
**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 436 OF 2013**

**BETWEEN**

**POLITICAL PARTIES FORUM COALITION …1ST PETITIONER**

**MUUNGANO PARTY ……..2ND PETITIONER**

**KENYA NATIONAL CONGRESS …….3RD PETITIONER**

**JULIUS MWANGI MURIUKI ……4TH PETITIONER**

**AND**

**THE OFFICE OF THE**

**REGISTRAR OF POLITICAL PARTIES ……1ST RESPONDENT**

**THE INDEPENDENT ELECTORAL**

**AND BOUNDARIES COMMISSION ……2ND RESPONDENT**

**THE ATTORNEY GENERAL ……3RD RESPONDENT**

**AND**

**CENTRE FOR**

**MULTI-PARTY DEMOCRACY…..INTERESTED PARTIES**

**PARTY OF DEMOCRATIC UNITY**

**NEW FORD KENYA**

**ORANGE DEMOCRATIC PARTY**

**UNITED REPUBLICAN PARTY**

**THE NATIONAL ALLIANCE PARTY**

## JUDGMENT

### Introduction

1. This petitioner case raises an important issue in our constitutional democracy concerning the facilitation and promotion of the exercise of political rights through the public funding of political parties. The petitioners' case is that as small parties and coalitions of small parties, they have a right to be funded from the Political Parties Fund ("the Fund") established under **section 23** of the ***Political Parties Act, Act No. 11 of 2011***("the ***Act***") and that the funding formula adopted by the Act is unconstitutional.

2. Political parties are recognised under **Article 38** of the Constitution as an integral element of political rights. It provides as follows;

> *38. (1) Every citizen is free to make political choices, which includes the right—*
>
> *(a) to form, or participate in forming, a political party;*
>
> *(b) to participate in the activities of, or recruit members for, a political party; or*
>
> *(c) to campaign for a political party or cause.*
>
> *(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—*
>
> *(a) any elective public body or office established under this Constitution; or*
>
> *(b) any office of any political party of which the citizen is a member.*
>
> *(3) Every adult citizen has the right, without unreasonable restrictions—*
>
> *(a) to be registered as a voter;*
>
> *(b) to vote by secret ballot in any election or referendum; and*
>
> *(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.*

3. In view of the importance attached to political parties, **Article 91** of the Constitution provides for the organisation and essential elements of political parties. **Article 92** empowers Parliament to enact legislation for, inter alia, *"the establishment of a political parties fund."*

4. **Section 24** of the ***Act*** makes provision for sources of money for the Fund. It also sets a threshold for the amount of money to be appropriated for purposes of the Fund and it provides;

> ***24.*** *(1) The sources of the Fund are—*
>
> *(a) such funds not being less than zero point three per cent of the revenue collected by the national government as may be provided by Parliament; and*
>
> *(b) contributions and donations to the Fund from any other lawful source.*
>
> *(2) The balance of the Fund at the end of the financial year shall be retained for the purposes for which the Fund is established, subject to any law relating to public finance.* [Emphasis mine]

5. **Section 25** of the ***Act*** sets the formula for distribution of the Fund. It provides;

> ***25****. (1) The Fund shall be distributed as follows—*
>
> *(a) ninety five per cent of the Fund proportionately by reference to the total number of votes secured by each political party in the preceding general election; and*
>
> *(b) five percent for the administration expenses of the Fund.*
>
> *(2) Notwithstanding subsection (1), a political party shall not be entitled to receive funding from the Fund if—*
>
> *(a) the party does not secure at least five per cent of the total number of votes at the preceding general elections; or*
>
> *(b) more than two-thirds of its registered office bearers are of the same gender.*
>
> *(3) For purposes of subsection (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.*

6. According to the evidence before court, out of 58 registered political parties participating in the 4th March 2013 General Elections ("the General Elections") only three were eligible for funding under the formula provided in the ***Act***.

**The Petitioners' Case**

7. The 1st petitioner is a coalition of political parties registered on 4th December 2012 as a pre-election coalition comprising 10 political parties. The 2nd and 3rd petitioners are registered political parties while the 4th petitioner is an individual citizen and member of Mwangaza Party and former aspirant for Embakasi North Constituency National Assembly seat. He is also the secretary to the 1st petitioner.

8. After the General Elections, the 1st petitioner entered into a post-election coalition agreement with 6 additional parties under **section 10** of the ***Act*** which permits political parties to enter into a coalition before or after the election.The parties joining the coalition parties are Muungano Party, Democratic Party, Mazingira Greens Party, Mzalendo Party, Safina Party and National Vision Party.

9. The petitioner case is contained in the petition dated 30th August 2013. It is supported by the affidavit of Julius Mwangi Muriuki, the Secretary General of the 1st petitioner and the 4th petitioner, sworn on 30thAugust 2013 and a further affidavit sworn on 29th October 2013. The matters raised are principally matters of law and were urged on the petitioners' behalf by Mr Kanjama and supplemented by written submissions and authorities.

10. The petitioners contend that **section 25(2)*(a)*** of the *Act* is unconstitutional on the ground that it establishes discriminatory party funding. They submit that this provision has set an unreasonably high threshold of 5% of total votes cast thus denying smaller political parties equitable access to public resources and discriminating against them in favour of larger political parties thus undermining the tenets of democracy by limiting participation of the smaller parties.

11. The petitioners aver that after General Elections, only three parties reached the statutory threshold; The National Alliance (TNA) - 29.8%, Orange Democratic Movement (ODM) - 26.1% and the

United Republican Party (URP) - 9.4% amounting to 65.2% of all votes cast in the General Elections.The petitioners aver that as a result 35% of the Kenyan voters are effectively disenfranchised from having their votes count in funding of political parties. The petitioners argue that the existence of smaller parties cater for minorities and marginalised groups, as well as representing alternative political opinion within the social, economic and political spheres as such the threshold on funding is unconstitutional.

12. The petitioners further contend that since political party coalitions are recognised under the Constitution and **section 10** of the ***Act***, they ought to be treated as political parties for purposes of public funding. At a minimum, the petitioners' submit, political party coalitions are entitled to be treated as a unit for purposes of calculating the statutory threshold in order to benefit from the Fund. The petitioners therefore fault the Registrar of Political Parties ("Registrar") for failing to give them an opportunity to be eligible for funding on the basis of their joint contribution of votes cast during the election. They plead that they, *"[A]re confident that they can reach the threshold of 5%, or indeed any lower reasonable funding threshold, if treated as coalitions and given reasonable notice period for the purpose of entering into any additional post-election coalitions as provided in law where necessary."*The petitioners aver that they have been engaged in further discussions with other registered political parties that participated in the General Elections and are ready to enter into further post-election coalitions to achieve the joint and common political interests of the constituent parties so that they can have reasonable access to the Fund. The petitioners therefore accuse the Registrar of violating the Constitution by failing to provide adequate time for the smaller political parties to set up or join party coalitions for purposes of meeting the statutory threshold to qualify for public funds.

13. The petitioners assail the implementation of **section 24(1)(a)** of the ***Act*** which requires that no less than 0.3% of the projected revenue estimate shall be allocated to the Fund. They contend that the Cabinet Secretary in charge of Finance failed to make sufficient provision for the Fund in the 2013/2014 financial year. The petitioner's case is that the Fund should receive not less than 0.3% of the revenue collected by national government as may be provided by Parliament which creates an obligation on the Cabinet Secretary in charge of Finance to ensure that no budget estimate is presented to Parliament for which the Fund is less than 0.3% of the projected revenue estimate. According to the petitioners, since the Finance Cabinet Secretary projected the ordinary revenue of Kshs 961.3 billion, it follows that the Fund ought to have been allocated Kshs 2.88 billion for the 2013/2014 financial year which was not done and is therefore a violation of the law.

14. The petitioners' case against the Independent Electoral and Boundaries Commission ("IEBC") is that it has failed to promptly disclose and publish the full electoral results for all the six seats after the General Elections. Accordingly it has failed to provide verifiable results in accordance with its obligation under **Articles 81** and **88** of the constitution.

15. In their petition, the petitioners seek the following reliefs;

a. *A declaration that the Political Parties Act is unconstitutional null and void in section 25(2)(a) to the extent that it purports to establish a high and discriminatory threshold for political party funding, and is applied to deny about 35% of voters of contribution in determining allocation of the Political Parties Fund.Further and in particular:*

i. *A declaration that the section 25(2)(a) of the Political Parties Act is unconstitutional null and void to the extent that it has been or is intended to be applied only to individual political parties and/or only to pre-election coalitions contrary to the constitutional and statutory recognition of political party coalitions.*
ii. *A declaration that the 1st, 2nd and 3rd petitioners are entitled to fair access to the political parties fund and to a reasonable notice to scrutinise the full electoral results of the March 4th General Elections and to enter into any necessary post-election coalitions thereafter.*
iii. *A declaration that the 4th petitioner, and other Kenyan citizens, tax payers and voters, are entitled to have fair and reasonable distribution of the political party fund to all parties that obtained*

*votes in the March 4th General Elections*

iv. *A declaration that the 1st respondent is obliged to ensure that the political parties fund has an adequate share of the projected ordinary revenue of the Government, and not less than the statutory threshold of 0.3%*

b. *A conservatory Order restraining the respondents by themselves or through their agents or representatives, or any persons claiming through them, from disbursing any portion of the Political Parties Fund, without giving full, fair and reasonable notice to all political parties of the electoral results and enabling all parties a reasonable opportunity to enter into post-election coalitions so as to access the funding.*

c. *A conservatory order to stay the operation of section 25(2)(a) of the Political Parties Act.*

d. *An order directing the 2nd respondent to release and publish in full the electoral results of the March 4th General Elections, including for all six electoral contests therein.*

e. *That the costs of this petition be borne jointly and severally by the respondents.*

**1st Respondent's Case**

16. The Registrar, Lucy Ndungu, opposes the petition through an affidavit sworn on 24th September 2013. The thrust of her defence to the petition is that the Office of the Registrar of Political parties is a creation of statute and as such it must follow the stipulations of the ***Act***. The Registrar avers that under the ***Act,*** only political parties are recognised and that political party coalitions are not entitled to receive public funding. The Registrar therefore counters the petitioners' complaint that she failed to give parties notice to form *"eligible post-election coalitions to reach any fair funding threshold"* on the ground that such an obligation, constitutional or statutory, does not exist and all that is required from the political parties is to demonstrate that the requirements of the ***Act*** have been met before the money is disbursed to them.

17. Mr Imende, counsel acting on behalf of the Registrar, submitted that the nature and threshold of entities eligible for funding are legislative policy considerations enacted into law and to accede to the petitioners' pleas would amount to replacing the statute with the petitioners' preferred policy considerations.

18. The Registrar denied that there was any discrimination by citing the cases of ***John Harun Mwau v Independent Electoral and Boundaries Commission and Another*** **[2013]** ***e*** **KLR** and ***State of Kerala & Another v N.M. Thomas & Others*** **[1976] AIR 490, 1976 SCR (1790)** which support the principle that equality does not mean every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position and that equality does not connote absolute equality. Counsel also cited the case of ***Peter Njoroge Mwangi and 2 others v The Attorney General and another,*** **Nairobi Petition No. 73 of 2010** to support the proposition that the legislature is entitled to determine legislative policy through the statute it enacts hence the threshold for eligibility for public funding reflect a legislative policy which the court ought to defer to.

**2nd Respondent's Case**

19. The IEBC opposed the petition based on the Grounds of Opposition dated 26th September 2013 and deposition of Moses Kipkogei, its senior legal officer. The IEBC supports the submission of the Registrar.

20. IEBC's contends that the Court lacks jurisdiction to determine the matter as the petitioners are challenging the legislative authority of Parliament to enact legislation governing the establishment of the Fund and that the orders sought from this Court would violate the doctrine of separation of powers.

21. The IEBC denies that it has not released verifiable electoral results of the last general elections. It

states that it complied with its obligation by releasing the full results of the General Elections to the National Assembly and the Registrar. It avers that all citizens and political parties have access to these results as evidenced by the fact that the petitioner used the said results to calculate the cumulative tally of the results upon which they base their claim that they have met the 5% threshold set out in the ***Act***.

**Interested Parties' Case**

22. The interested parties are registered political parties who were invited to join these proceedings pursuant to the orders of the court. Naturally, the political parties that are beneficiaries of the Fund oppose the petition while the other parties support the petition. The Centre for Multi-Party Democracy (CMD) which is a non-governmental organisation, Party of Democratic Unity (PDU) and New Ford Kenya (NFK) support the petition.

23. CMD submits that **section 25(2)*(a)*** of the ***Act*** sets an'*unreasonably high threshold'* which is unfair and unjust as it denies smaller parties access to public resources thereby undermining democracy. It reiterates the submission that a coalition must be treated as political party for purposes of public funding. CMD therefore argues that the Registrar ought to have added together the total votes garnered by each member party of the pre and post-election coalition in order to determine eligibility for public funding.

24. NFK, a member of the Amani Coalition, supports the petition through the supporting affidavit of its Secretary General, Col. Benjamin Mwema sworn on 4th December 2013. It submits that **section 25(2)*(a)*** of the *Act* contradicts **Article 4(2)** of the Constitution which states that Kenya is a multi-party state. NFK argues that since the Fund draws from the exchequer, it would be unfair unjust and discriminatory to fund only three political parties at the cost of *'suffocating the rest of the political parties, some of them, the same tax payers belong to, as members.'* NFK submits that discrimination against other political parties is reflected in application of the funding formula under the ***Act*** which is a violation of the political rights of voters and the members of these parties.

25. PDU, through the deposition of its Chairman Isaiah Gichu Ndirangu sworn on 18th December 2013, is aggrieved by the statutory formula of disbursing the Fund as it creates a scenario whereby *'only the cream of political parties benefit from the fund.'* It contends that the formula creates a vicious cycle whereby bigger parties draw resources from the Exchequer and in return garner majority votes at the expense of the smaller parties. PDU questioned the fairness of denying smaller parties an opportunity to benefit from the Fund arguing that every party has at least 24,000 members and has complied with statutory provision in order to be registered.

26. URP and TNA are beneficiaries of the Fund and oppose the petition. URP relies on the affidavit of Mr Fred Muteti, its Secretary General, sworn on 10th December 2013 while Onyango Oloo, the Secretary General for TNA, deponed the affidavit of 11th December 2013 in opposition to the petition.URP and TNA submit that the decision to set the threshold for political party funding is a policy decision made by Parliament and the Executive. That the criteria for eligibility, formula and threshold for distribution of the Fund was arrived at after wide consultation with political parties and various actors and that it was informed by various policy considerations. They contend that a coalition of political parties is not an entity eligible for funding unless the law is amended to include such coalitions.

27. The ODM opposed the petition on the basis of the deposition by Mr Magerer Langat, the Secretary General, sworn on 9th December 2013. ODM denies that the impugned provision contravenes the Constitution noting that the section acts as a guide for the equitable and co-ordinated distribution of the Fund. It was emphatic that only political parties qualify for funding under the ***Act***. Moreover, it contended that **section 25(1)*(a)*** of the ***Act*** does not set an unreasonably high threshold since the law takes into account inclusiveness by ensuring that the qualifying parties exhibit a national character by obtaining votes across the elective divide and

within the length and breadth of the country.ODM supports the petitioners' case against the IEBC that it has failed in its obligation to produce verifiable results.

**Determination**

28. The preamble to the Constitution recognises the sovereign and inalienable right of the people of Kenya to determine the form of governance of their country and acknowledges the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. **Article 4(2)** secures the position of Kenya as a multi-party democratic State founded on the national values and principles of governance set out in **Article 10**.

29. The sovereignty of the people of Kenya is underwritten by political rights guaranteed under **Article 38**. The freedom to exercise political rights is one of the principles of the electoral system under **Article 81**. **Article 91** specifically provides for basic requirements of political parties. **Article 92** goes further to mandate Parliament to enact various laws on political parties. These laws provide the platform upon which political rights are exercised and realised. In ***Diana Kethi Kilonzo& Another v Independent Electoral & Boundaries Commission & 10 Others*** **Nairobi Petition No. 359 of 2013 [2013]*e*KLR** the Court noted,**"***[153] We recognize the new paradigm brought about by the Constitution. The role of the people of Kenya shows through every facet of its philosophical and jurisprudential life, and throughout its enforcement continuum through legislation. … **Article 38** grants every citizen freedom to make political choices including the right to participate in the affairs of a political party, and to campaign for a political party or cause. **Article 81** creates the fertile soil for functioning of the electoral system, including universal suffrage based on the aspiration for fair representation and equality of vote; and **Article 91** provides for political parties to, inter alia, respect the right of all persons to participate in the political process and to promote the objects and principles of the Constitution. [154]All these are not mere platitudes. In our view, the growth of democracy cannot any longer be stifled and must be promoted by dint of the constitutional imperatives recited above. <u>We think that the political process in Kenya can only be robust if political parties have opportunity to fully participate</u>."*[Emphasis mine]

30. Under our constitutional set up, political parties are expected to sponsor candidates for elections so that citizens can choose the candidates who present alternative policies for governance, political parties are also expected to nominate members of Parliament for special seats representing women, persons with disability, the youth, marginalized and minorities. In order to participate in the political process, political parties incur substantial expenses associated with establishment, maintenance and operation. In the current environment where we have high poverty levels and low income, political parties are expected to mobilise the kind of support from the people to ensure that Kenya remains, in reality, a multiparty state. Public funding in these circumstances becomes an important component of promoting, protecting and fulfilling the political rights of citizens in a multi-party democracy.

31. The fact that the majority of Kenyans lack the kind of income that would enable them donate generously to political parties means that political parties are often funded by wealthy and influential individuals and their proxies. The direct result of this is that democracy is often sold out to the highest bidder thus undermining the very core of democracy by engendering corruption and fealty to special interests. Public financing of political parties therefore seeks not only to even the playing field but also to limit reliance of political parties on a few financially well-endowed individuals. It also provides political parties with the incentive to reduce reliance on illegal sources of money.

32. But public financing of political parties does not mean that the Exchequer should write a blank cheque to all political parties. There is a need regulate the funding and in this respect, I would do no better that quote Gubbay CJ., in the case of ***United Parties v Minister of Justice, Legal and Parliamentary Affairs and Others*** **[1998] 1 LRC 614**, where he stated that, " *[R]egulation of*

*public funding for elections has been identified with the following five goals: (a) To ensure equality of opportunity in a liberal democracy characterized by inequalities in the distribution of wealth; (b) to make enough money available for competitive campaigns to occur; (c) to allow new entrants, while not encouraging frivolous candidates or propping up decaying political organizations; (d) to reduce the possibility for undue influence; and, (e) to prevent corruption. The formula adopted to allocate State funding to political parties would determine whether these goals would be achieved or not. Certain formulae would do no more than entrench and re-enforce the regime of the major political parties, and sideline their minor or new opponents."*

33. It is against this background that I now turn to consider the issues raised by the petitioners for determination.

***Constitutionality of section 25(2)(a) of the Act***

34. The petitioners have impugned the provisions of **section 25(2)*(a)*** of the ***Act*** which provides the threshold for eligibility of political parties for public funding on two grounds. They contend that the section discriminates against small parties in as far as it effectively excludes them from public funding. They further contend that the threshold for eligibility by parties, which excludes political party coalitions, is unreasonably high thereby excluding small parties as well as coalitions of small parties which would otherwise meet the statutory threshold for eligibility if coalitions are permitted for that purpose.

35. The basic principles applicable when determining the constitutionality of legislation are well settled. The Court proceeds on the premise that the laws enacted by Parliament are constitutional. The burden lies on the petitioner to prove that the law is unconstitutional. In the words of court in ***Pearlberg v Varty*** **[1972] 1 WLR534**, as cited in ***Re Application by Bahadur*** **[1986] LRC 545 (Const.);** *"I would only emphasise that one should not start by assuming that what Parliament has done in a lengthy process of legislation is unfair. One should rather assume that what has been done is fair until the contrary is shown…"* (See also ***Ndyanabo v Attorney General of*** **[2001] EA 495**).

36. In determining whether a legal provision is unconstitutional, the court will have regard to its purpose and effect. The test was summarised by the Supreme of Court of Uganda in ***Olum and Another v Attorney General*** **[2002] 2 EA 508, 518** as follows,"*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 its 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."* I would also add what Lenaola J., in ***Samuel G.Momanyi v Attorney General and Another,*** **Nairobi Petition No. 341 of 2011**, noted that, *"...what has to be ascertained is the true character of the enactment as a whole and to its objects, purpose and true intention and the scope and effect of its provisions..."*(See ***Hon. Chirau Ali Mwakwere v Robert M. Mabera & 4 Others,*** **Nairobi Petition No. 6 of 2012**, ***Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others,*** **Nairobi Petition No. 3 of 2011**).

37. So what is the intention of the legislature under **section 25(2)*(a)*** of the ***Act***? The section is clear, that a political party must obtain at least 5% of the total votes in order to qualify for public funding from the Fund. The implication of the threshold is that parties that cannot muster sufficient votes at the election to overcome the statutory baseline do not qualify for public funding. The petitioners therefore urge that small parties or those that fail to meet this threshold are subject to discrimination.

38. The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position. It does not connote equality regardless of the circumstances. In the case of ***FIDA-K & Others v Attorney***

***General & Others*** **Nairobi Petition No. 102 of 2011 [2011]*e*KLR** stated the following regarding equality and discrimination;"*The equal protection and non-discrimination principles are not abstract propositions. They are expressions of policy arising out of specific difficulties and historical injustices to be addressed so that specific goals and remedies are achieved. The Constitution does not require things and circumstances which are different in fact or in opinion to be treated in law as though they were the same. The question is whether the classification is scientifically perfect or logically complete. In answering that question it is important to understand that the law does all that is needed when it does all that it can, indicates a policy and applies it all within the lines in order to address a particular situation. It is also important to understand that the difference which would warrant a reasonable classification need not be great. What is required is that it must be real and substantial and must bear some just and reasonable relation to the object of the drafters."*

39. Thus, **Article 27** of the Constitution which provides for equality and prohibits discrimination on certain grounds does not prohibit differentiation or classification based on different requirements as long as the criteria for differentiation bear a rational relationship to a legitimate government purpose. Although the Court in ***FIDA-K & Others v Attorney General & Others*** **(Supra)** referred to a reasonable basis for differentiation, I think the proper test is one of rationality in the sense that all the court needs to be satisfied is that the object of differentiation bears a rational relationship to a legitimate government purpose compatible with the principles and values of the Constitution. Such a test maintains fidelity to the principle of separation of powers that is one of the pillars of the Constitution.

40. The Supreme Court in ***Re the Matter of the Interim Independent Electoral Commission*** **SC Constitutional Application No. 2 of 2011 [2011]eKLR** elucidated on the essence of separation of powers as follows, "*[53] Separation of powers is an integral principle in Kenya'sConstitution: for instance, Chapter 8 is devoted to the Legislature; Chapter 9 to the Executive; and Chapter 10, on the Judiciary…[54] The effect of the Constitution's detailed provision for the rule of law in the processes of governance, is that the legality of executive or administrative actions is to be determined by the Courts, which are independent of the Executive branch. The essence of separation of powers, in this context, is that the totality of governance powers is shared out among different organs of government, and that these organs play mutually countervailing roles. In this setup, it is to be recognized that none of the several governmental organs functions in splendid isolation."*Likewise in the case of ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*****,* Civil Appeal No. 290 of 2012 of 2012 [2013] *e*KLR**, the Court of Appeal stated that,"*[49] It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre commitment in our constitutional edifice. However, separation of powers does not only proscribe organs of government from interfering with the other's functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function. We therefore agree with the High Court's dicta in the petition the subject of this appeal that:"[Separation of powers] must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet, as the Respondents also concede, the Courts have an interpretive role including the last word in determining the constitutionality of all governmental actions..."* [Emphasis mine]

41. Thus where the Parliament is vested with authority to legislate, the Court will not interfere simply because it disagrees with result or that it could have chosen a different result. **Article 94** as read with **Article 92** of the Constitution vests Parliament with the mandate to enact legislation governing management and funding of political parties fund. As a result, Parliament has established certain criteria for eligibility of public funding under **section 25** of the ***Act***.

42. All the parties concede the need for establishing a threshold for public funding of political parties.

Whether it is 2%, 4%, 6.5% or any other percentage or even whether it is to be based on some other criterion such as actual seat representation as is the practice in some jurisdictions is really a matter within legislative competence. As long as the rationality test is satisfied, the Court will not intervene. However, if it shown that the threshold violates the Constitution then the Court has the supreme duty of intervening and providing relief where necessary. The South African Constitutional court in ***Pharmaceuticals Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others*** **2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC)** pointed out that rationality as a minimum requirement for the exercise of public power, *"does not mean that the courts can or should substitute their opinions as to what is appropriate, for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately."* In reciting this passage, the same court noted in ***United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening ; Institute for Democracy in South Africa and Another as Amici Curiae) (No 2)*** **(CCT23/02) [2002] ZACC 21; 2003 (1) SA 495; 2002 (11) BCLR 1179 that**, *"This applies also and possibly with greater force to the exercise by Parliament of the powers vested in it by the Constitution, including the power to amend the Constitution."*

43. Although none of the parties referred to it, my research disclosed the question raised in this matter was dealt with by the Supreme Court of Zimbabwe in the case of ***United Parties v Minister of Justice, Legal and Parliamentary Affairs and Others*** **(Supra)**. The applicant sought a declaration that **section 3** of the ***Political Parties (Finance) Act*** was unconstitutional. The provision had been enacted to provide for political party funding but whose effect was that only the ZANU(PF), the ruling party, was the only party that qualified for funding. The Court held that the provision was inconsistent with the Constitution as it violated the freedom of expression. Under the Act, the formula for financing was calculated on the basis that no registered political party with less than 15 elected members of Parliament out of the total 120 members would be entitled to state funding.The Court held that a very high threshold for receiving state funding makes it extremely unlikely that small but meaningful voices will be heard and that in a relatively non-affluent society where private funding is not available, it is virtually impossible for the other political parties to gain any real margin of success.

44. In deciding the case in favour of the applicants, the Court considered the effect of the legislation on the other parties. Gubbay CJ, writing for the Court, stated as follows, "*It seems to me legitimate to assess the measure of the threshold by taking account of the situation on the ground. The question toask is: What is the practical effect of this funding system upon political parties in Zimbabwe? The answer is clear. It is the provision of finance for the ZANU(PF) party alone. The last two general elections have demonstrated this; and the pattern is likely to continue. In the 1990 election, the political party known as Zimbabwe Unity Movement polled 17% of the total votes cast. Yet notwithstanding the number of votes, it did not qualify for any funding from the state ….. Any public funding regime that systematically excludes all but one or two political parties strongly suggests that the threshold is set too high. To my mind, public funding is a vital element of a sound democracy both as an egalitarian measure and as a means of curbing the dependency of political parties upon private interests, it should be offered in a manner respectful of pluralism and the possibility of political change. It is in this respect that s 3(3) fall short. Its very formula creates a threshold far higher, and less attainable, than those of any of the other countries to which reference has been made."*

45. The reasons for fixing the threshold are not difficult to find. Gubbay CJ., in ***United Parties v Minister of Justice, Legal and Parliamentary Affairs and Others*** **(Supra at 625c,d)** observed that, *"The justification for placing a reasonable limitation upon the payment of state funds to political parties admits no controversy. Its purpose is understandable. It is to encourage serious political parties or candidates to contest an election and thereby strive to obtain representation in*

*Parliament. Yet, on the other hand, it is to discourage inability to attract an important following– to command a significant proportion of votes cast. Put differently, the aim is to inhibit the proliferation of trifling parties; to prevent them from participating in the election simply in order to secure public moneys."*

46. Some parties will satisfy the requirements of registration on the date of registration then wither away for lack of public support hence the need for the political party to prove that it has a level of public support at the election. Further, viable political parties worthy of public financing must prove themselves at the elections as a means of ascertaining whether or not they should be funded from the public purse. The State has an interest in discouraging the splintering of political parties and funding hopeless and unaccountable shell parties whose existence is merely to benefit certain individuals from public funding. All these reasons are legitimate reasons for insisting on eligibility requirement for political parties to benefit from the Fund. The 1st petitioner's argument as depicted at paragraph 12 above that given more time, it would obtain the threshold by engagement in post election coalition agreements with more political parties only goes to buttress this point. As a matter of fact, a closer look at the Constitution reveals that **Articles 90, 97** and **98** provide for the nomination persons to Parliament and the County Assemblies to represent gender and special interests on the basis of the proportion of votes received by political parties. It does not requires all political parties to nominate representatives.

47. The case of ***United Parties v Minister of Justice, Legal and Parliamentary Affairs and Others* (Supra)** that I have cited is distinguishable on several grounds. Firstly, the threshold in Zimbabwe was based on the number of party members elected to the legislature. Secondly, the effect of the legislation was to ensure that only the ruling party benefited exclusively from State funding. In Kenya, a different situation obtains. The 2013 General Elections Results per Party list prepared by the Registrar showing the proposed distribution of the Fund for the 2013/2014 financial year shows that only three parties, TNA, ODM and URP, garnered over 5% of the total votes, 10 parties garnered between 1% and 5% and the rest of 45 parties garnered between 0.01% and 0.9%. What is clear is that there is large number of small parties with a very small percentage of votes. On the other hand, none of the three top parties can be said to be out rightly dominant to the extent that they would be a threat to multi-party democracy. In my view, the effect of the statutory threshold would not result in undermining multi-party democracy. In light of these facts, I hold that the threshold for eligibility of public funding based on the percentage of total votes received is not unreasonable and on the contrary, it serves a legitimate purpose.

48. I therefore reject the petitioners' argument that the result of the formula adopted for funding political parties effectively disenfranchises 35% of the voters. I think this is gilding the lily. Funding of political parties is not the sole means of promoting democracy but one of the many mechanisms provided by the law. The Constitution does not require Parliament to provide funding for all political parties and the adoption of a reasonable threshold by Parliament, that meets constitutional muster, is aimed at promoting the franchise rather than diminishing it.

***Comparative aspects of political party funding***

49. As the petitioners have pointed out in their submissions, public funding of political parties is not unique to Kenya.The modalities of public funding to political parties differ from country to country with the common denominator being that some form of criteria is devised to govern its allocation based mainly on party representation or popularity.

50. In South Africa for instance, **section 236** of the Constitution provides: *"To enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis."* The ***Public Funding of Represented Political Parties Act 1997(Act 103 of 1997)*** establishes the Represented Political Parties' Fund. According to the Act, each political party is entitled to be allocated moneys from the Fund for any financial year that it is represented in the National Assembly, Provincial legislatures or both in a particular financial year. The distribution of the funds is based

on the principles of proportionality and equity. Account is taken of the relation that the number of such a party's representatives in the National Assembly bears to the membership of the National Assembly, Provincial legislature or both. Allocation is based on both a fixed and weighted threshold for a minimum allocation to each of the political parties represented in the National Assembly, Provincial Legislatures or both. A percentage of 90% of financial year allocation is paid in proportion to each party's aggregate seat representation in the sum of the seats of the National Assembly and Provincial legislatures with the remaining 10% being divided among the provinces in proportionate to the number of seats in each province and the provincial allocations are divided equally among the parties in each legislature. The allocation of public funds is therefore pegged on actual representation in the legislature, national and provincial.

51. In the United Kingdom, the ***Political Parties, Elections and Referendums Act 2000*** provides for funding of political parties through a "policy development grant" which is defined under the Act as '*a grant to a represented registered party to assist the party with the development of policies for inclusion in any manifesto…'* About £2 million is made available by the government to political parties who are active in the United Kingdom, European and Scottish parliaments, national assemblies in Wales and Northern Ireland and local governments. To qualify for the grant, parties must have at least two sitting MPs in the House of Commons. In practice, parties receive some certain amount of money for each seat won along with an additional amount for every 200 votes received.

52. In Australia, preferential voting system is used at the federal level. Citizens rank their first, second, third and fourth choices and candidates who receive more than four per cent of the formal first preference votes are eligible for the subsidies. Payment is based on the percentage of votes received and, much like Canada, determined by multiplying the number of votes received by a pre-determined dollar figure. A similar practice obtains in Germany where party financing eligibility is based on popular vote in national and European elections.

53. What emerges from other jurisdictions is that differentiation of political parties is not an uncommon feature in allocation of public financing and is largely pegged on popularity of votes or the extent of actual representation. The approach adopted by Kenya is not outside the mainstream of international consensus on the issue of political party funding.

***Political Party Coalitions***

54. Mr Kanjama, counsel representing the petitioners, submitted that the Registrar ought to consider political party coalitions as political parties for purposes of distributing the Fund. He submitted that coalitions are recognised by **Article 108** of the Constitution as read with **section 10** of the ***Act*** as legitimate entities. Counsel buttressed this argument by pointing to **paragraph 3(o)** of the **Third Schedule** to the ***Act*** that provides for basic requirements for coalition agreements which provision contemplates funding of the coalition parties.

55. Although I find this submission attractive, if accepted, it is one that would violence to the words of the ***Act***. Parliament is given the authority to prescribe legislation for political parties. The entity that is recognised for that purpose is the political party which is registered and regulated in accordance with the ***Act.***It is therefore not open for the Court to re-write the ***Act*** to define a political party to include coalition where there is no ambiguity. A coalition as defined by ***Act*** is, "*alliance of two or more political parties formed for the purpose of pursuing a common goal and is governed by a written agreement deposited with the Registrar."* The Act on the other hand points to the meaning of a political party as that provided under **Article 260** of the Constitution, which defines a political party to mean, "*an association contemplated in Part 3 of Chapter Seven."* The Part 3 is one that deals with legislation and basic requirements of political parties. I reckon that if Parliament intended that coalitions be eligible for public funding, it would easily and expressly stated as much.

56. It is for this reason that the Registrar cannot be faulted for not inviting political party coalitions to

demonstrate their eligibility for the public funding. She is required to comply with the law as it is written. I therefore dismiss the petitioners'claims against the Registrar.

***Finding and Conclusion***

57. I therefore find and hold that **section 25(2)*(a)*** of the ***Political Parties Act*** is neither discriminatory nor unconstitutional in either its purpose or effect.

58. The petitioners expressed concern that the threshold adopted to fund political parties would exclude minorities and the marginalized from participation in the political process. Under **Article 91** of the Constitution all political parties are obliged to promote the objects and principles of the Constitution which include promoting and protecting the interests of women, the youth, persons with disabilities, minorities and the marginalised hence political party funding is not the only and exclusive means of promoting these groups. The ***First Schedule*** to ***the Act*** under the banner, Code of Conduct for political parties also serves to underline these constitutional values and principles.

59. Mr Kanjama submitted that the Court should adopt a sceptical approach towards considering the legislation passed by Parliament to regulate and fund political parties as such legislation passed by legislators on political party funding is in self-interest. Counsel referred to dicta in ***Commission for Implementation of the Constitution v Attorney General & Another,*** **Civil Appeal No 351 of 2012 (Unreported)** in which the Court of Appeal highlighted the need for an inclusive policy to enshrining political rights given the historical injustices. The appellate court observed that, *"...the rationale for special seats is to open up political space for the entry and participation of persons, groups and categories of people who, due to various disadvantages and vulnerabilities, have historically been unable or incapable of generally and effectively finding their way through a strictly competitive methodology and have thus been relegated to the peripheries of the political playground."*

60. In my view, the issue before the Court was what constituted special interests and the Court rightly pointed out that in line with specific provisions of the Constitution, the legislature failed to appreciate the meaning of special interests when enacting the ***Elections Act, 2011*** by including persons other than those who were unable to participate in the political process through historical marginalisation in the definition of special interests. In fact, the conclusion reached by Court in that decision negates the petitioner's case that special interests will be excluded from participation in the political sphere by mere application of the statutory threshold under the ***Act***. In this case the issue is whether the legislature has exercised its mandate in regulating political parties and making provision for the Political Parties Fund. Even if one takes a sceptical view of what Parliament can do, the fact remains that the mandate under **Article 92** is reposed in Parliament and the duty of the Court is to exercise deference to legislative choices as long as these do not violate the Constitution.

61. Although I have expressed the view that the provisions of the ***Political Parties Act*** are not unconstitutional, I think it is still open to Parliament to review the criteria and formula for funding political parties including coalitions of political parties in order to benefit more political parties.

**<u>Allocation of Political Parties Fund in Budget</u>**

62. The petitioner seek a declaration that Registrar is obliged to ensure that the Fund has an adequate share of the projected ordinary revenue of the Government and not less than the statutory threshold of 0.3%. The petitioners argue that the amount allocated to the Fund for the 2013/2014 budget was below the 0.3% of the revenue collected by the national government as provided under **section 24(1)*(a)*** of the ***Act***. The petitioners' contend that out of the projected government revenue of Kshs 961.3 billion, the Fund allocation ought to have been set at approximately Kshs 2.88 billion.

63. Mr Kaumba, counsel for the Attorney General, submitted **section 24(1)*(a)*** of the ***Act*** was a mere

guideline and the Parliament could appropriate any sum by enacting the relevant Appropriation Act which varies the amount set out under the ***Act***. The petitioners, on the other hand, argue that Act provides a floor for the minimum funding of the Fund.

64. In my view, it is not necessary to deal with this issue for two reasons. First, the evidence upon which to base the decision is insufficient. The depositions filed on the petitioner's behalf did not contain or refer to the ***Appropriation Act*** for the year 2013/2014 nor did the parties submit on it. While I am entitled to take judicial notice of the state of legislation and the legislative process under **section 60** of the ***Evidence Act (Chapter 80 of the Laws of Kenya***, making a far reaching decision on whether the legislature has complied with the law in the absence of a material basis would not be in the interests of justice.

65. The second reason is that the political parties who are beneficiaries of the Fund have not complained that there has been inadequate provision or that the provision so far made does not comply with the dictates of the law. I also note that the parties that benefit from the Fund are represented in Parliament and are part of the decision regarding appropriation for the Fund. Any finding in this respect is therefore premature and cannot be made in the absence of a real dispute.

**Failure to publish verifiable election results**

66. The final issue for determination concerns the petitioners' contention that the IEBC failed to publish verifiable results hence it was difficult to determine the election results. The petitioners seek an order that the 1EBC be directed to release and publish full electoral results of the General Elections including for all six contests therein.

67. **Article 81** of the Constitution provides that one of the principles of the electoral system is that the election must be free and fair. This imposes on the IEBC the obligation to conduct the election in a transparent, accurate and accountable manner. **Article 86** provides that at every election the IEBC shall ensure that whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent.

68. These provisions are given effect by the ***Elections Act, 2011*** and the regulations made thereunder which include the ***Elections (General) Regulations, 2012***. The manner in which the elections are carried out and the results collated, tallied, announced and declared is clearly provided for in law. Once the results are declared by the IEBC they are the valid results for the elections unless challenged in the manner provided for by law.These are the only results contemplated in law and are the only results available.

69. In paragraph 31 of the petition, the petitioners aver that the IEBC has produced non-verifiable results for the General Elections. I find the demand for verifiable results lacks a legal basis as there can be no other results other than those declared by the respective returning officers in accordance with the law. Furthermore, this court cannot enter into an inquiry whether those results are indeed verifiable as the opportunity provided for such an inquiry has long passed.

70. However, I believe that the results as declared are available to the petitioners and should they wish to have the same they have the right to demand the same as it is their right under **Article 35(1)** of the Constitution hence my order of 4th December 2013 in which I directed the IEBC to file an affidavit verifying the results of the elections within 7 days.

71. In my view therefore, the petitioners are entitled to exercise the right to seek information from the IEBC regarding the declared election results under **Article 35(1)** of the Constitution.I therefore decline to grant the declaration sought against the IEBC.

**Disposition**

72. Having considered the petitioners' case, I find as follows;

a. **Section 25(2)*(a)*** of the ***Political Parties Act*** does not violate the Constitution.
b. In the absence of a real dispute I decline to make a finding as to whether Parliament has appropriated the amount necessary to comply with **section 24(1)*(a)*** of the ***Political Parties Act***.
c. I decline to order the IEBC to release and publish the election results of the 4th March 2014 General Elections.

73. As this matter is filed in public interest there shall be no order as to costs.

74. Consequently the final orders are that the petition be and is hereby dismissed with no order as to costs.

75. I thank counsel for their erudite submissions and I apologise if I have not referred to each and every argument and authority cited.

**DATED** and **DELIVERED** at **NAIROBI** this **3rd** day of **February 2014**

**D.S. MAJANJA**

**JUDGE**

Mr Kanjama instructed by Muma and Kanjama Advocates for the petitioners.

Mr Imende instructed by Mohammed Muigai Advocates for the 1st respondent.

Mr Muhoro instructed by Kimani Muhoro and Company Advocates for the 2nd respondent.

Mr Kaumba, Litigation Counsel, instructed by the State Law Office for the 3rd respondent.

S. Musalia Mwenesi Advocates for the Centre for Multiparty Democracy (CMD).

Mr Omboga instructed by Omboga and Company Advocates for the United Republican Party (URP) and The National Alliance (TNA).

Mr Makori instructed by S O Makori and Associates for the Orange Democratic Movement (ODM)

Mr Ongoto instructed by C. M. Ongoto and Company Advocates for the Party of Democratic Unity (PDU)

Mr Biketi instructed by Wamalwa, Abdi and Company Advocates for the New Ford Kenya Party.