



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CONSTITUTIONAL PETITION NO. 22 OF 2018

IN THE MATTER OF INTERPRETATION OF THE AMENDMENT PROVISIONS OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF AMENDMENTS TO THE STRUCTURE OF THE NATIONAL AND DEVOLVED GOVERNMENTS

AND

IN THE MATTER OF THE DELEGATED SOVEREIGN POWER OF THE PEOPLE EXPRESSED THROUGH PARLIAMENT

AND

IN THE MATTER OF SOVEREIGN POWER OF THE PEOPLE EXPRESSED THROUGH A POPULAR REFERENDUM

AND

IN THE MATTER OF ARTICLES 255, 256, 257, 258 & 259 OF THE CONSTITUTION OF KENYA

TITUS ALILA.....1ST PETITIONER

JACKLINE OTIENO.....2ND PETITIONER

FRANCIS OGADA.....3RD PETITIONER

(Suing on their own behalf and as the Registered Officials of the SUMAWE YOUTH GROUP)

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION....2ND RESPONDENT

JUDGMENT

The Petition before me was premised on the provisions of **Articles 255, 256, 257, 258 and 259** of the **Constitution of Kenya**.

1. The Petitioners have indicated that they have come to court for and on behalf of the “*entire Kenyan population*”, who are already overburdened by harsh economic times.
2. It was the Petitioners’ view that Kenya was, in all likelihood, headed to a referendum as there appears to be a wide consensus by the political class that the structures of Government, as currently constituted, is too expensive to manage and that therefore, the burden needs to be reduced.
3. However, the Petitioners contend that the route of a referendum was “*long, tortuous and expensive.*” Therefore, if the said route could be avoided, as the Petitioners believe, the court should urge the relevant organs of the state to make use of the available alternative route, which would guarantee value for money for the people of Kenya.

4. The Petitioners submitted thus;

“The subject of this petition is the interpretation of Articles 255 and 256 of the Constitution in the light of the salient issues that have been raised by KENYANS so as to bring clarity on whether changes/reduction in size/offices of the county and national governments require respective amendments to the Constitution by way of a referendum or not.”

5. The Petitioners appear to be convinced that Kenyans require a reduction in the size or in the number of offices that should be found in both the County Governments and the National Government.

6. However, they believe that a distinction must be made between the amendments which must be effected through a referendum, and those that do not require a referendum.

7. According to the Petitioners, any issues touching upon proposed changes to “*the Structure of Government*” must go through a referendum.

8. The Petitioners urged the court to declare;

“..... that the question as to the composition of seats and offices in both the national and county government can be done by an amendment under Article 256 of the Constitution without the need of a referendum.”

Establishment of a Proper Legislative Framework for holding a Referendum

9. The Petitioners’ case is that there is a need for a proper legislative framework for holding a referendum and for a proper framing of referendum questions.

10. The Petitioners pointed out that in previous instances when a referendum has been conducted in Kenya, the people were presented with “*Non Separable Preferences*”, which led to a result that is not necessarily what the people want.

11. Therefore, it is the Petitioners’ position that the will of the people can only be appreciated if each Issue was voted upon separately.

12. It was submitted that;

“The respondents must initiate steps to avoid the risk of a potential referendum degeneration into a “collective fatal choice” which is not necessarily the ‘people’s choice’, which can best be attained through ‘issue by issue’ or ‘sequential voting’ thereby contravening the sovereign power of the people and the concept of democracy under Articles 1(1) and 10(2)(a) of the Constitution of Kenya.”

13. It was further asserted that the Respondents had contravened the legitimate expectation of the people of Kenya by failing to jumpstart the process of implementing the raft of recommendations in the “*Referendum Report*” which had been presented by the Constitution of Kenya Review Commission after the referendum conducted on 21st November 2005, about the Proposed New Constitution.

14. As a result of the alleged failure, the Petitioners submitted that;

“Kenya has no specific law on referendum and it is currently shallowly found in Sections 49 to 54 of the Elections Act No. 24 of 2011 (Rev. 2012), which is not substantive enough with a legal framework on how to effectively carry out referendum.”

15. The Petitioners recognize that pursuant to the **Elections Act**, the Independent Electoral & Boundaries Commission [**IEBC**] has been vested with wide powers which include the framing of the referendum question.

16. Nonetheless, the Petitioners hold the view that the said statute does not contain parameters on how the **IEBC** should go about their mandate on referendums.

17. The Petitioners compared the provisions in the **Elections Act** which govern Elections to the provisions which govern referendums.

18. In their view, there were numerous laws and regulations on how Elections are to be carried out, whilst there exist no substantive laws or regulations on referendums.

19. It was for that reason that the Petitioners urged the court to direct the Respondents to initiate the process to enact legislation to give a framework for the holding of constitutional referendums.

20. Secondly, the Petitioners called upon the court to stop the **IEBC** from holding a constitutional referendum until legislation is put in place for the conduct of referenda.

Costs

21. The Petitioners submitted that they are entitled to the costs of the Petition.
22. In their view, even though this be Public Interest Litigation, the Petitioners were compelled to move the court because the Attorney General had abdicated his role.
23. It is said that the Attorney General, as the Principal Legal Adviser of the Government, was constitutionally obliged to promote, protect and uphold the rule of law and to defend Public Interest, such as those that the Petitioners have now had to take up.
24. Meanwhile, as regards the **IEBC**, it has been said that because it was responsible for conducting or supervising referenda, the Commission ought not to have remained silent, thus compelling the Petitioners to take up a role which **IEBC** should have played.
25. I understand the Petitioners to be saying that because they carried out a task that ought to have been carried out by the Respondents, the court ought to order the Respondents to pay the costs of the Petition.
26. In answer to the Petition, both Respondents asked the court to dismiss it.
27. The 1st Respondent submitted that the Petition was seeking to challenge the validity of the Constitution. Therefore, as **Article 2(3) of the Constitution** expressly bars any person from challenging the Validity or Legality of the Constitution, I was asked to dismiss it.
28. Secondly, the 1st Respondent pointed out that the Constitution already contained provisions that set out the manner in which the said Constitution can be amended.
29. The court was told that it cannot grant the orders sought because by doing so the court would be raising questions about the criteria established by the people of Kenya, for amending the Constitution.
30. In any event, the 1st Respondent said that the Petitioners had failed to pinpoint any specific action that he was required to take but failed to take, or any specific action that he was required to refrain from taking but which he undertook.
31. Furthermore, the Petition is said to have failed to state in a precise, concise and clear manner how the provisions of Articles **255, 256** and **257** of the **Constitution** had been breached.
32. The failure to draft the Petition with precision was said to be prejudicial to the Respondents, since they were required to defend themselves against pleadings which did not disclose any clear controversy capable of judicial intervention.
33. Finally, the 1st Respondent submitted that the Petition was not ripe for judicial intervention as there was no tangible decision made by the Respondents, which could be deemed to have either prejudiced the Petitioners or to be a real threat of prejudice.
34. In effect, the 1st Respondent submitted that the Petition was premature as there had not arisen any justiciable controversies.
35. On its part, the 2nd Respondent reasoned that the Petition did not raise any profound questions about the application or the interpretation of the Constitution.
36. As far as the 2nd Respondent was concerned, there was absolutely no ambiguity in the provisions of the Constitution which the Petitioners have cited. Therefore, there was no need for the court to interpret such clear and unequivocal provisions.
37. Secondly, the **IEBC** submitted that it cannot be barred from conducting a referendum in Kenya, as the Constitution expressly gives it that mandate.
38. Finally, the Respondents asked the court to order the Petitioners to pay the costs of the Petition as the said Petition was said to be frivolous.
39. In determining the Petition, I note that the Petition is premised on what the Petitioners described as the likelihood of a referendum being conducted in Kenya. The said likelihood is said to be based upon a wide consensus by the political class, on the need to reduce the financial burden of a large structure of Government.
40. An example of the view of the said political class is to be found in the proposal of Hon. George Kariuki the Member of Parliament for Ndia Constituency, to reduce the Counties from 47 to 12.
41. Another example given by the Petitioners is the proposal by the Member of Parliament for West Mugirango, Hon. Vincent Mogaka, that the number of Ministries to be reduced from 22 to 12.
42. A third example is the proposal by Hon. Caleb Kositany, the Member of Parliament for Soy, for the scrapping of the Senate; the positions of Nominated Members of Parliament; and Members of County Assemblies.
43. As the Petitioners pointed out, the proposals of the Members of Parliament were all made in Parliament.

44. Pursuant to **Article 256 (1) (a)** of the **Constitution**, a Bill to amend the Constitution may be introduced in either House of Parliament.

45. Thus if any of the Members of Parliament had lodged Bills to amend the Constitution, they would have taken action in line with the Constitution, provided that the proposed amendments do not relate to matters specified in **Article 255 (1)** of the **Constitution**.

46. Pursuant to **Article 255 (1)**;

“A proposed amendment to this Constitution shall be enacted in accordance with Article 256 or 257, and approved in accordance with Clause (2) by a referendum, if the amendment relates to any of the following matters –

a. the supremacy of this Constitution;

b. the territory of Kenya;

c. the sovereignty of the people;

d. the national values and principles of governance mentioned in Article 10 (2) (a) to (d);

e. the Bill of Rights;

f. the term of the President;

g. the independence of the Judiciary and commissions and independent offices to which Chapter Fifteen applies;

h. the functions of Parliament;

i. the objects, principles and structure of devolved government; or

j. the provisions of this Chapter.”

47. To my mind, that provision is very clear, about the proposed amendments to the Constitution which must be approved by a referendum.

48. One such amendment is the objects, principles and structure of devolved government.

49. Thus, whether or not the route of a referendum was long, tortuous and expensive, the people of Kenya decided that in respect to the specified amendments, a referendum is compulsory.

50. The distinction between the amendments to the Constitution which may be made without a referendum and those that can only be made through a referendum has been made by the Constitution itself. Therefore, there is no interpretation is required in that respect.

51. In my understanding issues pertaining to the composition of “seats and offices” of the government are so intertwined with what constitutes the “structure” of the devolved government that they fall within the arm bit of **Articles 255 (1)** of the **Constitution**.

52. Therefore whether or not referenda are long, tortuous and expensive, the same must be held if a proposed amendment falls under **Article 255 (1)** of the **Constitution**.

53. Secondly, I find that the Constitution has already set up a Proper Legislative Framework for holding a referendum.

54. Pursuant to **Article 256 (5) (a)** of the **Constitution**, it is the Independent Electoral and Boundaries Commission which has the mandate to conduct a referendum for the approval of a proposed amendment that falls under **Article 255 (1)**.

55. And pursuant to **Article 257 (3)** of the **Constitution**, the promoters of a Popular Initiative, (signed by at least one Million registered voters), once again it is the **IEBC** which is mandated to undertake the steps necessary to conduct a referendum.

56. Furthermore, there are explicit provisions in the Elections Act which govern the conduct of a referendum in Kenya.

57. **Section 49** of the **Elections Act** gives to the **IEBC** the mandate to frame the question or questions to be determined through a referendum.

58. In the exercise of the said mandate it is definitely open to the **IEBC** to determine whether or not they would have a “non-separable preference”; or an “Issue by Issue” question; or “sequential voting.”

59. This court cannot purport to give to the **IEBC** directions on exactly how to carry out its responsibility in that respect.

60. If the court were to give generalized directions to the **IEBC**, when it had not been shown that the Commission had strayed from the path established by law, that would constitute a blatant interference by the Judiciary in the Constitutional mandate of an Independent Commission.
61. Meanwhile, I note that it may be logical to have a referendum which addresses one specific issue, rather than an omnibus question. That could result in the people of Kenya having a clear picture of the exact issue they were being called to vote upon.
62. Such a process would avoid a situation in which a voter was compelled to throw out the baby with the bath water, simply because the omnibus issue contained one or more objectionable matters, which had been lumped together with good amendments.
63. Nonetheless, it must be acknowledged that the process of conducting either Issue by Issue referenda or Sequential Voting would most probably be more expensive compared to instances where there was one composite question.
64. As the Petitioners were already bemoaning the large expense that the country has to go through in a referendum, I hold the view that it is the body tasked with formulating the structure of the referendum which is best suited to determine how best to go about their task.
65. If the Petitioners or any other person holds the view that there was a need to have either more detailed laws or more regulations to govern a referendum, it is open to them to lobby the legislative arm of government to do the needful.
66. The legislature, in its wisdom, has already enacted statutes to address the issue of a referendum, when it is required for the purposes of amending the Constitution.
67. It is not the function of the Judiciary to determine in general terms, whether or not the said statutes were inadequate or in-elegant.
68. In this case, I have found no reason that would have required the Attorney General to give advice, and in which he failed to provide such advice.
69. The Petitioners have failed to satisfy the court that there had been a Violation of the Constitution or a threatened violation of the Constitution.
70. If anything, the invitation by the Petitioners to this court, to stop the **IEBC** from conducting a referendum, is what might amount to a violation of the Constitution, if the court were to accede to the said invitation. I so find because if the Court stopped the **IEBC** from conducting a referendum, that would be tantamount to stopping them from conducting the very task that Kenyans had entrusted them with.
71. Whether or not there was a need to improve the quality of participation by Kenyans in the process of a referendum, is not a justiciable question. Kenyans have a freedom of expression.
72. They are entitled to express themselves directly or through their elected or other leaders.
73. The courts ought not to be drawn into determining how the people of Kenya should exercise their rights.
74. The State Organs to which Kenyans have delegated respective powers, must perform their functions in accordance with the Constitution. That is the explicit command provided for in **Article 1 (1)** of the **Constitution**.
75. Therefore, it is expected that the **IEBC** shall perform its functions in relation to the conduct of a referendum, in accordance with the Constitution. The Court cannot take away that mandate from them. Nor can the Court stop them from carrying out the said function.
76. And if the time comes when a referendum is to be conducted, **IEBC** shall derive guidance from the Constitution and the Elections Act.
77. The **IEBC** shall not seek the guidance of the court on how to do their job.
78. And the Court shall not interfere in that process unless it will be demonstrated that it was being done in a manner that violates the Constitution and the relevant statutes.
79. It is speculative to imagine that the **IEBC** was incapable of performing its functions in accordance with the Constitution.
80. This court rejects the invitation to given orders which are anticipatory in nature.
81. Accordingly, the Petition is rejected.
82. On the issue of costs, I note that the reliefs sought were of a public interest. Therefore, although the Petition was premature and without merit, I find no good reason to saddle the Petitioners with the costs of the said Petition. I so hold because it has not been shown that the Petitioners had some ulterior motives in instituting these proceedings.
83. Therefore, I order that each party will meet his costs.

DATED, SIGNED and DELIVERED at KISUMU This 16th day of September 2019

FRED A. OCHIENG

JUDGE