



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, WARSAME & G.B.M. KARIUKI, J.J.A.)

CIVIL APPEAL NO. 280 OF 2013

BETWEEN

BISHOP DONALD KISAKA MWAWASI.....APPELLANT

AND

HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION (I.E.B.C.)2ND RESPONDENT

THE COMMISSION ON IMPLEMENTATION

OF THE CONSTITUTION (C.I.C.).....3RD RESPONDENT

*(Appeal against the judgment and decree of the high court of Kenya at Nairobi (D. S. Majanja, J.)
delivered on 28th January, 2013*

in

H.C. ELECTION PETITION NO. 12 OF 2013)

JUDGMENT OF THE COURT

[1] This is an appeal from the judgment and decree of the High Court (**Majanja, J.**) whereby the learned Judge held in essence that by virtue of **Article 78(2)** of the Constitution a person who holds dual citizenship cannot run for an elective office as a member of Parliament. It was submitted by counsel for the appellant in this appeal that the learned Judge erred in law in so finding.

[2] The appellant is a citizen of Kenya by birth having been born in 1950 in Taita Taveta County. He went to United States of American (USA) in 1987 and became an American citizen in 2011 and describes

himself as a dual citizen. On 14th December 2012, the appellant was registered as a member of Agano political party and applied to be nominated to contest for Senate seat of Taita Taveta County in the general elections held on 4th March 2013. The appellant was duly nominated and was issued with a nomination certificate by the Agano party.

[3] Sometime in January 2013 the Independent Electoral and Boundaries Commission (**IEBC**), the second respondent herein, published a public notice prescribing the minimum qualifications and requirements for candidates contesting various elective positions and nominees to party lists. The prescribed qualifications for candidates for election as a member of senate were:

(i) Must be a Kenyan citizen for at least 10 years before the election.

(ii) Must not hold dual citizenship.

(iii) Must not owe allegiance to a foreign state.

(iv) Must be a registered voter

(v) Must be nominated by a political party or an independent candidate.

[4] Following the publication of the notice, the appellant concerned that a Kenyan with dual citizenship was disqualified, wrote to IEBC protesting against what he maintained was an erroneous interpretation of the Constitution and subsequently filed a petition in the High Court seeking various declarations, including a declaration that, save for the office of the President and Deputy President, Article 78 does not bar a citizen of Kenya holding dual citizenship from contesting for election of County Governor, Deputy Governor, Member of Senate, National Parliament, County Assembly and nominee to party lists; an order of certiorari to quash the notice to the extent that it prohibits dual citizens and persons owing allegiance to a foreign state from contesting *inter alia* elective positions as members of senate and national assembly. The appellant in addition claimed damages for violation of his constitutional rights and freedoms. The 2nd respondent (IEBC) filed a replying affidavit maintaining that the qualifications set out in the notice are derived from express and implied provisions of the Constitution and the national legislation.

[5] The questions raised in the petition and in the replying affidavit of IEBC relates to the interplay, or more correctly the interpretation of **Articles 99** and **78** of the Constitution. By Article 93(1) Parliament consists of the National Assembly and the Senate. Article 99, which is under the Chapter of Legislature, ordains the qualifications and disqualifications for elections as a member of parliament. Article 99(1) provides;

“Unless disqualified under clause (2) a person is eligible for election as a member of Parliament if the person –

- a. ***is registered as a voter;***
- b. ***satisfies the educational, moral and ethical requirements prescribed by this Constitution or by an Act of Parliament; and***
- c. ***is nominated by a political party, or is an independent candidate who is supported –***
 - i. ***In 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.”***

By Article 99(2), a person is disqualified from being elected as a member of Parliament if the person is, among other things, a State officer or other public officer other than a member of Parliament or if he has not been a citizen of Kenya for at least ten years immediately preceding the date of election.

On the other hand, Article 78 which is under the chapter on Leadership and Integrity and under the subheading **“Citizenship and Leadership”** Provides:

“78(1) A person is not eligible for election or appointment to a State office unless the person is a citizen of Kenya.

(2) A State officer or a member of the defence forces shall not hold dual citizenship.

(3) Clauses (1) and (2) do not apply to -

(a) judges and members of commissions; or

(b) any person who has been made a citizen of another country by operation of that country’s law, without ability to opt out.”

[6] A State officer is defined in Article 260, the interpretation Article and a State office is similarly defined. The State offices are enumerated and include, among others, the President, Deputy President, Cabinet Secretary, a member of Parliament, a member of county assembly, governor, deputy governor of a county and other members of the executive committee of a county government. A State officer means a person holding a State office.

Article 137 deals with the qualification and disqualification for nomination as President. Article 137(1) provides:

“A person qualifies for nomination as a presidential candidate of the person -

- a. a citizen by birth;***
- b. is qualified to stand for election as a member of parliament;***
- c. is nominated by a political party, or an independent candidate; and is nominated by not fewer than two thousand voters from each of a majority of counties.”***

Article 137(2) provides that a person is not qualified for nomination as presidential candidate if the person, among other things, **owes allegiance to a foreign state.**

By **Article 148** the same qualifications and disqualifications apply to the nomination as a candidate for Deputy President.

[7] The appellant averred in the petition that by **Article 38** which entrenches political rights, he has a right to be a candidate for public office and if elected to hold office; that the IEBC has unlawfully prescribed the qualifications relating to prohibition of a dual citizen and allegiance to a foreign state that the Constitution does not impose, save for President and Deputy President; that, notwithstanding the provisions of Article 78(2), Article 99 does not disqualify a Kenyan holding dual citizenship from seeking election as a member of Parliament save for President and Deputy President and that the definition of State officer in **Article 260** is incompetent and a nullity to the extent that it applies to any office besides the Office of the President, Deputy President, Cabinet Secretary, Chief of Kenya Defence Forces, Commander of Defence Forces and Director General of National Intelligence Service.

On the other hand, **Praxedes Tororey** – a Director of Legal And Public Affairs of IEBC deposed in answer to the petition that Articles 78, 93, 260 are in proper context construed to mean that anybody running or intending to run for senatorial position is a State officer and qualifications for a candidate for a State office under the Constitution must include the requirement under Article 78; that such candidate must not hold dual citizenship; that the qualifications in Article 99 are subject to the other general provisions of the Constitution and national legislation and that the appellant as a citizen of USA must have taken an oath of allegiance to USA constitution and renounced his allegiance to Kenya and is thus precluded by the qualifications and disqualifications set in the law.

[8] The learned Judge made some important findings including:

(1) Article 12 permits the limitation to the rights, privileges and benefits of the citizenship by the Constitution.

(II) Similarly, political rights are not absolute and may be limited either by the law or by the Constitution.

(III) Provisions of Article 99 are neither exclusive nor exhaustive as to the qualifications and disqualifications of a candidate to parliamentary elections.

The learned Judge ultimately held:

***“I find and hold that the Article 78(2) which prohibits a State officer from holding dual citizenship disqualifies a prospective candidate from consideration for nomination. Section 22(1) of the Elections Act No. 12 of 2011 is categorical that a person can only be nominated as a candidate for an election if the person inter alia ‘(a) is qualified to be elected to that office under the Constitution and this Act.*”**

That means that prospective candidates must in the first place be qualified under law to be elected to the posts for which they wish to contest. In our case, that person who is a dual citizen cannot qualify to be a member of Parliament in view of the wall elected by Article 78.”

[9] The appeal is essentially against those findings and holding. **Dr. Khaminwa**, learned counsel now appearing for the appellant, in addition to the submissions made in the High Court submitted that Article 78(2) refers to naturalised Kenyans and does not apply to Kenyan born in Kenya. He relied on a bundle of authorities which according to him show that the international community is accepting the view that a person holding dual citizenship can contest an elective post without any hindrance at all. **Mr. Kakoi** and **Mr. Omuko** the respective counsel for 1st and 2nd respondents made similar submissions as in the High Court which were also reflected in the replying affidavit of IEBC to the petition already referred to. It is not necessary to repeat them here.

[10] The petition and the appeal raise a wider question of leadership by dual citizens, more particularly the question of political representation. The **Kenya Constitution 2010 (new constitution)** recognizes two forms of citizenship – citizenship by birth and citizenship by registration. It has done away with citizenship by naturalization which was contained in the repealed 1963 Constitution. The new Constitution also recognizes dual citizenship and provides in Article 16 that a citizen by birth does not lose citizenship by acquiring citizenship of another country. This is in contrast to section 97 of the 1963 Constitution which provided that a citizen of Kenya and also a citizen of some other country ceased to be a citizen of Kenya unless he has renounced his citizenship of the other country and taken an oath of allegiance. Article 16 is reinforced by section 8(1) of the Kenya Citizenship and Immigration Act, No. 12 of 2011 which provides that a citizen of Kenya by birth who acquires citizenship of another country is entitled to retain the citizenship of Kenya subject to the provisions of the Act and the limitations prescribed in the Constitution. Section 8(7) of the Act however provides that a dual citizen shall owe allegiance and be subject to the laws of Kenya. In case of a foreign national – that is, a person who is not a citizen of Kenya, who applies for registration as a citizen of Kenya, section 20(1) of the Act gives him an option either to retain or renounce the citizenship of the other country.

[11] There is no obligation under international law for a country to recognize dual citizenship nor are there any international standards. Whether a country will recognize dual citizenship would depend on its peculiar circumstances - historical, social, economic and political dynamics. The recognition of dual citizenship by the new Constitution is a bold milestone and a progressive one considering that many countries even the developed countries are reluctant to allow dual citizenship. It is a measure of our understanding and recognizing the peculiar circumstances that prevails in our legal regime.

There is also no universal principle on the rights to be enjoyed by a dual citizen. The research paper prepared by the Caribbean Policy Research Institute entitled **DUAL CITIZENSHIP AND**

POLITICAL REPRESENTATION IN JAMAICA gratefully availed by the advocates for the appellant and which contains a helpful comparative analysis shows that even in countries which allow dual citizenship, full rights by dual citizens are restricted. In many countries, dual citizens are disqualified from holding high constitutional offices and from political participation. A few countries like USA, UK and Canada are more tolerant. Contrary to submissions of Dr. Khaminwa, very few countries allow a dual citizen to hold leadership positions.

It follows that whether the political system in Kenya allows leadership and political representation by dual citizens can only be determined from the interpretation or the application of the new Constitution and national legislation having regard to the sovereign will and power of the people of Kenya who adopted the new Constitution in a referendum.

[12] The political rights of the citizens of Kenya including dual citizens under Article 38 are part of the fundamental rights and freedoms under the Bill of Rights. They can be restricted as Article 38(3) itself provides or limited by law as Article 24(1) provides.

There is an apparent tension between Article 99 which provides for qualifications and disqualifications for election of a member of Parliament and Article 78(2) which states that a State officer shall not hold dual citizenship. The validity or legality of both Articles cannot by virtue of Article 2(3) be challenged. Similarly the definition of a State officer in Article 260 is not subject to challenge. As Article 259 provides those articles must be interpreted in a manner *inter alia* that promotes the purpose, values and principles of the Constitution and also in a manner which promotes good governance. Furthermore, as the learned Judge correctly stated the three Articles must be considered together as an integral whole. Again, as the learned Judge stated, Article 260 which interprets a State officer to include, among other officers, a member of Parliament, a member of county assembly, governor, deputy governor or other members of the executive committee of a county government cannot be *ultra vires* the Constitution.

[13] Article 99 does not expressly disqualify a dual citizen from vying as a member of Parliament. However, by Article 99(2) a person is disqualified if he is a State officer or a Public officer other than a member of Parliament. That means that a person who is already a State officer or Public officer is ineligible for election as a member of Parliament. By the time the appellant was nominated by his party he was not a State officer and was not therefore disqualified under Article 99(2). Similarly as the appellant is a Kenyan citizen he is by virtue of Article 78(1) eligible for election. The proscription in Article 78(2) is for a State officer holding dual citizenship. However the proscription is not absolute. It is exempted by Article 78(3) (b), if the person is made a citizen of another country by operation of that country's law without **ability to opt out**. That exception is significant. It implies that if the laws of that other country have no provision for renunciation of citizenship of that country, a State officer can hold dual citizenship. Article 80 authorized Parliament to enact legislation on Leadership, to among other things, provide for the application of the chapter on Leadership with necessary modifications, to public officers. In pursuance of that Article, Parliament enacted the Leadership and Integrity Act (Chapter 182) which provides in section 31 thus:

“31 (1) subject to Article 78(3) of the Constitution, a State officer who acquires dual citizenship shall lose his or her position as a State officer.

(2) a person who holds dual citizenship shall, upon election or appointment to a State office, not take office before officially renouncing their citizenship in accordance with the provisions of Kenya Citizenship and Immigration Act, 2011 (No. 12 of 2011)”.

[14] Thus Parliament interpreted Article 78(2) to mean that a dual citizen is eligible to stand for election but upon election he cannot hold office unless and until he voluntarily and officially renounces citizenship of the other country according to the law. Although the Immigration and Citizenship Act has no specific provision for renunciation of citizenship of another country by a dual citizen, section 20 which applies to voluntary renunciation of citizenship by a foreign national upon application for registration as a citizen of Kenya presumably applies to dual citizenship as the marginal note to the section implies. Such a person is required to avail to the Cabinet Secretary evidence of renunciation of citizenship of the other country.

Section 22(1) (a) of the Elections Act provides that a person may be nominated as a candidate for election under the Act only if that person is qualified to be elected to that office under the Constitution and the Act. The learned Judge relied on that provision and Article 78(2) for the finding that a dual citizen is not qualified for nomination as a candidate for an election. This was an erroneous finding for, as observed above, the proscription is not against a dual citizen vying for an election but against a dual citizen holding a State office. That is the point which was missed by the learned trial Judge. We think that was a fundamental error.

[15] The prescription by IEBC in the assailed notice that a candidate contesting an elective post must not owe allegiance to a foreign state is in conformity with the law. As already stated, section 8(7) of the Immigration and Citizenship Act provides that a dual citizen shall owe allegiance to Kenya. That is the duty of every citizen as section of 23 of the same Act provides.

[16] It has been submitted that Article 78(2) does not apply to a Kenyan born in Kenya and that it applies to naturalized Kenyans. The Constitution does not provide for a class of citizens of “**Kenyan born in Kenya**”. Article 14 only provides for a citizenship by birth which has a wide and technical meaning as stipulated in Article 14 as read with clause 30 of the Sixth Schedule of the Constitution. The law does not discriminate against the rights of citizens of Kenya nor place dual citizens in different categories. Article 78(2) applies to all dual citizens.

[17] From the above analysis, we hold that:

1. While a citizen by birth does not lose citizenship by acquiring the citizenship of another country and while a dual citizen is by virtue of Article 12(1) entitled to rights, privileges and benefits of citizenship by rights to leadership including political participation are limited by Article 78(2).
2. Parliament in enacting section 31 of the Leadership and Integrity Act interpreted Article 78(2) correctly. The proscription in Article 78(2) is not against a dual citizen being elected or being appointed as a State officer. The restriction is against leadership by dual citizen in the specified State offices, and it does not all apply unless and until a person is elected and/or appointed to a State office. That is a material fact which must be borne in mind.
3. A dual citizen is eligible to seek nomination for election as a member of Parliament or member of county government and to stand as a Member of Parliament or county government in an election and also eligible to hold any State office.
4. However, a dual citizen is disqualified upon election or appointment to a State office from assuming office before voluntarily and officially renouncing his other citizenship howsoever granted in accordance with Kenya Citizenship and Immigration Act unless as Article 78(3) provides, he has no ability under the laws of the other country to renounce citizenship of the other country.
5. The High Court erred in law to the extent that it held that a dual citizen is disqualified from nomination and from standing for election as a member of Parliament.

[18] Lastly, the claim for damages for breach of constitutional rights was not seemingly pursued in the High Court. The nature and extent of damages are not known. Furthermore, the damages appear too remote as there is no certainty that the appellant could have been elected by the electorate as a member of the Senate or that he could have renounced citizenship of USA upon election.

The appeal has substantially succeeded and the appellant is entitled to the costs of the petition and of the appeal as against the 2nd respondent.

[19] In the premises, the appeal is allowed, the judgment of the High Court is set aside and in lieu thereof substituted with holdings No. 1, 2, 3 and 4 above. The claim for damages is dismissed. The 2nd respondent shall pay to the appellant the costs of the appeal and the costs of the petition. The 1st and 3rd respondents shall bear their own costs.

Orders accordingly.

Dated and delivered at Nairobi this 6th day of June, 2014.

E. M. GITHINJI

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

*I certify that this is a
true copy of the original*

DEPUTY REGISTRAR