



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 179 OF 2017

IN THE MATTER OF ARTICLE 2, 22, 23, 36, 38, 159,165,258 & 259
OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ELECTIONS (AMMENDMENT) ACT, 2017

BETWEEN

MAENDELEO CHAP CHAP PARTY.....1ST PETITIONER

HELLEN SAMBILI.....2ND PETITIONER

CARNICIUS JACKSON MESOH.....3RD PETITIONER

– VERSUS –

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

Introduction

1. This petition challenges the constitutionality of Section 28 of the Elections Act, 2011, as amended by **Section 10 of the Election Laws (Amendment) Act, 2017**, restricting party hoping **one hundred and twenty (120) days** before a general election.

2. The 1st petitioner is a Political Party duly registered under the Political Parties Act. The 2nd petitioner is a sitting Member of the National Assembly for Mogotio constituency and currently a member of the 1st petitioner, while the 3rd petitioner is, said to be Member of the National Assembly, for Dagoretti North Constituency. Both intend to run for re-election under the sponsorship of the 1st petitioner.

The Petition

3. The facts of this petition are straight forward. The 2nd and the 3rd petitioners were members of **Jubilee Party**. They offered themselves for nomination as candidates for their respective constituencies in the forthcoming general election under **Jubilee Party**, but were unhappy with the conduct of the entire nomination exercise. They decamped to the 1st petitioner on whose ticket they intended to seek re-election. to the National Assembly.

4. According to the record, the 2nd and the 3rd petitioners resigned from **Jubilee Party on 27th April, 2017 and on** the same day joined the 1st petitioner as members. It has been stated that by virtue of **section 28** of the **Election Act**, as amended by **section 10** of the **Election laws (Amendment) Act, 2017**, the 2nd and the 3rd respondents, may not be able to stand for election under the sponsorship of the 1st petitioner because by the time they joined the 1st petitioner they were already outside the 120 days, and the impugned law could not allow them to “defect” to another Political Party. They say the amendment to section 28 is a violation of their freedom of association under **Article 36** and the right to participate in affairs of a Political Party of choice under **Article 38** of the constitution. They have therefore filed this petition seeking the following orders:–

i. A declaration that section 28 (1) (a) of the Elections Act, 2011 as amended by section 10 of the Elections (Amendment) Act, 2017 violates fundamental rights guaranteed under Articles 36 and 38 of the constitution of Kenya, 2010.

ii. A declaration that Section 28 (1) (a) of the Elections Act, 2011 as amended vide section 10 of the Elections (Amendment) Act, 2017 does not amount to reasonable and justifiable limitations to the employment of the fundamental rights and freedom under Articles 36 and 38 as envisaged under Article 24 of the constitution of Kenya, 2010.

iii. A declaration that Section 28 (1) (a) of the Elections Act, 2011 as amended vide Section 10 of the Elections (Amendment) Act, 2017 is inconsistent with the construction of the constitution of Kenya, 2010 as envisaged under Article 259 (1) of the constitution and therefore null and void.

iv. A declaration that Section 28 (1) (a) of the Elections Act, 2011 as amended vide Section 10 of the Elections (Amendment) Act, 2017 changing the window period within which an aspirant can resign from a party and join another from forty five (45) days to one hundred and twenty (120) days is unreasonable, unfair, prohibitive and a clog to the enjoyment of the rights guaranteed under Articles 36 and 38 of the constitution and to the promotion and advancement of fundamental rights and freedoms guaranteed by the constitution hence null and void.

v. A declaration that deadline for submissions of membership list set by the 1st Respondent pursuant to Section 28 (1) (a) of the Elections Act, 2011 following the amendments vide Section 10 of the Elections (Amendment) Act, 2017 is unreasonable and hence a violation to the petitioners’ rights and freedoms guaranteed under Articles 36, 38 and 47 of the constitution of Kenya, 2010.

vi. A declaration that the 2nd and the 3rd Petitioners are entitled to join the 1st Petitioner, participate in its affairs and seek election to the National Assembly as candidates holding the 1st Petitioner party ticket.

vii. The cost of the petition.

Response by 1st Respondent

5. The 1st respondent filed a replying affidavit by **Praxides Toroney**, director of legal affairs in the 1st respondent, sworn on 8th May, 2017. It was averred that the 1st respondent is responsible for regulating

the process by which political Parties nominate their candidates for election and has mandate to monitor political parties' compliance with electoral Laws, that the 1st respondent is simply enforcing legislation enacted by the National Assembly to ensure there is efficient preparation for elections, and that the impugned provisions were enacted by the National Assembly in which the 2nd and the 3rd Petitioners are members. The 1st respondent therefore averred that the impugned provision is constitutional and does not in any way infringe on the petitioners' right to political participation.

Response by 2nd Respondent

6. The 2nd respondent filed grounds of opposition dated 8th May, 2017 and filed on the same day. He stated that both the motion and petition are ***Res-judicata*** since a similar matter had been determined, being **petition No. 56 of 2017** which had challenged the same provision. The 2nd respondent further stated that the petitioners had not demonstrated that the impugned **section 28** as amended, had infringed on their freedom to belong to a Political Party of their choice, and participate in political activities under **Articles 36 and 38** of the constitution. It was also stated that, the aim of taming Party "*hoping*" through **section 28** as amended had foundation in **Article 103 (1) (e)** of the constitution hence it did not in any way violate the constitution.

Petitioners' Submissions

7. Mr. Nyamu, learned counsel for the petitioners, submitted at length both orally and by written submissions on the unconstitutionality of the impugned provision. Counsel reiterated what was contained in both in the petition and affidavits, arguing that the 2nd and 3rd petitioners, right to join a Political Party of their choice on which to run for a political seat had been violated by limiting the period within which they could resign from one political party and join another.

8. Mr. Nyamu submitted that, the 2nd and 3rd petitioners resigned from Jubilee Party on 27th April, 2017 when they were already late and joined the 1st petitioner which promised to allow them run on its ticket but they are in a dilemma given that **section 28 (1) (a)** prohibited movement from one party to another **one hundred and twenty (120) days** to the general elections, which they feel curtailed their right to change parties.

9. In a nutshell, Mr. Nyamu's submission was that the limitation violates **Articles 36 and 38** of the constitution and is therefore unreasonable and unjustifiable, and to that extent, it violated **Article 24** of the constitution. He asked the court to declare **section 28** of the **Elections Act, 2011** as amended by **Election Laws (Amendment) Act, 2017** unconstitutional, and extend time to allow the 2nd and 3rd petitioners present their documents and run on the 1st petitioner's ticket.

First Respondent's Submissions

10. **Mr. Gumbo**, learned Counsel for the 1st Respondent, Submitted that, the impugned Section came into effect in January 2017, and all along, the petitioners were aware of the existence of the provision, that a **Public Notice** was published notifying the general public including candidates, of the calendar of events leading up to the date of election 8th August, 2017, and the petitioners were fully aware of the calendar. Counsel submitted that any party wishing to challenge the calendar or the legislation had sufficient time to do so. According to counsel, although, the petitioners who were aware of the existence of the law and calendar, participated in the nomination process of **Jubilee Party**, only to leave on 27th April 2017 and join the 1st petitioner. Yet they could have taken the chance to stand as independent candidates.

11. Learned counsel submitted that the impugned provision is constitutional and does not in any way violate **Articles 36, 38 or 24** of the constitution. According to counsel, the limitation was justified and only limited the time when one could cross from one party to another, but not the right to change parties at all. Counsel contended that to the extent that the petition challenges the constitutionality of **section 28**, the same is **res-judicata**, since a decision has been made on the constitutionality of the impugned section

in Council of Governors v Attorney General & Another, petition number 56 of 2017.

Second Respondent's Submissions

12. **Mr. Ogosso**, learned counsel for the 2nd Respondent agreed with the 1st respondent's submissions, and reiterated that the petition is indeed *res-judicata* following the decision in the Council of Governors v Attorney General case(supra), since the issue in that petition was substantially the same to that in the present petition, that the respondents in that petition are the same, to this petition except that the petitioners are different. The petition also challenged the constitutionality of **section 28** of the **Elections Act** as amended, which is the same issue in the current petition.

13. In counsel's view, therefore, there is foreclosure hence the same issue cannot be re litigated in court. Counsel referred to a number of decisions on *res-judicata* to support his contention that indeed the petition is *res-judicata*.

14. On the constitutionality of **section 28**, Mr. Ogosso submitted that there was no doubt that the impugned section is constitutional, and did not in any way violate the petitioners' rights. According to counsel, **section 28** has to be read together with **Chapter 7** of the constitution as well as the **Political Parties Act**. He also argued that there was no violation to **Article 47** since the 1st respondent was enforcing provisions of the law.

Analysis and Determination

15. From the pleadings, submissions and authorities, there is only one issue for determination in this petition, that is; **whether section 28 (1) (a) of the Election Act, 2011, as amended by section 10 of the Election Laws (Amendment) Act, 2017 is unconstitutional.** Determining constitutionality of a provision or a statute requires interpreting the impugned Provision vis-à-vis the **Articles** of the constitutions alleged to be offended by the statutory provision and draw a conclusion on the constitutionality or otherwise of the impugned provision.

16. **Article 259(1)** of the constitution decrees that the constitution should be interpreted in a manner that *promotes its purposes, values and principles, advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights, permits the development of law and contributes to good governance(emphasis).*

17. In the case of Olum v The Attorney General {2000}EA, the Constitutional Court of Uganda dealt with the issue of constitutionality of a section of a Statute and stated that to examine the constitutionality of a section of a statute or Act of Parliament, the **court has to consider the purpose and the effect of the impugned statute or section thereof. If its purpose does infringe a right guaranteed by the constitution, the court has to go further and examine the effects of its implementation. If either its purpose or its implementation infringes a right guaranteed by the constitution, the impugned Statute or Section thereof shall be declared unconstitutional.**(Emphasis)

18. The same position was stated in the case of R V Big M. Drugmart Ltd {1986}, LRC by the constitutional court of Canada thus;

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

19. When confronted with the question of unconstitutionality of a statute or provision, the court has to lay the impugned legislation alongside the provision of the constitution said to be offended and determine

whether indeed the impugned provision is unconstitutional. This was stated in US Vs. Butter, 297 USI {1936}, that where an act of Congress is appropriately challenged as being unconstitutional, the judicial branch has only one duty; to lay the Article of the constitution involved beside the statute challenged and decide whether the latter squares with the former.

20. There is also a rebuttable presumption of constitutionality of a Statute. And party, who alleges that a Statute or Provision of a Statute is unconstitutional, has an obligation to prove that allegation. The presumption of legality is important because the legislature as representative of the people is taken to know the challenges faced by citizens they represent and therefore, the laws enacted are intended to solve those problems. This principle was well stated in the case of Hamdarada Nakhana Union of India Air (1960) 354, thus;

“In examining the constitutionality of a statute, it must be assumed that the legislature understands and appreciates the needs of the people and the laws it enacts are directed to problems which are made manifest by experience and, the elected representatives in a legislature and it enacts laws which they consider to be reasonable for purposes for which they were enacted, presumption is therefore in favour of the constitutionality. In order to sustain the presumption of constitutionality, the court may take into account matters of common knowledge, the history of the times and may assume every state or facts as existing at the time of legislation.

21. This principle has been applied locally in many cases notably, the case of Nairobi Metropolitan PSV Saccos Union Limited & 25 others vs County of Nairobi Government & 3 others [2013] eKLR. Like the principle of he who alleges must prove, the onus is always on the person challenging the constitutionality of a legislation to prove the alleged unconstitutionality.

22. The impugned **Section 28** provides;

1. “A political party that nominates a person for an election under this Act shall submit to the Commission a membership list of the party;

a. In the case of general election, at least one hundred and twenty days before the date of election; and

b. In the case of by-election, forty five days before the date of the by-election.”

23. After receiving the membership lists, the commission is required under **sub-section 2**, to publicize the lists as received from Political Parties. This provision was introduced by the Election Laws (Amendment) Act, 2017. Section 28 has undergone a couple of amendments. When the Elections Act, 2011 was enacted section 28 originally provided as follows;

“A Political Party that nominates a person to any election under this Act, shall submit to the commission a Party membership list of the party at least three months before the nomination of the candidate.”

24. This provision was subsequently amended by **Act No. 12 of 2012** to read:

“A Political Party that nominates a person for election under that Act, shall submit to the commission a Party membership list of the Party at least ninety days before the date of the general election.” (Emphasis).

25. It is therefore clear that prior to the impugned amendment, party lists were to be submitted to the 1st respondent within **ninety days (three months)** before the election whereas, previously, it was before nominations. However, the amendment made in 2012 provided that Party lists be submitted ninety days before the general election. The provision has now reduced the period from three months (Ninety days) to One Hundred and Twenty Days (Four months) before the date of the general election.

26. The petitioners' complaint is that the law as it now stands, has prevented them from changing parties “(Party hoping)” a popular trend in the country and the petitioners have therefore argued that the provision has infringed on their rights to political association under **Articles 36 and 38** of the constitution. The respondents have on their part contended, that the provision has not infringed on the petitioners' rights, and in their view, the provision is constitutional.

27. **Article 36** is on the freedom of association which includes *freedom to form, join and participate in the activities of an association, and not compelled a person to join an association*. **Sub Article 3** is to the effect that *a legislation may not unreasonably restrict registration of an association and registration of an association may not be cancelled without a fair hearing*.

28. Juxtaposing **section 28 (1) (a)** with **Article 36**, it is clear that the impugned section does not stop the petitioners from joining a Political Party. It has only limited the time when one cannot join another Political Party, during the critical period towards a general election or by-election.

29. **Article 38** which is on Political choices has also been cited with an allegation that the impugned section has violated the petitioners' political rights under this Article. **Article 38** provides that *every person has the right to form or participate in forming a Political Party, Participate in activities of a Political Party, the right to free, fair and regular elections based on universal suffrage and free expression of the will of elector*. The Article gives people the right to seek elective positions to any elective public body or office under the constitution, or political party in which he is a member.

30. It is also important to note, that **Article 38 (2)** provides that *citizens have a right to free, fair and regular elections* which can only be a product of planning and preparation thereby guarantee a democratic elections which is the hallmark of an open and democratic society.

31. The object and purpose of the impugned provision can be discerned from the preamble to the Act which states that it is *an Act of Parliament to give effect to Article 99 (1) (b) of the constitution, to amend the Elections Act, 2011... to provide for electoral processes and connected purposes*. The purpose of the legislation was to provide for an electoral process, or roadmap to the elections. That informs why the section provides that those party lists should be submitted at least one hundred and twenty (120) days before the date of election. **Article 99** is generally on qualifications to run for the position of Member of Parliament, which means the impugned section was intended to provide for electoral roadmap to elections in the country and streamline the electoral process which would also allow the 1st respondent deal with any issues arising from nominations by political parties.

32. The provisions being challenged, as can be seen from the petition and submissions by counsel for the petitioners, curtailed the petitioner's ability to hop from their former party to the 1st petitioner and run on its ticket. In fact, the 2nd and the 3rd petitioner were candid that they felt short changed in their former party and were seeking refuge in the 1st petitioner for a ticket to stand for election.

33. Party hoping is not allowed by the constitution. **Article 103 (1) (e)** prohibits party hoping after one has been elected through a political party or as an independent. The constitution requires people make choices, either to belong to Political Parties or remain independent. That is why Party hoping is a ground for losing one's position as a member of parliament. This was intended to bring order and discipline within political parties and allow democracy to flourish in those parties, section 28 without a doubt was intended to aid this.

34. The petitioners have argued that the limitation imposed by **section 28** is unreasonable and for that reason, it violates **Article 24** of the constitution. **Article 24** provides that a right in the Bill of Rights cannot be limited except by law, and even then, only to the extent that the limitation is *reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account the nature of the right or fundamental freedom, the importance of the proposed limitation, the nature and extent of limitation, the need to ensure that the enjoyment of rights and fundamental freedom by any individual does not prejudice the rights and fundamental freedoms of others, the relation between the limitation and its purpose and whether there are less restrictive means*

to achieve the purpose.

35. Section 28 has only limited the right to change parties one hundred and twenty (120) days to the general election. The respondents have argued and correctly in my view that this is a necessary limitation to allow for preparation of general elections. The limitation to change parties is not only in section 28 but also in Article 103 (1) (e) of the constitution. The limitation is reasonable because it allows both political parties and the 1st respondent complete nomination processes and meet the timeline set for elections. The importance of limitation and purpose cannot therefore be over emphasized. Citizens have a right and time to decide whether to join Political Parties and if so which ones or run as independents. These are rights granted by the constitution. However, they should be excised timely.

36. In the case of the 2nd and 3rd petitioners, it is clear from their pleadings that they were doubtful that there would be a democratic nomination process within their own party. They were to make a decision, either to stick to the party and abide by the nomination results or join another party before the closure of the window of opportunity or still stand as independents. They waited until the moment only for them to change parties knowing that the law did not allow.

37. I must also point out that Article 103 (1) (e) and section 28 are meant to instill discipline and a democratic political culture. People join parties because they believe and share their vision and ideology. A Political Party takes time to build its image and a sense of recognition. It is not possible that, a person should only join a political party for purposes of competing for an elective position without necessarily believing in the party's policies and ideals. That, in my respective view, cannot be said to be encouraging democracy in political parties.

38. **Article 259** is also clear **that the constitution be interpreted in a manner that contributes to good governance.** Good governance is not only in government but also in political parties and all organs and institutions. There cannot be good governance in a country if political parties are not themselves properly governed. And steps must be taken like those in section 28 to bring order within political parties. The 1st respondent has an obligation to know who is standing for election, in which political parties otherwise allowing party hoping till a few days to election date, will itself cause poor governance within the 1st respondent.

39. **Article 91** also binds Political Parties to democratic ideals and good governance where they conduct free, fair and regular elections, which should include free and fair nominations. Article 92 allowed **Parliament to enact legislation to regulate Political Parties and any other matters necessary for the management of Political Parties.** Parliament enacted the Political Parties Act and the Elections Act, including the impugned provision. These are all meant to regulate management of Political Parties at various stages. It must not also be lost that, **Article 88** of the constitution gives mandate to the 1st respondent to **conduct and supervise elections as prescribed in an Act of Parliament (Elections Act), to regulate the process by which parties nominate candidates for elections, and settlement of disputes, including those relating to or arising from nominations by political parties.** These are constitutional functions and for that reason, the limitation imposed by section 28 is reasonable and justifiable to the extent that it allows the 1st respondent undertake its constitutional mandate to the fullest extent including mandate under **Article 88 (4) (k) to monitor compliance by Political Parties of election laws enacted under Article 82 (1) (b) relating to nomination of candidates.**

40. Article 4 of the Constitution declares Kenya as a Sovereign Republic and a multi-party democratic state founded on national values and principles of governance. One of the national values is good governance, integrity transparency and accountability. This is the same value that is required of political parties under Article 91 of the Constitution to among others, abide by democratic principles of good governance, promote and practice democracy, respect human rights, and promote the objects of the constitution. Political parties are required to respect laws enacted under Article 82 and 92 that is the Political Parties Act and the Elections Act.

41. Kenya cannot be a democratic mult party state if political parties like the 1st petitioner and by

extension; members of political parties do not comply with laws meant to regulate preparation and conduct of free fair and democratic elections.

It is perhaps important to point out here that according to the record the 3rd petitioner had lodged an appeal to his former party's Appeals Tribunal on the same date 27th April 2017, disputing the Preliminary nomination results, but has not disclosed what the outcome of that appeal was. Having subjected himself to the internal dispute resolution mechanism of the party he should have waited for the outcome and follow the route through the Political Parties Disputes Tribunal to the High Court. Instead he used this petition as a way of evading the dispute resolution process to come to this court.

42. I do not find favour in the petitioners' argument that the law is unreasonable and unjustifiable simply because it sets timelines within which political parties should file nomination lists, and after which no one will be allowed to change parties. Such regulation is necessary if the 1st respondent is to carry out its mandate and deliver a credible election.

45. The impugned section was the subject of litigation in the case of **Council of Governors and another v The Attorney General and Another** (Supra). And I agree **Mativo J's** holding that a **law requiring political parties to file a list of party members within a set time frame to a general elections or a law requiring internal party nomination is necessary to the integrity of the electoral process, and** is not unconstitutional. I have not been persuaded therefore that there is good reason to differ from the holding in the above case on the necessity of the law and its constitutionality.

44. The court has also been asked to find that there was breach of Article 47 of the Constitutional. The answer to this complaint is that the 1st respondent was enforcing the law. It was not performing an administrative act to require a fair hearing. On the request that the court extends the period to enable the 2nd and 3rd petitioners present their documents; the answer again is simple; that the 1st respondent was not exercising a discretion which the court can interfere with. This is a legal requirement that applies to all political parties and citizens.

45. In conclusion, I do not find is merit in this petition. Political parties and their members must accept that our transformative constitution values institutional democracy and good governance. Election is not an event but a process and parliament enacted a law to guide that process. The 1st respondent must therefore be allowed to take full charge if its mandate and deliver to Kenyans a fair transparent and credible election as is required of it by the constitution and the law.

For the above reason, the petition is disallowed and dismissed with costs.

Dated, Signed and Delivered at Nairobi this 12th Day of May, 2017

E C MWITA

JUDGE