IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, OKWENGU & KANTAI, JJ.A)

CIVIL APPEAL NO. 112 OF 2014

BETWEEN

JOHN HARUN MWAU……..……APPELLANT

AND

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION……..…1ST RESPONDENT

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

(Being an appeal against the Judgement and Orders of the High Court Constitutional and Human Rights Division (Lenola, J.) dated 1st November, 2013

in

Constitutional Petition No 26 of 2013)

****

JUDGMENT OF THE COURT

1. ***John Harun Mwau*** (appellant), filed suit by way of a Constitutional petition before the High court seeking a total of 37 declaratory orders or determinations of a range of issues from Constitutional interpretation of several Articles, various provisions of the Elections Act, Political Parties Act and some Regulations that he faulted for being unconstitutional. At the time the appellant filed the suit which was in January 2013, he was the Member of Parliament for Kilome Constituency and an aspiring candidate for the Makueni senatorial seat. He therefore sued the **Independent Elections and Boundaries Commission** (IEBC - 1st respondent) and the **Attorney General** (AG - 2nd respondent) whom he faulted for failing to uphold the letter and spirit of the Constitution in the enactment of the impugned statutes as well as the Regulations.

2. The petition was opposed by both respondents and upon hearing the parties the learned Judge, Lenaola J., (as he then was) was not persuaded that the appellants' case had any merit and he dismissed it the following word:-

> ***"As stated elsewhere above, I had tremendous difficulties with the above Petition because whereas a multiplicity of prayers were sought, many had no anchorage in the body of the Petition nor were they addressed in Submissions. Nonetheless, I was able to distil the real issues for determination and I have determined them against the Petitioner. In the end, the Petition is dismissed with no order as to costs, and I regret delay in delivering this judgment which was occasioned by factors beyond the Court's control."***

3. The gravamen of the dispute before the High Court was a whole gamut of allegations that the appellant made generally citing infringement of several Articles of the Constitution through the enactment of certain provisions of the statutes that he claimed went contrary to the spirit and values of good governance. The learned Judge fastidiously went through the 37 declarations that were sought in the petition and extracted three issues which he determined. The issues were the following;

> ***"(i) Whether Section 24(1) of the Elections Act and Regulations 16, 18 and 19 are unconstitutional.***

(ii) What are the educational qualifications for nomination as Member of Parliament?

(ii) Whether section 10 and 11 of the Political Parties Act on mergers and coalition are unconstitutional."

The leaned Judge faulted the appellant for failing to plead his case as required under the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** (Rules), but he nonetheless examined the merits of each of the allegations made within those three headings and found no violations of the Constitution, the Statutes or the Regulations.

4. Aggrieved by the aforesaid order dismissing the petition, the appellant has now either expanded the scope of the grounds or repeated them as he has filed in the instant appeal some 80 grounds of appeal. Some of the grounds are wholly prolix, repetitive and argumentative. In line with the provisions of ***Rule 86(1)*** of the **Court of Appeal Rules** we intend to summarize or recast the said grounds to avoid repetition. The Rule stipulates in mandatory terms thus;-

> **"A Memorandum of Appeal shall set forth concisely and under distinct heads, without argument or narrative the grounds of objection to the decision appealed against, specifically the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make."** (Emphasis added)

5. Having said that, looking at the issues that cut across all those grounds and also considering that counsel for the appellant in his written and oral submissions also summarized the grounds into what appears like three (3) thematic areas; we will address the same as;-

(a) Violation of the principal of equality in that the Elections Act, guidelines and regulations require that different candidates meet different criterion for nomination and elections of respective political office. The case of Independent candidates was cited as a good example where Presidential Candidate who is sponsored by a political party is supported by the officials while an independent candidate is required to be supported by at least 2000 voters registered in a majority of the counties.

(b) Education qualifications of the President, Member of Parliament and eligibility for election as Governor; in this the appellant argues that the provisions of the Constitution regarding the qualifications of the various candidates for political seats should never have been varied by the Elections Act and the regulations made thereunder should never have set educational qualifications that leave out candidates who are capable leaders with demonstrable results.

(c) Whether mergers and coalitions among Political Parties for purposes of elections undermined the principles of good governance. Here the appellant argues that Political Parties that enter into coalition should not be allowed to nominate same candidates thus the appellant faults the provisions of the Political Parties Act which introduced coalitions which defeated the whole purpose of strengthening political parties as democratic institutions that guarantee fair participation of members in elections.

6. During the plenary hearing ***Mr. Mwangi*** learned counsel for the appellant relied on his written submissions and made some oral highlights. Counsel emphasized that the provisions of the **Elections Act** as regards the qualifications and eligibility to vie for various political seats undermine the principles of free, fair and democratic elections; that Parliament failed in its duty to enact legislations that guarantee free, fair and regular democratic elections based on universal suffrage. The **IEBC** was also faulted for interpreting ***Section 24 (1)*** of the **Elections Act** so as to require that different candidates meet different criterion for nomination and election to the respective political offices in the Election Regulations.

7. Citing the provisions of ***Article 99 (1) (b)*** and ***193*** that deal with the qualifications for persons who should be eligible for election as a Member of Parliament and County government respectively, counsel argued that setting the threshold on post-secondary education in accordance with the Kenyan curriculum was in total disregard of other educational qualifications and was discriminatory. The education attained from polytechnic, vocational training colleges, police training and courses gained from foreign education curricula should have been recognized. Counsel singled out the training of advocates as articled clerks who underwent apprenticeship programmes and were admitted in the profession as advocates; also the Kenya Industrial Training Institute (KITI) has a system of admission of standard 8 trainees who are meticulously trained and proceed to diploma level without secondary school certificate. The appellant also gave an example of the Police Service where he said he served as a member and was aware that some officers were recruited from primary school, but they were able to undergo various trainings to become distinguished prosecutors and senior police officers. It was therefore paradoxical that such distinguished Kenyans who are occupying positions of high responsibility as lawyers, magistrates and prosecutors can be excluded from seeking elective office simply because they did not have post-secondary education.

8. It was further submitted for the appellant that these requirements went contrary to various Articles of the Constitution and impinged upon fundamental human rights of non-discrimination on the basis of education. The case of **Josiah Taraiya Ole Kores vs. Dr. David Ole Nkedienye & 3 Others [2013] eKLR** was cited as an example where the academic qualifications of the deputy governor who had attained a degree without ever attending secondary school was declined by **IEBC** but his election was upheld by the High Court. In this regard the appellant faulted the trial Judge for not declaring the requirements of secondary school qualifications for persons vying for political office as unconstitutional. The spirit and purposes of the Articles of the Constitution should always be interpreted in a way that fundamental rights that are guaranteed are not taken away and the national values and principles of governance enshrined under ***Article 10*** of the Constitution should always be upheld and no legislation or regulation should undermine their application.

9. Likewise in the case of **Johnson Muthama vs. Minister for Justice and Constitutional Affairs & Another [2012] eKLR**; ***Johnson Muthama*** who was the Member of Parliament for Kangundo Constituency challenged a move by Parliament where it was proposed that a person vying for a Parliamentary seat must hold a University degree. Mumbi, J., interpreted the requirement for "educational requirement" prescribed by Parliament to mean not only a University degree but any post-secondary qualification; this by parity of reasoning should also mean post primary qualification. The appellant pointed out that by limiting qualifications to post-secondary, would exclude some very capable and well oriented and talented leaders who have very good proven leadership skills and tangible results.

10. On nomination of candidates, counsel for the appellant pointed out that the provisions of ***Article 38*** that makes provisions for political parties and in particular ***Sub-Article (3)*** which guarantees every adult citizen a right without unreasonable restriction to be registered as a voter; to vote by secret ballot in any election; 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. The appellant's further argument is that some of the regulations of the **Elections Act 2011** introduced fresh conditions that require a candidate vying for president be nominated by a political party and to be supported by the officials of the political party while an Independent candidate is supposed to support his nomination by an odious process of delivering to the IEBC a list of at least 2000 voters registered in a majority of the counties in A4 sheets of papers and in electronic form, serially numbered, to be accompanied by copies of the voters cards of the said persons. This, according to the appellant was tantamount to limiting and inhibiting the voters from making free political choices of the leaders they would wish to have and at the same time the rights of independent candidates who might enjoy support from across the board.

11. Yet again counsel for the appellant submitted that there is discrimination of an Independent candidate who should be supported in case of the election to the National Assembly, by at least one thousand voters in a constituency; or in the case of election to the Senate, by at least two thousand registered voters in the county. As regards an Independent candidate for the position of a member of county assembly, an Independent candidate is supposed to be supported by at least five hundred registered voters in the ward. According to the appellant the Constitution envisages a situation where all Kenyans are able to vote freely for the leaders of their choice without any differential requirements; that Independent candidates are of no lesser status to the candidates who are sponsored by political parties; all candidates are equal before the law and the differential treatment killed the whole purpose of candidates who were locked out by political parties unfairly and that there is nothing in the Constitution to suggest that the drafters thereto intended the various persons vying for the different seats to be governed by different provisions of the law.

12. On the issues of mergers and coalitions of political parties for purposes of elections, the appellant argued that political parties are body corporate with perpetual succession and a common seal. Therefore through political parties, people of Kenya exercise their inalienable right of determining the kind of leaders and political system they want; it is through the political parties that they also elect their representative of choice. According to counsel for the appellant, political parties are a means to the end and not an end in themselves. He emphasized that the objective of underpinning political parties in the Constitution and the **Political Parties Act 2012** was to strengthen democracy by building strong democratic institutions geared to ensure continuity and certainty beyond individuals. The Constitution does not make any provisions for political party mergers or coalitions. These two concepts were introduced by the Political Parties Act which undermines the provisions of the Constitution. It was argued that when political parties get into coalitions and campaign for one candidate, they are in effect persons who are members of different parties campaigning for or promoting ideologies of another political party in total violation of the letter and spirit of the Constitution and the **Political Parties Act**.

13. This appeal was opposed ***Mr. Gumbo*** learned counsel for the 1st respondent. The 2nd respondent did not appear although they were served with a hearing notice and nor did they file written submissions. Counsel relied on his written submissions and made some oral highlights. Generally the 1st respondent faulted the petition by the applicant which did not disclose the nature of injury caused or likely to be caused to the appellant by the various sections of the Acts that were cited. For instance, the appellant did not state how the requirement for post-secondary education affected him or the larger members of the society. Thus for the court to issue the declarations that were sought, the appellant had a duty to anchor the prayers on the pleadings. As the pleadings stood and as observed by the trial Judge in the judgment, the prayers sought lacked foundation in the petition. The petition largely particularized contravention of the Constitution on the basis that IEBC by making provisions for different requirements on candidates nominated by political parties and independent candidates was an interference with the sovereignty of the People, is discriminative, violates the fundamental freedoms guaranteed under ***Articles 24, 27, 32, 38, 47*** and ***259 (1)*** of the Constitution without any specific particulars. Yet the **IEBC** does not make laws, and the actual injuries suffered by the appellant are not particularized not to mention that Parliament was not a party to the petition.

14. Counsel for the 1st respondent went on to argue that the trial Judge rightly drew the issues from the appellant's petition as a party is bound by their own pleadings and as held by the Supreme Court in the case of; **Raila Amollo Odinga & Another vs. IEBC & 2 Others [2017] eKLR** that;

> ***"In the absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material preposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings…"***

Counsel went on to state that the appellant failed to plead his case with reasonable precision on the alleged violation/contraventions of his rights by the respondents as provided under ***Rule 10*** of the Rules. Moreover the appellant did not show how the 1st respondent violated his rights and yet it does not enact the statutes their mandate being only to administer the elections according to the law. The National Assembly that was responsible for the enactment of the impugned laws was also not joined.

15. Further, with regard to the authority by **IEBC** to make regulations, counsel for the 1st respondent submitted that this is derived from ***Articles 84*** and ***88 (4)*** of the Constitution and ***Section 109*** of the **Elections Act** which gives power to **IEBC** to make wide range of regulations for the better carrying out of the objectives and purposes of the **Election Act**. Counsel pointed out that the provisions of ***Regulations 16, 17***, and ***18*** of the **Election Regulations** makes provisions in regard to the manner of nomination by the political party of the presidential candidates which is no different from a nomination of independent candidates. For example ***Regulation 16*** requires a presidential candidate nominated by a political party to deliver an application for nomination signed by the candidate, and the authorised official of the party delivered to the **IEBC** personally by the candidate or by an official of the party. While ***Regulation 17*** requires an independent presidential candidate to deliver an application for nomination signed by the candidate and by two persons who have nominated the candidate in accordance with ***section 29(2)*** of the **Act**. The person delivering an application under ***Regulation 16*** or ***17*** shall at least 5 days to the day fixed for nomination, deliver a list bearing the names, respective signatures, identity card or passport numbers of at least two thousand voters registered in each of a majority of the counties. Therefore the requirements placed on candidates for the office of the President under the aforesaid ***Regulation 16*** and ***17*** do not impose any discriminatory or unequal requirements on the part of the Independent

candidates. The requirement of support by voters for nomination of a candidate in the two categories is the same. That notwithstanding, an independent candidate must comply with the provisions of ***Article 85*** of the Constitution.

16. In respect to the grounds of appeal on education requirements, counsel for the 1st respondent submitted that the academic requirements for President and that of Member of Parliament are the same. Therefore the trial Judge was right when he observed that the academic qualifications of leaders are set by Parliament. This is in accordance with ***Article 99 (2) (b)*** of the Constitution which also reflects the will of the people who saw it fit to have leaders with prescribed education, skill and exposure. Moreover, the Judge further held that the provisions of ***Section 24*** of the **Elections Act** was a replica of the ***Article 99*** of the Constitution which provides for the qualifications and disqualifications for election as Member of Parliament. Thus declaring it unconstitutional would in essence mean the court declaring ***Article 99*** unconstitutional.

17. Lastly on the issue of coalition of political parties, counsel submitted that this is provided for under ***Section 10*** of the **Political Parties Act** which alludes to both pre- election and post-election coalitions and the Judge rightly found that there was no contravention of the Constitution; that it is a good practice for political parties to merge and form coalitions to attain political strength and dominance as long as no law prohibits the practice. Coalitions of political parties is a political practice that emerged in Kenya gaining grip in the 2002 polls where a group of several political parties coalescing to advance democracy and fair representation came together in a coalition. Counsel urged us to dismiss the appeal.

18. We have considered the grounds of appeal, the record, and numerous authorities cited and deliberated on the submissions. In the case of **Abok James Odera T/A A.J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR**, this Court stated as follows:

> ***"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."***

That said, we still discern three issues which in our view cut across the 80 grounds of appeal for our determination; that is, whether the appellant's rights were violated, impaired or limited in the nomination of independent candidates; by the provisions in the Elections Act that set out the education qualifications that require post-secondary education as eligibility for one to vie for various political seats and in allowing political mergers and coalitions.

19. Just like the trial court held, we also reiterate that the appellant's pleadings do not disclose the nature of injury caused or likely to be caused to him or the public generally in regard to the various allegations that he makes. Also, the appellant has not demonstrated how the respondents were responsible for the alleged breaches or violations of rights. The allegations made in the petition are general; the appellant had a duty to plead with particularity how his rights were infringed against as court orders are never issued based on an assumption or speculation. In the case of **S vs. Zuma & Others (1995)2 SA 642(CC)** the Court held that:

> ***"A party alleging violation of a constitutional right or freedom must demonstrate the fundamental right has been impaired, infringed or limited. Once a limitation has been demonstrated, then the party which would benefit from the limitation must demonstrate a justification for the limitation. As in this case, the State, in demonstrating that the limitation is justifiable, must demonstrate that the societal need for the limitation of the right outweighs the individual's right to enjoy the right or freedom in question.'***

20. That notwithstanding, we have a duty to go over the pleadings, and determine whether the conclusions reached by the learned trial Judge can stand. The crux of the first allegation is that the provisions of ***Section 24*** of the **Political Parties Act** violated the various Articles of the Constitution to wit ***Articles 27*** that guarantees the right to equality; and ***Article 81 (d)*** that the electoral system shall comply with the principles of Universal suffrage based on the aspiration for fair representation. It was the appellant's case that statutory requirements that elevate political preferences over human rights and fundamental freedoms are unconstitutional. He relied on the cases of **John Harun Mwau vs. IEBC & Another** in **Civil Appeal No 74 of 2012** consolidated with **CA No 82 of 2012; Centre for Rights Education and Awareness & Another vs. John Harun Mwau & 6 Others [2012] eKLR**; **United States of America vs. Butler, 297 US 1(1936) No 401** among others. The authorities set out the principles of Constitutional interpretation; that the Constitution is the supreme law and should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law human rights and fundamental freedoms and permits development of the law and contributes to good governance. As we understood, the appellant's argument is that the learned Judge erred by declining to declare ***Section 24*** of the **Elections Act** and ***Regulation 16, 18*** and ***19*** as unconstitutional for imposing limitations which are not justifiable in an open and democratic society.

21. To appreciate the above arguments we think it is important to set out the actual provisions of the Constitution as well as the **Elections Act** so as to establish whether the later undermined the principles of the Constitution. ***Article 82(1)*** of the **Constitution** clearly mandated Parliament to enact legislation on elections. ***Sub-Article (1) (b)*** has empowered Parliament to specifically enact legislation to provide for nomination of candidates. Pursuant to this Article, Parliament enacted the **Elections Act No. 11 of 2011** and the preamble to that Act states that;

> **"An Act of Parliament 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**

Section 24(1) of the Elections Act, states as follows;

> **"(1) Unless disqualified under subsection (2), a person qualifies for nomination as a Member of Parliament if the person-**

(a) Is registered as a voter;

(b) Satisfies any educational, moral and ethical requirements prescribed by the Constitution and this Act; and

(c) Is nominated by a political party, or is an independent candidate who is supported

(i) in the case of election to the National Assembly, by at least one thousand registered voters in the constituency; or

(ii) in the case of election to the Senate, by at least two thousand registered voters in the county."

22. As posited by the learned trial Judge ***Article 99*** of the Constitution that deals with the qualifications and disqualifications for election of Member of Parliament, is wholly a replica of ***Section 24 (1)*** of the **Elections Act. Article 99 (1)** provides as follows:

"***Unless disqualified under clause (2), a person is eligible for election as a member of parliament if the person-***

(a) is a registered voter;

(b)satisfies any educational, moral and ethical requirements prescribed by this constitution or by Act of Parliament."

(c) is nominated by political party, or is an independent candidate who is supported-

(i) in the case of election to the National Assembly, by at least one thousand registered voters in the constituency; or

(ii) in the case of election to the Senate, by at least two thousand registered voters in the county."

Although the provisions of the **Election's Act** and the Constitution as far as the qualifications are concerned are the same, the appellant's gripe with the **Elections Act** is the Regulations set thereto to prescribe the actual educational qualifications.

23. It is indicated elsewhere in this judgment that the appellant's pleadings are not specific on the actual infringements of rights that he is complaining about. It is not clear whether he was complaining that the provisions of ***Section 22*** of the **Elections Act** that provide for academic qualifications excluded him from running for a particular office. Nonetheless, what we gather is that the requirement for post-secondary qualifications left out deserving Kenyans who obtained an equivalent qualification by attending courses at the Kenya Police or other institutions and the appellant gave his own example. This is how the learned Judge determined this issue by explaining the reasons why the Legislature found it necessary to set educational standards for elective positions which are positions of power and immense responsibilities to be executed by persons who have some knowledge, skill and training.

24. We also agree with the trial Judge that setting standards in regard to education qualifications for leaders seeking positions of power and responsibility cannot be discriminatory, as it cuts across all the parties and those who do not qualify have an opportunity to first of all seek to attain the qualifications before vying for the offices. We therefore agree with the Judge's reasoning and interpretations of both the Constitution and the governing Statutes. This is how the Judge expressed himself in his own words:-

"It is against the background of Mumbi, J.'s judgment that the Petitioner now contends that even the requirement to hold post-secondary education is unreasonable and that any academic qualification would be sufficient. I am unable to accept his argument for two reasons. First, the nature of the duties and functions performed by the National Assembly and the Senate in my view require higher educational qualifications, skills and wide exposure which is gained through higher education. It is important that a representative to either of the House understands the proceedings, nature of business being carried out and most important be in a position to make his/her contribution to the various and many at times complex motions and debates in Parliament. It must also be understood that the elected persons represents the people who appointed them and they should therefore be able to execute that duty without any difficulties.

36. Secondly, the sovereign power belongs to the people of Kenya and that power ought to be exercised in accordance with the Constitution. The people may inter alia exercise their sovereign power through their democratically elected representatives. It is thus crystal clear that the ultimate will of the people of Kenya is to be found in the Constitution. At Article 99(2)(b), the people of Kenya have envisaged, in passing the Constitution, that a person would not be eligible to run for certain offices if they did not meet the criteria set by Parliament. While the Constitution does not set an educational criteria, it imposes a duty on Parliament to enact legislation setting that criteria, and this is what has now been done in the Elections Act. In my view, the provisions of Section 22 of the Election Act were enacted by Parliament pursuant to the provisions of Article 99(1)(b) of the Constitution. This Article envisages a situation where Parliament prescribes an educational threshold for those who seek to be elected as Members of Parliament. In its wisdom, Parliament prescribed the provision of a post-secondary qualification. I do not think this qualification is unreasonable or unattainable by all in Kenya. I am alive to the fact that each year, the tax payer spends billions of shillings in both free primary and secondary education. Every Kenyan from all walks of life there has in my view opportunity to gain this qualification. I therefore find the argument that any other academic qualification would be sufficient to even include Primary education cannot hold water. In any event, it does not reflect the ultimate will of the people of Kenya as can be seen from the requirements of Article 99(1)(b). I therefore find that post-secondary education as enshrined under Section 22 (1) (b) of the Elections Act is attainable, sufficient and constitutional. To hold otherwise would be absurd 50 years after independence."

25. On the grounds of appeal touching on the nomination of Independent candidates, the appellant took issue with the **Elections Regulations 16, 17 & 18** which he claims makes the nomination of independent candidates an odious process since it requires them to deliver to the

IEBC a list of at least 2000 voters registered in a majority of the counties in A4 sheets of papers and in electronic form, serially numbered, to be accompanied by copies of the voters cards of the persons in the list. This is what is stated in the Regulation:-

Regulation 16;

"(1)A political party candidate at a presidential election shall be nominated by a political party by and delivery to the commission on that day fixed for the nomination of candidates at that election, an application for nomination in Form 12 set out in the Schedule.

(2) An application for this nomination under this regulation shall be-

(a) signed by the candidate, and the authorised official of the party; and

(b) delivered to the Commission personally by the candidate or by an official of the party."

Regulation 17;

"(1) An independent candidate at a presidential election shall deliver to the Commission on the day fixed for the nomination of candidates at that election, an application for nomination in Form 12 set out in the Schedule.

(2) An application for nomination under this regulation shall-

(a) Signed by the candidate, and by two persons who have nominated the candidate in accordance with section 29(2) of the Act;

(b) delivered to the Commission personally by the candidate or by any of the two persons referred to in paragraph (a)."

Regulation 18

"(1) The person delivering an application for nomination under regulation 16 or 17 shall at least five days to the day fixed for nomination, deliver to the Commission a list bearing the names, respective signatures, identity card or passport numbers and voters card numbers of at least two thousand voters registered in each of a majority of the counties, in standard A4 sheets of paper and in an electronic form.

(2) The sheet of paper delivered under this regulation shall-

(a) be serially numbered;

(b) each have at the top, in typescript, the wording at the top of Form 12; and (c) be accompanied by copies of the voters cards of the voters referred to in sub-regulation(1)

(3). There shall be delivered to the returning officer together with the application for nomination, a statutory declaration in Form 13 set out in the schedule, made not earlier than one month before the nomination day."

A scrutiny of the said regulations readily reveal that the requirement to deliver the signature of supporters is a duty placed on both the Political party nominees as well as the Independent candidates. We therefore find there is no discrimination. All the applications must be supported by supporters who are registered voters.

26. This now takes us to the last issue on the political coalitions that the appellant complained was a formation that undermined and diluted the institution of political parties as well as killing democratic culture based on competition on the basis of party manifestos. In this regard, the appellant faulted ***Section 10*** of the **Political Parties Act** which he argued contravened the provisions of ***Articles 91*** and ***92*** of the Constitution. This is because under the **Political Parties Act**, Political parties are a body corporate with perpetual succession through which people exercise their right in determining the system of government or kind of leaders they want. Thus according to the appellant, the Constitution did not envisage political coalitions which were introduced by ***Section 10*** of the **Political Parties Act** which states:

"1. Two or more political parties may form a coalition before or after an election and shall deposit the coalition agreement with the registrar.

2. A coalition agreement entered into after an election shall be deposited with the registrar at least three months before that election.

3. A coalition agreement entered into after an election shall be deposited with the registrar within twenty one days of the signing of the coalition agreement.

4. A coalition agreement shall set out the matters specified in the third schedule"

27. Here the question we have to answer is whether the learned Judge erred by not declaring ***Section 10*** of the **Political Parties Act** unconstitutional? The cardinal rule in interpretation of statute is to check whether it complies with the constitutional mandate. This is a rule that has gained traction in several jurisdictions as stated in the case of, **U.S vs. Butler, (supra)** which was relied on by the appellant. It was held that a duty of a court in determining the constitutionality of a provision of a statute should take the following as a guidance:-

> ***"When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the Court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This Court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends."***

Also in **The *Queen vs. Big M. Drug Mart Ltd*, 1986 LRC (Const.) 332**, the Supreme Court of Canada stated that;

> ***"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. The object is realized through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of the legislation's object and ultimate impact, are clearly limited, but indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation's object and thus validity."***

28. Bearing in mind the above principles we are of the view that although the Constitution does not make any provisions for political mergers or coalitions, Parliament is mandated under ***Article 92*** to make Legislation to provide *inter alia* for the regulation of political parties, the roles and functions of political parties and other matters necessary for their management thereto. We are cognisant of the fact that enactment of legislation involves a lengthy process that involves people's representative as well as public participation. A party seeking to strike a provision of a statute must demonstrate how the particular enactment is unfair, irrational and patently against the values or the spirit of the Constitution. The appellant merely alleged that political parties that form coalitions and support candidates from the coalescing partners offend the principles of good governance and fundamental rights of the individuals.

29. Unfortunately for the umpteenth time, the appellant did not demonstrate how the same people who choose to enter into coalitions can at the same time complain of their rights being violated by their own actions. To us these are the same people and taken conversely, if they were to be barred from forming political mergers and coalitions it can also be taken to be an impediment of their freedom of choice which are enshrined in the Constitution. Had the framers of the Constitution intended to restrict the power of Parliament to enact a Political Parties Act without provisions for coalitions, it would have done so by express terms. There is always a presumption that every statute enacted by Parliament is constitutional and a person challenging the same has an uphill task of demonstrating that the impugned enactments do not engender the national values and principles of good governance which the appellant has failed to do.

30. In conclusion and for the aforesaid reasons, we find no merit in this appeal which is hereby dismissed. As regards the issue of costs, just like the trial court, we make no order as to costs for reasons that the issues raised touched on the interpretation of the law for the benefit of the general public. We order each party to bear their own costs.

Dated and delivered at Nairobi this 22nd day of November, 2019.

M. K. KOOME

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR