



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 327 & 328 of 2012

EVANS MISATI JAMES.....PETITIONER

AND

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

ATTORNEY GENERAL.....2ND RESPONDENT

CONSOLIDATED WITH PETITION NO. 328 OF 2012

BETWEEN

HON JOHN HARUN MWAU.....1ST PETITIONER

EVANS MWANIA NYAMASYO.....2ND PETITIONER

MUTUA MWENDWA.....3RD PETITIONER

PERPETUAL MUTHINA MUTINDA.....4TH PETITIONER

MAKAU KIOKO.....5TH PETITIONER

KATHAMBONI SEC. SCHOOL.....6TH PETITIONER

KITHINGIISYO PRIMARY SCHOOL.....7TH PETITIONER

KYOME PRIMARY SCHOOL.....8TH PETITIONER

AND

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

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

THE DISTRICT COMMISSIONER MUKAA DISTRICT.....3RD RESPONDENT

JUDGMENT

1. In his Madaraka day speech in 1963, the founding father of the Nation, Mzee Jomo Kenyatta said, “As we participate in pomp and circumstance and as we make merry at this time, remember that we are relaxing before the toil is to come. We must work harder to fight our enemies; Ignorance, sickness and poverty. Therefore I give you the call Harambee. Let us work together for our country.” And thus was born our national motto.

2. These are two petitions deal with the issue of “*harambee*” within the context of our electoral process.

3. Both petitions concern the interpretation and constitutionality of **section 26** of the *Elections Act, 2011(Act No. 24 of 2011)* (“**section 26**”)which provides as follows;

26 (1) A person who directly or indirectly participates in any manner in fundraising or harambee within eight months preceding a general election or during an election period, in any other case, shall be disqualified from contesting in the election held during that election year or election period.

(2) Subsection (1) shall not apply to a fundraising for a person contesting an election under this Act or to a fundraising for a political party.

4. Under **section 2** of the Act, “*harambee*” means the public collection of monies or other property in aid or support of a cause or project.’

Petition No. 327 of 2012

5. The petitioner is a citizen and a member of the civil society who claims that **section 26** is a breach of **Articles 27** and **43** of the Constitution. In the petition dated 30th July 2012, the petitioner basically seeks this court’s declaration that **section 26** is unconstitutional.

6. The crux of this petition is that **section 26** is discriminatory as it allows persons aspiring for elective posts to participate in harambees to assist themselves and their political parties. The petitioner describes this provision as a self-serving piece of legislation that allows politicians to conduct harambees for themselves while denying deserving ordinary citizens the participation of their leaders in development projects such as assisting the poor and the sick, orphans and other marginalised members of the society. That the inclusion of **section 26** is meant to allow the political class to collect money through harambee for their own benefit which is in itself discriminatory and contrary to the provisions of **Article 27**.

7. The petitioner submits that the spirit of harambee has developed into a custom in Kenya and that the philosophy of harambee has always been a way of life of Kenyans as it envisaged social development objectives entailed at the promotion and implementation programmes aimed at enhancing the quality of life of all Kenyans. The petitioner’s case that the *harambee* is a cultural way of life in Kenya and cannot be subjected to legislation. That it is a community based self-help mechanism meant to supplement the Government and public efforts in achieving Economic, Social and Cultural rights envisaged and protected under **Articles 43** and **44**.

8. It is the petitioner’s argument that the banning of harambees is unnecessary as the mischief intended to be cured can be dealt with by the election offences stipulated under the *Elections Act*. The petitioner contends that the **section 26** is unconstitutional in so far as it differentiates the political class from ordinary Kenyans. Thus, the petitioners argue, there is no justification in differentiating between a Kenyan raising money for any cause or any other Kenyan soliciting money for politics.

9. In his supporting affidavit, the petitioner depones that he has personally been a beneficiary of the public collection of money in education and has participated in many instances in the public collection of money in aid or support of various causes or projects. That through harambee various causes or projects including collection of money in aid of orphans, school fees, school development, medical expenses, funerals, water projects, electricity supply, ward projects, health facilities, construction of public facilities and others.

10. The petitioner maintains that the need for engaging in the aforesaid projects is not limited to any specific period and has never been connected to elections or limited to the participation of politicians or aspiring politicians but has been a spirit in Kenya since its coining as harambee by the founding father of the Nation, Mzee Jomo Kenyatta.

11. Mr Mogeni, counsel for the petitioner, contended that harambee is a purely voluntary process, one of a willing giver and taker through which national building has been achieved and has proved beneficial to individuals. Counsel contended that the banning of harambees was discriminatory and unnecessary and that the legislation undermined the social economic and cultural rights as enshrined under **Articles 43 and 44**.

12. According to the petitioner, harambee is based on four major principles. First, the bottom up development strategy where the people at the community and grassroots level participate actively in the planning of the local development projects. Second, participation is guided by principles of collective good rather than individual gain where the end product benefits the people rather than the individual. Third, the choice of the project is guided by the felt needs of the majority instead of leaving the task to the Government and other change agents whose priorities in terms of project selection may not be the choice of the people, the ultimate beneficiaries. Fourth, the project implementation is supposed to maximise the utilization of the local resources such as labour, funds and materials which would otherwise have remained immobilised or expensive.

13. It is the petitioner's argument that the fund-raising is intended to target all the leaders in society who become the leading guide to the success of the projects. That for the success of the harambee projects, it is the more affluent members of the society who will mobilize the collection of funds. That through the various forms of harambees, various achievements have been realised such as hospital bills, pre-weddings, further studies for the youth both locally and abroad which have largely helped improve the quality of different people and communities in Kenya.

14. The petitioner argues that harambee has become a way of life for Kenyans in supplementing the inability of the Government to reach out and provide the much needed socio-economic rights as guaranteed under **Article 43** and which the State is enjoined to actively develop under **Article 21(2)** and has not undertaken any measure to so do save for the impugned **section 26**.

15. Mr Mogeni submitted that ban is unnecessary and irrelevant as the object intended by **section 26** is well cushioned and covered by the offences and penalties created under **sections 62, 63 and 64** of the Act as these offences deal with issues like bribery and treating. That the provisions of **section 26** are contrary to the letter and spirit of the Constitution and are meant to restrict the full enjoyment of the rights guaranteed under **Article 43**.

16. It is the petitioner's contention that **section 26** is invalid, null and void, ill conceived, untenable, unmaintainable and unenforceable for lack of legal basis and fairness or equity and thus contravene the principles legality and national values and principles of Governance under **Article 10**.

17. Mr Mogeni also submitted that there lacked a mechanism to establish a violation as under the section and how the IEBC was to monitor the process.

Petition 328 of 2012

18. The 1st petitioner is the current member of Kilome Constituency, in Makueni County and the 2nd, 3rd, 4th and 5th petitioners are residents of the constituency. Although the petition raises issues of relating to the right to health and particularly emergency care, the petitioners' advocate withdrew these claims and limited the petition to issues concerning **section 26**.

19. The thrust of the petition dated 31st July 2012 is that **section 26** violates the right to life guaranteed under **Article 26** and is also discriminative as it is through harambees that the people and their leaders pull resources together to provide for development and social service facilities mostly in the rural areas.

That harambee is the main means through which the needy and the disabled members of the society get the necessary assistance and **section 26** in effect locks out help for the poor and needy in society who cannot afford it.

20. The petitioners underscored the significance of the spirit of harambee in the Kenyan society and avers that the concept is not only an integral element of Kenyan nationalism, that is embodied in our court of arms and symbol of solidarity in fighting poverty, illiteracy and diseases but also a core concept of the Kenyan culture and traditional principle that existed in all indigenous communities whereby people work together to help the disadvantaged.

21. Reference was made to Kenya's International obligations including the ***International Convention on Economic, Social and Cultural Rights*** (ICESCR) which at **Article 2(1)** provides that, "*Each State Party to the present Convention undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant...*"

22. It is the petitioner's case that **section 26** violates the right to health under **Article 43(2)** and the right to education under **Article 53**. The petitioners also argue that **section 26** as a limitation to political rights is unreasonable, unjustifiable and discriminatory and therefore contrary to **Article 24**.

23. Mr Ombati, counsel for the petitioners, avers that harambee is the golden thread that runs through the national fabric. **Section 26** is intended to disqualify any Kenyan who participates in a cause other than a political cause to participate in the election and is contrary to **Article 27** which provides for equality. Counsel submitted that the provision is discriminative and unjust to support candidates and political parties which are political activities which according to the petitioner, are 'not more important' than fund raising to assist ailing people or school initiatives.

24. Counsel submitted that there is no justification in differentiating between a Kenyan raising money for any cause or any other Kenyan dealing with politics. He argued that in as far as the section falls short of the test of differentiation; the provisions of the section are unreasonable, arbitrary and has no rational basis having regard to objects of the legislation in question.

25. Mr Ombati further submitted that **section 26** is unconstitutional as the intention of the legislature was to separate politicians from ordinary Kenyans and perpetuate the dominance of the political class. Counsel further argued that the **section 26** is broad and vague and it is left to the decision maker, the IEBC to be a judge in their own cause thereby infringing the principal of legality.

Respondents' case

26. Through the grounds of objection dated 8th October 2012, the IEBC, opposed the petition on the grounds that;

(1) *The right that the petitioners seek to assert is not a social economic right as envisaged by Article 43 of the Constitution.*

(2) *The rights guaranteed by the Article 43 of the Constitution are second generation or positive rights and are not justiciable in the manner that the petitioners have proceeded.*

(3) *If the right that the petitioners seek to assert are social economic rights as envisaged by Article 43 of the Constitution, then the right restricted by the Section 26(1) of the Elections Act is the right guaranteed by Article 43 of the Constitution.*

(4) *The restriction imposed by section 26 of the Elections Act on the right guaranteed by Article 38(3)(c) of the Constitution has been examined by this court and found to be justifiable in a free and open society.*

27. The IEBC refutes the petitioners' claim that **section 26** limits participation in fund raisers or

harambees terming the argument as incorrect and misleading as the section does not in fact place a ban on either the political aspirants or the community or society from organizing or participating in harambees.

28. Mr Nyamodi, counsel for the IEBC, submitted that the petitioners had misinterpreted the harambee spirit as used in the national motto. According to him the harambee means working together for a particular cause and that public fundraising was just but one aspects of the concept of harambee that has acquired prominence.

29. Regarding the petitioners' allegation that there was a breach of **Articles 43** and **44**, the respondent contended that these were positive rights which required the State to take steps to avert infringement of these rights. According to the respondent, the right that the petitioners sought to enforce in this case is not a social economic right. That *harambee* is not part of **Article 43** and should not be anchored there as it was not a positive right. The IEBC urged that provisions of **Article 43** ought to be read together with **Article 2(2)** which imposes an obligation of the state to progressively put in place legislation and policy that will ensure that the social economic rights are realised in the country.

30. Counsel referred the court to the case of *Hon. Johnstone Muthama v Minister of Justice and Constitutional Affairs & Another, Nairobi Constitutional Petition No. 198 of 2011 (Unreported)* in which the court addressed the issue of the constitutionality of **section 26**. In that case the Court did not find **section 26** discriminatory. Counsel urged the court to follow this this decision.

31. Counsel also urged the court to take into consideration the political context and history in which the legislative provisions were enacted. He referred the court to the case of *Party of Independent Candidates of Kenya v the Attorney General and Others, Nairobi Petition No. 290 of 2011(Unreported)* for this proposition. Mr Nyamodi submitted that the political history of the **section 26** is such that for nearly a decade, the participation of public officers in fundraising activities has been regulated through the statute books as it was felt that some public officers were abusing the offices they held to collect money. That **section 13** of the *Public Officer Ethics Act, 2003* prohibits public officers from taking part in fundraising activities. Under the Act, members of parliament are public officers while aspirants or persons seeking public offices are not and therefore, the purpose of the section was to bring parity among all contestants in the political arena by bringing aspirants under the same regulatory regime as sitting elected public offices.

32. It was further submitted that **section 26** gives effect to various constitutional provisions; namely, **Article 80(d)** which vests in parliament the duty to enact legislation that promotes principles of leadership and integrity under **Chapter Six** of the Constitution, **Article 81(c)** which provides that the electoral system shall comply with principles of free and fair elections which are free from improper influence and **Article 82(1)** which mandates parliament to enact legislation to provide for the nomination of candidates. The IEBC submits that **section 26** aimed at promoting the election of leaders on the basis of their manifestos rather than the influence of money and other material influences.

33. Mr Nyamodi countered the petitioners' argument that other sections of the Act dealing with election offences already deal with the mischief intended by the section contending that election offences do not deal with this mischief as these deal with actual conduct of an election. He urged the court to dismiss the petition with costs.

34. The 2nd respondent, through Mr Ojwang' supported the position and submissions made on behalf of the 1st respondent and relied on the grounds of opposition filed on 9th October, 2012.

35. In the grounds of opposition, the 2nd respondent basically denied that the **section 26** violated any of the constitutional provisions as alleged by the petitioners. Further that the petitioners had not demonstrated how the rights are being violated and whether there were alternative means of addressing the problems without resorting to harambees.

36. It was further submitted that the provisions of **section 26** were justifiable in an open, free and democratic society as anticipated in **Article 24**.

Determination and Disposition

General Principles

37. The issue under contention in this case is whether **section 26** is unconstitutional. In determining this issue, this court will be guided by various principles which have been set out in various cases.

38. Firstly, the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. This court is enjoined under **Article 259(1)** to construe the Constitution in a manner that promotes its purpose, values and principles, advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights and permits development of the law and contributes to good governance.

39. Under **Article 24**, the rights and freedoms in the Bill of Rights are subject only to the limitations contemplated in this Constitution. In applying provisions of the Bill of Rights, this court is obliged under **Article 20(3)** to among other things adopt the interpretation that most favours the enforcement of a right or fundamental freedom and to develop the law to the extent that it does not give effect to a right or fundamental freedom.

40. Secondly, all provisions of the Constitution bearing upon a specific issue should be considered together; this is the principle of harmonization. As was held in ***Olum v Attorney General of Uganda [2002] 2 EA 508***, *‘the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. Constitutional provisions must be construed as a whole in harmony with each other without insubordinating any one provision to the other.’*

41. Thirdly, there is a rebuttable presumption of law that the legislation enacted by parliament is constitutional. The onus of proof thus lies on any person who alleges otherwise. The Court of Appeal of Tanzania in the case of ***Ndyanabo v Attorney General [2001] EA 495*** eloquently enunciated the principle. The Court noted that, *“In interpreting the Constitution the court would be guided by the general principles that ... there was a rebuttable presumption that legislation was constitutional, and...the onus of rebutting the presumption rested on those who challenged the legislation’s status save that, where those who supported a restriction on a fundamental right relied on claw back or exclusion clause, the onus was on them to justify the restriction.”*

42. Fourthly, it is now a well-established principle established that in determining the constitutionality of an Act or any of its provisions, regard must be had to the statutory purpose and its effect. Justice Lenaola, in ***Samuel G. Momanyi v Attorney General and Another Nairobi Petition No. 341 of 2011 (Unreported)*** paragraph 25, posed the question, *“In what circumstances can a Court declare a Law to be unconstitutional?”* He stated, *“There is a whole raft of legal authorities on this subject but I am persuaded by the reasoning in ***Hamdardda Wakhama v Union of India AIR 1960 at 554*** where the Court stated inter-alia as follows, “...when an enactment is impugned on the ground that it is ultra vires and unconstitutional what has to be ascertained is the true character of the legislation and for that purpose regard must be had to the enactment as a whole to its objects, purpose and true intention and the scope and effect of its provisions or what they are directed against and what they aim at.”*

43. Therefore, in examining whether a particular statutory provision is unconstitutional, the court must have regard to its purpose and the effect of the statutory provision. Canadian Supreme Court in the ***R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295*** stated, *“Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation’s object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation’s object and thus the validity.”* (Adopted by Justice Musinga in

Murang’a Bar Operators & Another v Minister for State for Provincial Administration and Internal

Security and Others, Nairobi Constitutional Petition No. 3 of 2011 (Unreported).

44. Finally, it is one of the linguistic canons applicable to the construction of legislation that an Act is to be read as a whole, so that an enactment within it is to be treated not as standing alone but as falling to be interpreted in its context as part of the Act. (*See Lall v Jeypee Investments Limited [1972] EA 512*). It is also a principle of statutory interpretation that courts should have in mind the parliamentary intent in an enactment and the mischief the particular legislative provisions sought to cure and as such adopt an interpretation in such a way as to suppress the mischief (*See Heydon's Case, 1584 3 Co Rep 7a.*).

Meaning and purpose of section 26

45. It is against these broad principles that I must now turn to determine the constitutionality or otherwise of the impugned section. No one disputes that 'harambee' has been a rallying call for Kenyans since independence and an avenue of pulling resources together for development of various projects in the country. The concept of harambee is not restricted to money, it covers a diverse activities which include pulling together of resources of whatever kind.

46. The prohibition of harambees contained in **section 26** is not absolute, it only intended to govern the conduct of persons who intend to contest elections. The purport and intent of **section 26** is to prohibit prospective candidates from getting involved in harambees as defined by the Act for a period of time prior to the election except for the purpose of raising funds for the candidate or the party.

47. The **Elections Act (No. 24 of 2011)** came into force in 2nd December, 2011. The purpose of the Act according to its long title is to, "...to provide for the conduct of elections to the office of the President, the National Assembly, the Senate, county governor and county assembly; to provide for the conduct of referenda; to provide for election dispute resolution and for connected purposes." According to the *Memorandum of Objects and Reasons* to the Elections Bill, the main object of this Bill was 'to give effect to Articles 82 and 88(4) of the Constitution and to consolidate and amend the law relating to elections...'

48. The provisions of the **section 26** must be read in light of the overall purpose of the Act and the constitutional provisions including the principles of the electoral system which are provided under **Article 81**. One of the principles set out in **Article 81** is free and fair elections which among other things is 'free from violence, intimidation, improper influence or corruption.'

49. Our history is replete with instances where money and harambees have been used by potential candidates not only as a measuring gauge for their political influence. Cases of voter buying and bribery have also been associated with these fund drives which have had the effect of disadvantaging the 'poor' candidates which in any case undermines the principle of free and fair elections and diminishes the right of any Kenya to vie for political office as money is seen as an impediment to elective office.

50. Fundraisings during the election period are closely related to the issue of money in politics. The amount of money spent around the electoral period has been a key concern throughout the Kenyan political history. Indeed, the **Independent Review Commission**, the Krieglar Commission, which examined, inter alia, the constitutional and legal framework of the of electoral law prior to 2007, in its report highlighted the challenges of campaign financing and money spending in the following terms at **Para 5:7:3**, "...the number of ways that money is poured into politics (read elections) can determine not only the result of electoral contests but also their nature. Finances may, for instance, be made not only for routine activities such as hiring public address systems, but also for bribing election officials and voters alike; or in exchange for favourable treatment in regard to a process that is supposed to be managed fairly (e.g. public procurement); or they may be coming from public coffers for partisan political activity of no benefit to the ordinary taxpayer."

51. Public Collections have attracted regulation for a long time. The **Public Collections Act (Chapter 106 of the Laws of Kenya)** which was enacted in the year 1960 had the sole aim of '[providing] for the regulation of collections of money and property from the public.' The tenor and effect of the Act is to ensure that public collections are lawful purposes and are not conducted by dishonest persons. In light of

the provisions of the Act, it cannot be argued that harambees are beyond the regulatory purview of the legislature.

52. In another sphere of activity, public officers are restricted in the manner in which they participate in harambees. It is accepted that because of the positions they hold, public officers, may exert undue influence on their junior officers to make contributions or insist on contributions for harambees from members of the public in order to provide service. It is for this reason that **section 13** of the **Public Officer Ethics Act** was enacted. It provides:

13. (1) *A public officer shall not -*

(a) use his office or place of work as a venue for soliciting or collecting harambees; or

(b) either as a collector or promoter of a public collection, obtain money or other property from a person by using his official position in any way to exert pressure.

(2) In this section, "collection", "collector" and "promoter" have the same meanings as in section 2 of the Public Collections Act.

53. The public collection of money and property may have a deleterious effect of the political system. In April 2003, the government appointed a task force mandated to investigate inter alia the nature forms and linkages of corruption, extortion and other abuses of harambees and to make policy and legislative proposals for the introduction of transparency and accountability in Harambees. The Harambee Task Force reported in December, 2003 and in its report titled, "*Report of the Task Force on Public Collection or "Harambees,"*" it noted, "*The nineties saw the full politicization of Harambees. Harambees became an avenue for buying political power and elective positions. Accountability was also done away with; individuals started using Harambees for personal/family enrichment and civil servants used it to buy political favours and promotions. The nineties saw the Harambee spirit falling to its lowest ebb.*"

54. The Task Force recorded that one of the reasons the public had opposed harambees was that, "*[T]hey had been politicized and have, therefore affected the caliber of leadership at both local and national levels. The rich literally buy power through harambee, thereby distorting the meaning of true leadership and democracy.*" After reviewing the evidence received from the public, the Task Force made the following, inter alia, recommendation;

5.1.1.10 Aspiring candidates who are not Public officers should, four years before elections, be subjected to the requirements of section 23 of the Public Officer Ethics Act in order to qualify to contest the next elections.

5.1.1.11 Leadership must be redefined to mean people of integrity with exemplary behaviour that promote the vision and ideas and not through making huge contribution of dubious money to harambees.

55. The values of integrity and leadership referred to by the *Harambee Task Force* are now at the core of our transformative Constitution. The value

56. s and principles of national governance contained in **Article 10** and **Chapter Six** of the Constitution which deals with leadership and integrity provide the milieu for consideration of **section 26**.

57. I also think that the interpretation given by the petitioners to harambee is rather strained as it elevates politicians to a central and key position within the harambee system. Harambee as a participatory activity is not the preserve of politicians or for purposes of this case limited to persons intending to contest elections. Once it is understood that the purpose of the prohibition is to remove the pernicious effect of money on politics, it becomes clear that it is legitimate for the state to limit, for a specific period, the involvement of prospective candidates in the public collection which have no relation to the political

process. As contended by the IEBC, collections that have no connection to the election exert an unhealthy influence on the electorate and undermine a free and fair election. It is against this background that I find and hold that harambee is a legitimate sphere of regulation to meet the objective of a free and fair election.

58. Conversely, the requirement that only prospective candidates participate in harambees for purposes of supporting their candidature and the political party serves a legitimate purpose. First, it requires that those who wish to participate in elections do so by a specific time prior to the election. Secondly, harambee for purposes of supporting a particular candidate engenders public participation in the electoral process through supporting specific candidates or causes. If harambee was prohibited for all aspiring candidates, then only the rich and well off would seek political office as they would be self-financing. It empowers those who wish to participate in the election to seek support from their fellow citizens. Thirdly, the Constitution has provided for political parties as vehicles for political participation and as means for the realization of the political rights guaranteed under **Article 38**. It is therefore critical that during the period of election, that political parties and their candidates be at liberty to raise money for their political activities from citizens who support them.

Discrimination and Political Rights

59. This brings me to the issue of discrimination raised by the petitioners. The argument here is that persons vying for political office are differentiated from ordinary citizens through the prohibition of harambees contained in **Article 27**. The gravamen of the petitioners' argument is that the **section 26** is discriminatory in as far as it allows fundraising by politicians for their personal gain. In this respect it creates a class of person during the election period. On the hand, there are politicians who are allowed to fundraise for political activities and then the other persons are prohibited from soliciting funds.

60. **Article 38** which enshrines political rights envisages that there may be reasonable restrictions on the right to be a candidate. **Article 38(3)** provides as follows;

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;

(c) To be a candidate for public office, or within a political party of which the citizen is a member and, if elected, to hold office. [Emphasis mine]

61. **Section 26** is a reasonable restriction on the right of a candidate to participate in Harambees for the candidacy and the party. Once the money is available for campaign, that is the party and or candidate, it is subject to the regulations contemplated under **Article 88(4)(i)** which empower the IEBC to make regulations for “*the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election.*” The argument by the petitioners that the **section 26** lacks an enforcement mechanism therefore lacks merit. The general penalty provision contained in **section 106** of the **Election Act** means that a contravention of **section 26** will attract a criminal sanction.

62. The petitioners would like all citizens to participate in harambees on the same terms whether as a candidate in an election or not. The legislature is allowed to deviate from the general principle of equality where differentiation serves a legitimate constitutional purpose. I find and hold that object of **section 26** is legitimate. It has a rational connection to the overall purpose of achieving a free and fair election and fulfilling political rights enshrined in **Article 38** and the objective of a free and fair election in **Article 81(e)** and is therefore not discriminatory. (See cases of *Jacques Charl Hoffmann v South African Airways*, CCT 17 of 2000, *Malaysian Bar & Another v Government of Malaysia* 11988 (LRC) 428).

63. In the case of *Hon. Johnson Muthama v Minister for Justice and Constitutional Affairs & Another*, (Supra), Hon. Lady Justice Ngugi, in reference to section 26, stated, “*My analysis of this*

provision against the provisions of the Constitution and the test set out does not indicate any violation. As the respondent correctly point out, the ban on the conduct of harambees has been in our statute books for years, and its intentions are in line with the attempt to bring ethics in the conduct of elections.”

Harambee and socio-economic and cultural rights

64. The petitioners’ claim that the prohibition on harambees or fund raisings enacted by **section 26** violates their socio-economic rights and cultural enshrined in **Articles 43** and **44** respectively. Under **Article 21(1)**, the state is obliged to observe, respect, protect, promote and fulfill these fundamental rights and freedoms. Furthermore, **Article 21(2)** enjoins the State to, ‘*take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43.*’

65. I do not see the limitation of harambees as a violation of these provisions. Harambee is a purely voluntary endeavor and it cannot, at least in case, be elevated to a state obligation under **Article 21(2)** so as to warrant relief of the kind sought in the petitions. Harambees can only supplement State efforts to achieve these rights and are not the only means of achieving equality and realization of the cultural and socio-economic rights of the underprivileged in society.

66. On a broader level, the petitions are an attempt to graft the Harambee philosophy to the Constitution as a right to be enforced either as a cultural or socio economic right. This is a temptation I must resist. The strength of harambee lies in its voluntary nature. In the ***Harambee Task Force*** noted that, “*The term “harambee” simply means pulling together of resources and efforts for socio-economic development.*” It can never be a substitute for the state obligations enshrined in the Constitution and I would resist any attempt to elevate it into a right capable of protection and enforcement. The strength of harambee is in the fact that people of their own free will pull together resources to assist people and projects they desire.

67. The State, on the other hand, has specific legal and constitutional obligation which must not be diminished by the noble and voluntary efforts of its citizens. Indeed, the Constitution boasts several noble provisions guarding the well-being of the citizens. Constitutional provisions such as the system of devolution that is now entrenched in our Constitution is one such measure aimed at ensuring that services and development is taken close to the people. If I may adopt the holding of court in ***R v Independent Electoral and Boundaries Commission and Another ex parte Councilor Eliot Lidubwi Kihusa and Others, JR Misc. Appl. No. 94 of 2012 (Unreported)*** at para. 215, “*We also take the view that the Constitution is forward looking. Communities change and evolve, new ties are formed and old bonds shaken and transformed by intermarriage, migration, education opportunities and economic interaction. With devolved government it is expected that where there were no roads, roads will be built and where there were no bridges, bridges will be constructed.*”

Conclusion and Disposition

68. In view of the foregoing find and hold that **section 26** of the ***Elections Act (No. 24 of 2011)*** does not violate **Articles 27, 43** and **44** of the Constitution.

69. I dismiss the two petitions namely, **Petition Nos. 327 of 2012** and **328 of 2012**. This being an application for enforcement of fundamental rights and freedoms, and in the circumstances of this particular case, I make no order as to costs.

DATED and **DELIVERED** at **NAIROBI** this 5th day of November 2012.

D. S. MAJANJA

JUDGE

Mr Mogeni instructed by Kelvin Mogeni Advocates for the petitioners in Petition No. 327 of 2012.

Mr Ombati Nchogu, Omwanza and Nyasimi Advocates for the Petitioners in Petition No. 328 of 2012.

Mr Nyamodi instructed by V. A. Nyamodi for the Independent Boundaries and Electoral Commission.

Mr Ojwang', Litigation Counsel, instructed by the State Law Office, for the Attorney General.