petitioner's lack of understanding or misapprehension of the provisions of the constitution.

36. I further find that Articles of the Constitution should not be read in isolation but must be read in conjunction with all the other Articles of the Constitution and especially Chapter 11 of the Constitution on devolved governments.

37. I also find an interpretation of the constitution in the manner proposed by the petition would be untenable as it would lead to an absurdity. I am guided by the decision in the case of **Ekuru Aukot v Independent Electoral & Boundaries Commission & 3 others [2017] eKLR** wherein the court held as follows: -

"There are important principles which apply to the construction of statutes such as:- (a) presumption against absurdity" – meaning that a court should avoid a construction that produces an absurd result; (b) the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces "unworkable or impracticable" result; (c) presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an "anomaly" or otherwise produces an "irrational" or "illogical" result and (d) the presumption against artificial result – meaning that a court should find against a construction that produces "artificial" result and, lastly, (e) the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to "public interest," "economic", "social" and "political" or "otherwise."

38. On the constitutionality of Regulation 43(2)(i) of the Regulations, I find that it is trite law that there is a presumption of constitutionality of statutes. The impugned Regulation 43 is a piece of legislation enacted by the 2nd respondent pursuant to the provisions of Section 109 of the Elections Act which stipulates as follows;

The Commission may make regulations generally for the better carrying out of the purposes and provisions of this Act, and in particular, but without prejudice to the generality of the foregoing, may make regulations to—

- (a) prescribe the manner in which registers of voters shall be compiled and the manner in which they shall be revised;**
- (b) prescribe the procedure for registration and issuance of voters cards and provide for the progressive registration of Kenyan citizens living abroad prisoner;**

- (c) to provide for the regulation of the process by which parties nominate candidates for elections;
- (d) to provide for the manner of nomination, allocation and re-allocation of special seats and mechanisms for resolving disputes arising out of such nomination, allocation and re-allocation;
- (e) prescribe the procedure for making and determining claims to be registered and objections to registration;
- (f) authorise any registration officer to consider or determine any application, claim, objection or appeal, to summon any person to appear before them and give evidence on oath, and to administer an oath for that purpose and to order the production of any document relevant to any issue which the officer is required to consider and determine;
- (g) provide for the division of constituencies into units for the purpose of the registration of voters;
- (h) prescribe the conditions under which elections may be held in accordance with the provisions of the Constitution, this Act or any other written law relating to elections;
- (i) prescribe the amount of the deposit to be paid by or on behalf of candidates at all elections and the circumstances in which the deposit may be forfeited;
- (j) provide for the appointment of officers to preside at polling stations;
- (k) prescribe the facilities to be provided at polling stations and the persons who may be admitted to polling stations;
- (l) prescribe the place and manner in which votes may be cast and the construction and scaling of ballot boxes and provide for the issue of ballot papers to voters;
- (m) provide for the manner in which, and the person by whom any question as to the identity of any person claiming the right to vote shall be determined;
- (n) provide for the manner in which a voter who is not able to read or write may vote or be assisted in voting;
- (o) provide for the manner in which a voter with special needs including a person with a disability may vote or be assisted in voting;
- (p) prescribe the procedure to be followed in the counting of votes and the circumstances in which votes may be rejected by a returning officer as being invalid;
- (q) prescribe conditions for the use of private motor vehicles, vessels or buildings at elections;
- (r) prescribe the facilities to be provided during the electoral process and in particular, for voting by electronic machines and the persons entitled so to vote and the circumstances in which persons may so vote;
- (s) provide for the allocation by the Commission, in a just and equitable manner of the use of state owned radio and television broadcasting services during any election period;
- (t) prescribe the procedure to be adopted by the public in making representations for the alteration of electoral area boundaries;
- (u) prescribe the forms which may be used under this Act and the fees in respect of anything to be done under this Act;
- (v) prescribe the procedure for advance voting for special categories including patients admitted in hospital, pastoralists, armed forces, elections officers and other citizens of Kenya providing essential services;
- (w) prescribe the procedure for voting for citizens residing outside Kenya;
- (x) provide for complaints resolution mechanisms and for the manner of settlement of electoral disputes;
- (y) provide for the conduct of election observers, the media, monitors and evaluators and organisations carrying out civic and voter education;
- (z) provide with reasonable grounds for the postponement of elections;
- (aa) provide for mechanisms for carrying out effective voter education;
- (bb) provide for the mode of declaration of the result of an election;
- (cc) prescribe the manner of enforcing the Electoral Code of Conduct; or
- (dd) provide for the conduct of campaigns during a referendum or an election;
- (ee) provide for the financing of campaigns during a referendum or an election;
- (ff) prescribe anything which is required to be prescribed or is necessary or desirable for the better giving effect to this Act.

The power to make regulations conferred on the Commission under this Act shall be—

- (a) for the purpose and objective of giving effect to the Constitution and this Act;
- (b) limited to the nature and scope specifically stipulated in the Constitution and this Act; and
- (c) based on the general principles and standards contained in the Constitution and this Act.

The power to make regulations shall be exercised only after a draft of the proposed regulations has been approved by the National Assembly, at least four months preceding a general election:

Provided that this applies to the first general election under this Act.

The Commission shall publish in the Gazette, not later than sixty days prior to the date of a general election, the regulations approved by the National Assembly under subsection (3).

The Commission may make regulations generally for the better carrying out of the purposes and provisions of this Act, and in particular, but without prejudice to the generality of the foregoing, may make regulations to—

- (a) prescribe the manner in which registers of voters shall be compiled and the manner in which they shall be revised;
- (b) prescribe the procedure for registration and issuance of voters cards and provide for the progressive registration of Kenyan citizens living abroad prisoner;
- (c) to provide for the regulation of the process by which parties nominate candidates for elections;
- (d) to provide for the manner of nomination, allocation and re-allocation of special seats and mechanisms for resolving disputes arising out of such nomination, allocation and re-allocation;
- (e) prescribe the procedure for making and determining claims to be registered and objections to registration;
- (f) authorise any registration officer to consider or determine any application, claim, objection or appeal, to summon any person to appear before them and give evidence on oath, and to administer an oath for that purpose and to order the production of any document relevant to any issue which the officer is required to consider and determine;
- (g) provide for the division of constituencies into units for the purpose of the registration of voters;
- (h) prescribe the conditions under which elections may be held in accordance with the provisions of the Constitution, this Act or any other written law relating to elections;
- (i) prescribe the amount of the deposit to be paid by or on behalf of candidates at all elections and the circumstances in which the deposit may be forfeited;
- (j) provide for the appointment of officers to preside at polling stations;
- (k) prescribe the facilities to be provided at polling stations and the persons who may be admitted to polling stations;
- (l) prescribe the place and manner in which votes may be cast and the construction and scaling of ballot boxes and provide for the issue of ballot papers to voters;
- (m) provide for the manner in which, and the person by whom any question as to the identity of any person claiming the right to vote shall be determined;
- (n) provide for the manner in which a voter who is not able to read or write may vote or be assisted in voting;
- (o) provide for the manner in which a voter with special needs including a person with a disability may vote or be assisted in voting;
- (p) prescribe the procedure to be followed in the counting of votes and the circumstances in which votes may be rejected by a returning officer as being invalid;
- (q) prescribe conditions for the use of private motor vehicles, vessels or buildings at elections;
- (r) prescribe the facilities to be provided during the electoral process and in particular, for voting by electronic machines and the persons entitled so to vote and the circumstances in which persons may so vote;
- (s) provide for the allocation by the Commission, in a just and equitable manner of the use of state owned radio and television broadcasting services during any election period;
- (t) prescribe the procedure to be adopted by the public in making representations for the alteration of electoral area boundaries;

- (u) prescribe the forms which may be used under this Act and the fees in respect of anything to be done under this Act;
- (v) prescribe the procedure for advance voting for special categories including patients admitted in hospital, pastoralists, armed forces, elections officers and other citizens of Kenya providing essential services;
- (w) prescribe the procedure for voting for citizens residing outside Kenya;
- (x) provide for complaints resolution mechanisms and for the manner of settlement of electoral disputes;
- (y) provide for the conduct of election observers, the media, monitors and evaluators and organisations carrying out civic and voter education;
- (z) provide with reasonable grounds for the postponement of elections;
- (aa) provide for mechanisms for carrying out effective voter education;
- (bb) provide for the mode of declaration of the result of an election;
- (cc) prescribe the manner of enforcing the Electoral Code of Conduct; or
- (dd) provide for the conduct of campaigns during a referendum or an election;
- (ee) provide for the financing of campaigns during a referendum or an election;
- (ff) prescribe anything which is required to be prescribed or is necessary or desirable for the better giving effect to this Act.

The power to make regulations conferred on the Commission under this Act shall be—

- (a) for the purpose and objective of giving effect to the Constitution and this Act;
- (b) limited to the nature and scope specifically stipulated in the Constitution and this Act; and
- (c) based on the general principles and standards contained in the Constitution and this Act.

The power to make regulations shall be exercised only after a draft of the proposed regulations has been approved by the National Assembly, at least four months preceding a general election:

Provided that this applies to the first general election under this Act.

The Commission shall publish in the Gazette, not later than sixty days prior to the date of a general election, the regulations approved by the National Assembly under subsection (3).

39. The impugned regulation stipulates as follows:

“A returning officer shall hold a nomination paper invalid on any of the following grounds.. that the persons stands nominated as a candidate in another electoral area.”

40. Having found that a county governor is different and distinct from that of a Member of County Assembly, I find that there is nothing unconstitutional about the provisions of the impugned regulation which simply reinforces provisions of the constitution and the distinction between the 2 offices and further confines candidates in the election to only one electoral area.

41. My take is that declaring the impugned regulation unconstitutional as suggested by the petitioner would create a chaotic outcome where candidates vying in multiple electoral areas yet a person can only hold one elective position at any given time.

42. In conclusion and for the reasons that I have highlighted in this judgment, I find that the instant petition is unmerited and the order that commends itself to me is the order to dismiss it with costs to the respondents.

Dated, signed and delivered in open at Nairobi this 9th day of January 2019

W. A. OKWANY

JUDGE

In the presence of:

Petitioner present

Mr Juma for the 1st and 2nd respondents

