



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

PETITION NO. 1 OF 2017

(Before D. K. N. Marete)

ERIC CHERUIYOT.....1ST PETITIONER
RAYMOND KINYUA2ND PETITIONER
EMILY THAARA NJUKI.....3RD PETITIONER
MONICA CYOMBUA GITARI4TH PETITIONER
DR. PETER KOROS.....1ST INTERESTED PARTY
RACHEL NGENO.....2ND INTERESTED PARTY
GEOFFREY LANGAT3RD INTERESTED PARTY
PHILEMON KIPNGETICH ARUASA4TH INTERESTED PARTY
SIMON KIPLANGAT KORIR.....5TH INTERESTED PARTY
STANLEY K. SOI.....6TH INTERESTED PARTY
EMILY CHERONO MOSONIK7TH INTERESTED PARTY
DR. STEPHEN KIPLANGAT KOSKEY.....8TH INTERESTED PARTY

VERSUS

**INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION.....1ST RESPONDENT
PUBLIC SERVICE COMMISSION2ND RESPONDENT
ATTORNEY GENERAL.....3RD RESPONDENT
CHIEF OF STAFF AND HEAD OF PUBLIC SERVICE.....4TH RESPONDENT
EMBU COUNTY GOVERNMENT.....5TH RESPONDENT
THE GOVERNOR, EMBU COUNTY.....6TH RESPONDENT
COUNTY GOVERNMENT OF BOMET.....7TH RESPONDENT
COUNTY PUBLIC SERVICE BOARD – BOMET COUNTY.....8TH RESPONDENT**

JUDGEMENT

This is a multifarious petition. It is originated by a public interest litigation in the form of a petition dated 16th January, 2017. This seeks the following relief;

- i) A declaration that Section 43(5) and (6) of the Elections Act, No.24 of 2011 is unconstitutional.
- ii) A declaration that Public officers can only leave office to participate in the election process upon dissolution of parliament and County Assemblies.
- iii) A permanent injunction do issue restraining the Respondents either by themselves, servants, agents, employees, assignees, proxies and or representatives from disqualifying public servants from the next general (election) for not vacating public office six months to election date.
- iv) An order of mandamus directed at the 1st Respondent to gazette the date for the next general election.
- v) An order of certiorari to quash the 4th Respondent's letter dated 1st December, 2016.
- vi) Cost of this Petition.
- vii) Any other relief that this honourable court may deem just and fair to order.

The facts relied on in the petition are cited as;

6. **THAT** the 3rd Respondent introduced before the National Assembly for debate and enactment of Section 43(5) and (6) of the Elections Act No.24 of 2011.
7. **THAT** the said debate and enactment of the said Section 43(5) and (6) of the Elections Act No. 24 of 2011 was not preceded by public participation as contemplated by Article 118 of the constitution.
8. **THAT** Section 43(5) and (6) of the Elections Act No. 24 of 2011 obligates a select category of public servants to vacate office 6 months before general elections.
9. **THAT** it is generally expected that the 1st Respondent will hold the next general election on 8 August 2017.
10. **THAT** the 1st Respondent has failed, refused and or neglected to gazette the next date of the expected general election.
11. **THAT** relying on Section 43(5) and (6) of the Elections Act No.24 of 2011 the 4th Respondent has asked a section of public servants who intend to participate in the forthcoming general election to vacate office by 7th February 2017.
12. **THAT** Section 43(5) and (6) of the Elections Act No.24 of 2011 interferes with public servants' contracts of employment with the 2nd Respondent and other public entities.
13. **THAT** Section 43(5) and (6) of the Elections Act No. 24 of 2011 is discriminatory against public servants with political ambition, as it targets their contracts of employment for termination, as it leaves the rest of public servants in employment.
14. **THAT** Section 43(5) and (6) of the Elections Act No.24 of 2011 has accorded current Members of Parliament, Members of the County Assembly and Governors an undue advantage as they will continue holding public office until the general election is held, while the rest of the public servants are expected to terminate their respective contracts of employment by operation of Section 43(5) and (6) of the Elections Act No. 24 of 2011.
15. **THAT** to that extent, Section 43(5) and (6) of the Elections Act No.24 of 2011 has conferred a benefit on Members of Parliament, Members of the County Assembly and Governors in contravention of Article 27 of the Constitution as it curtails other public servants' contracts of employment.
16. **THAT** Section 43(5) and (6) of the Elections Act No. 24 of 2011 introduces a threshold in participation in the electoral process that is not contemplated under Article 38 of the Constitution thereby interfering with the requirement as to being (sic) a free and fair election based on universal suffrage.
17. **THAT** Section 43(5) and (6) of the Elections Act No.24 of 2011 imposes unreasonable and un contemplated restrictions on public officers' participation in the country's political process in contravention of Article 38 of the Constitution.
18. **THAT** Section 43(5) and (6) of the Elections Act No.24 of 2011, by interfering with officer's contracts of employment, abrogates public officers' right to fair labour practices in contravention of Article 41(1) of the Constitution.
19. **THAT** Section 43(5) and (6) of the Elections Act No.24 of 2011 deprives public officers a source of income for a whole six (6)

months while Members of Parliament, Members of the County Assembly and Governors continue being in employment thereby making the political process and competition unfair.

20. **THAT** by enacting Section 43(5) and (6) of the Elections Act No.24 of 2011, Parliament overstepped its mandate by interfering with the 2nd Respondent's constitutional mandate of reviewing and making recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the public service pursuant to Article 234 of the Constitution.

21. **THAT** Section 43(5) and (6) of the Elections Act No.24 of 2011 abrogates Article 236(1) of the Constitution of Kenya by victimizing public officers and hounding them out of office six months to election date merely for expressing interest in the country's political process.

By an Amended Petition filed on 10th March, 2017, the now 2nd – 4th Petitioners brought in their petition seeking the following prayers, redress and relief;

(a) **THAT** a declaration be issued to declare the Section 43(5) of the Elections Act, 2011 is inconsistent with and violates the rights of the Petitioners and other public officers seeking elective office to fair labour practices enshrined in Article 41 of the Constitution.

(b) **THAT** a declaration be issued to declare that the rejection by the 3rd and 4th Respondents of the Petitioners' respective letters of revocation of resignation dated 7th February, 2016 is illegal and contravenes their rights enshrined in Articles 27, 28, 41, 47 and 50 of the Constitution.

(c) **THAT** an order of certiorari be issued to bring into this Honourable Court and quash the decision of the Fourth Respondent contained in his letters dated 9th February, 2017 to reject the Petitioners' respective revocation of their resignation pursuant to Section 43(5) of the Elections Act, 2011.

(d) **THAT** an order of permanent injunction be issued to restrain the 3rd and 4th Respondent to advertise the positions of the Petitioners or to replace them until after the close of the nomination process for the 2017 General Election.

(e) **THAT** a declaration be issued to declare that Section 43(5) of the Election Act, 2011 is unconstitutional for being discriminatory within the meaning of Article 27 of the Constitution.

(f) **THAT** a declaration be issued that under Article 24(1) and (2) of the Constitution the requirement for a public officer who intends to contest an election to resign from public office at least seven months before the date of the election is unreasonable and unjustified in a democratic society.

(g) **THAT** a declaration be issued to declare that unless and until nomination process for a given election there is no compelling public interest that demands mandatory resignation of a public officer from a public office.

(h) **THAT** a declaration be issued to declare that the value of political neutrality and attendant public interest vis-avis the right to fair labour practices under Article 41 of the Constitution can be achieved through a mandatory requirement for any unelected public officer who intends to contest an election to take leave of absence during the nomination period for that election.

(i) Compensation for violation of fundamental rights and freedoms of the Petitioners protected under Articles 27, 28, 38, 41, 47 and 50 of the Constitution.

(j) **THAT** the costs of this Petition be borne by the 3rd and 4th Respondents.

This is based on the following grounds;

6. At all material time, the Petitioners were respectively County Secretary, County Executive Committee Member Youth & Sports and Chief Officer Livestock and Fisheries in the County of Embu.

7. On or about January 5, 2017 the Petitioners together but separately tendered their resignations from their respective positions to the Governor of Embu pursuant to Section 43(5) of the Election Act, 2011 which provides as follows:

43(5) A Public officer who intends to contest an election under this Act shall resign from public office at least seven months before the date of election.

8. The said resignations tendered by the Petitioners were to take effect from 7th February, 2017. The Petitioners categorically stated in their letters that they were submitting their resignation that early for the General Elections schedule for 7th August, 2017 in order to comply with the law as opposed to own volition.

9. On or about 5th February, 2016 the Petitioners learnt that this Honourable Court in **Kericho ELRC Petition No.1 of 2017 – Eric Cheruiyot vs. Independent Electoral and Boundaries Commission & 3 Others** had issued an order which basically barred the IEBC from disqualifying Public Servants from the General Elections on grounds of not vacating public office seven months to the date of elections. Consequently – upon consulting their advocates – the Petitioners by separate letters dated 7th February, 2017 revoked their notices of resignation in order to continue serving in their respective positions until this Honourable Court determines

the case aforementioned more so the issue of constitutionality of Section 43(5) of the Elections Act.

10. In response to the Petitioners' respective resignation revocation letters the Embu Governor by separate letters dated 9th February, 2017 addressed to each of the Petitioners stated, inter-alia, that the Petitioners could not revoke their resignations as the same had been accepted and taken effect and the positions filled. However, the Petitioners aver that their positions have not been filled and they revoked their resignation before the same had taken effect. In the premises the Petitioners are entitled to retain their positions on the basis of the orders of this Honourable Court and pending determination of the constitutionality of Section 43(5) of the Elections Act against the backdrop of Articles 41 of the Constitution read with Articles 27, 28, 38, 41, 47 and 50 of the Constitution.

11. The Petitioners state that Article 41 of the Constitution guarantees them, inter-alia, the rights to fair labour practices, fair remuneration and reasonable working conditions. The Petitioners contend that under Article 24(5) of the Constitution the extensive limitation of the rights protected by Articles 41 of the Constitution is only permissible in regard to persons serving in the Kenya Defence Forces or the National Police Service.

12. In view of the foregoing contention, the Petitioners aver that any legislation seeking to limit the rights protected by Article 41 of the Constitution must comply with Article 24(1) and (2) thereof. In this connection, the Petitioners contend that Section 24(5) of the Elections Act is unconstitutional for contravening Section 24(1) and (2) of the Constitution as follows;

- i) The seven-month resignation is not reasonable and justifiable basis to limit the Petitioners rights under Article 41 read with Articles 27 and 38 of the Constitution
- ii) There are less restrictive means to achieve the political neutrality of civil servants including the following;
 - a) Enforcement of Chapter Six of the Constitution.
 - b) Enforcement of the Public Officers and Ethics Act, 2003.
 - c) Enforcement of civil service code of conduct.
 - d) Requiring that the Rule should apply after nomination.
 - e) Leave of absence by civil servants at the commencement of the nomination process
- iii) Section 43(5) of the Election Act does not specifically express the intention to limit the rights of political aspirants protected by Article 41 and 24(2)(a) of the Constitution.
- iv) Section 43(5) of the Elections Act derogates from the core and essential contents of the rights of the Petitioners and other political aspirants protected by Article 41 merely because they are public officers.

13. The Petitioners state that in order to prevent the obvious mischief of members of Parliament enacting a law that disadvantages their political rivals the resignation period must be specifically limited to commencement of the nomination process for a given election.

14. Further to the above, the Petitioners aver that Section 43(5) of the Election Act violates their rights and that of potential political candidates protected under Article 38 of the Constitution on the following grounds;

- i) It is unjustifiable and unreasonably raises the economic cost of seeking political office for political aspirants working in the public sector.
- ii) The benefit of Section 43(5) of the Elections Act is not proportionate to the limitation of Article 38 and attendant economic loss that public servants with political ambitions are condemned to suffer.
- iii) From the standpoint of Article 38 of the Constitution, Section 43(5) of the Election Act operates as a severe limitation of the number of public servants who can exercise their political right to seek elective office.

15. Section 43(5) of the Elections Act violate the Petitioners rights under Article 41 of the Constitution as follows;

- i) Given the necessary connection between the right to secure a dignified living and employment, there is no constitutional justification to compel the Petitioners to forfeit income and means of livelihood merely on the ground of harboring political ambitions.
- ii) The seven months period of resignation constitutes unfair labour practices both on account of being too long and for no-application to all public officers mentioned in Section 43(6) of the Elections Act.
- iii) The mischief sought to prevented by and the principle embodied in Section 43(5) of the Elections Act do not trump the rights of Petitioners and other political aspirants to secure income and livelihood from their employment for the longest

possible period compatible with justifiable public interest.

iv) As long as there is no linkage between the seven months period and the electoral timelines, Section 43(5) of the Elections Act is not a reasonable and justifiable limitation of the Petitioners' rights under Article 41 of the Constitution.

16. The petitioners aver that Section 43(5) of the Elections Act violates their rights to equality and protection of law and freedom from discrimination protected under Article 27 of the Constitution in that;

i) Section 43(6) of the Constitution seeks to exclude some public officers from the rigours and sanction of the seven months resignation period.

ii) Given that employment in the public sector is a legitimate means for some Kenyan citizens to derive their means of livelihood, there is no rational justification for one category of aspirants to lose their income whilst aspirants under section 43(6) and in the private sector enjoy their rights in full.

17. The Petitioners contend that in refusing to act on their revocation of resignation as public officers the County Government of Embu and its Governor have violated their rights under Articles 27, 28, 41, 47 and 50 of the Constitution in that;

i) The Petitioners have a right to equal protection of law as duly enacted and/or interpreted and applied by the courts. Consequently the order of the Court is ELRC Petition No.1 of 2017 uphold a position that the Petitioners are meanwhile entitled to take and enjoy (sic.)

ii) Section 43(5) of the Election Act offends the right to human dignity protected by Article 28 of the Constitution. Accordingly the decision of the County Governor has violated the Petitioners dignity.

iii) The Governor's decision to reject the revocation of the Petitioners' resignation amount to violations of the right to fair labour practices.

iv) The decision of the County Government of Embu is procedurally unfair and a usurpation of judicial power in brazen contravention of the Petitioners' rights under Articles 47 and 50 of the Constitution.

18. The Petitioners aver that any issue that directly relates to the rights, privileges and obligations of employers and employees falls within the exclusive jurisdiction of this Honourable Court.

19. It is in the public interest that this Petition be heard and determined together with ELRC No.1 of 2017 particularly because this matter relates to the General Elections scheduled to be held on 7th August, 2017.

20. The interests of justice and constitutional necessity dictate that the relief sought be granted forthwith in order to uphold the Rule of Law.

This petition was consolidated with Petition No.1 of 2017 on 27th February, 2017, with Petition No.1 of 2017 as the lead case.

The Petitioners are then joined by three applications brought to court by way of Notices of Motion. The first is dated 24th February, 2017 in which the 1st – 4th Interested Parties seek orders of court as follows;

a) THAT this application be certified as urgent, service of the same be dispensed with and it be heard ex-parte in the first instance.

b) THAT the Applicants be enjoined as an Interested Parties in this Petition.

c) THAT the Resignations' of Dr. Peter Koros, Rachel Ngeno, Geoffrey Langat and Philemon Kipngetich the Applicants/interested Parties herein from their respective public office position be stayed pending the Hearing and determination of the application dated 16th January, 2016 herein.

d) THAT the Resignations' of Dr. Peter Koros, Rachel Ngeno, Geoffrey Langat and Philemon Kipngetich the Applicants/interested Parties herein from their respective public office position be stayed pending the Hearing and determination of the petition herein.

e) THAT this Honourable Court do make any other orders as it may deem fit in the interest of justice.

f) THAT the costs of the Application be in the cause.

This is grounded on the following;

1. That all the interested Applicants were at all material times to this Petition serving as public servants when the 4th Respondent issued a letter dated 1st December, 2016 requiring all Public servants seeking elective positions in the 2017 general elections to resign vacate office on or before 7th February, 2017.

2. That all the interested Applicants herein want to seek elective positions in the 2017 General Elections
3. That the interested Applicants are in support of the Petition at hand together with the Notice of Motion Application dated 16th January, 2017 and would wish to actively take part in it's proceedings and further file pleadings.
4. The rights and interests of Interested parties will be prejudiced if this Application is not allowed.
5. No prejudice will be caused to any party by this Honourable Court granting the application.

On 2nd March, 2017, the 5th – 7th interested parties/Applicants join the fray in their application of even date seeking orders that;

1. THAT this application be certified as urgent, service of the same be dispensed with and it be heard ex-parte in the first instance.
2. THAT the Applicants be enjoined as an Interested Parties in this Petition.
3. THAT the Resignations' of Simon Kiplangat Korir, Stanley K. Soi and Emily Cheron Mosonik the Applicants/interested Parties herein from their respective public Office position be stayed pending the Hearing and determination of the petition herein.
4. THAT the Resignations' of Simon Kiplangat Korir, Stanley K. Soi and Emily Cheron Mosonik the Applicants/interested Parties herein from their respective public Office position be stayed pending the Hearing and determination of the petition herein.
5. THAT this Honourable Court do make any other orders as it may deem fit in the interest of Justice.
6. THAT the costs of this Application be in the cause.

This is based on the grounds adduced and enumerated in the earlier application dated 24th February, 2017.

Lastly, by an application dated 4th March, 2017, the applicant, one, Dr. Stephen Kiplangat Koskey comes to court in search of orders as follows;

- a) THAT this application be certified as urgent, service of the same be dispensed with and it be heard ex-parte in the first instance.
- b) THAT the Applicant be enjoined as an Interested Parties in this Petition
- c) THAT the Resignations' (sic) of Dr. Stephen Kiplangat Koskey the Applicant/interested party herein from his public Office position as the Deputy Director Medical Services-County Government of Bomet be stayed pending the Hearing and determination of the Application dated 16th January, 2017 herein
- d) THAT the Resignation of Dr. Stephen Kiplangat Koskey the Applicant/interested party herein from his public Office position as the Deputy Director Medical Services-County Government of Bomet be stayed pending the Hearing and determination of the Petition herein.
- e) THAT the Resignations' of all Public Officers who wish to seeking (sic) elective positions in the 2017 general elections be stayed pending the Hearing and determination of the Petition herein.
- f) THAT the Resignations' all Public Officers who wish to seeking (sic) elective positions in the 2017 general elections be stayed pending the Hearing and determination of the Petition herein.
- g) THAT this Honourable Court do make any other orders as it may deem fit in the interest of justice.
- h) THAT the costs of this Application be in the cause.

This application is grounded as follows;

1. That at all material times to this Petition I have been serving as a public servants (Deputy Director Medical Service – County Government of Bomet) when the 4th Respondent issued a letter dated 1st December, 2017 requiring all public servants seeking elective positions in the 2017 general elections to resign vacate office on or before 7th February, 2017.
2. That I want to seek an elective position in the 2017 General Elections.
3. That I am aware that this court issued an order which order is still in force suspending the implementation of the 4th Respondent's circular issued through a letter dated 1st December, 2016.
4. That I am in support of the Petition at hand together with the Notice of Motion Application dated 16th January, 2017 and would wish to actively take part in its proceedings.

5. *That my rights and other Kenyans stand to be prejudiced if our employers force us to resign our positions based on the Circular that was issued by the 4th Respondent whose contents have since been suspended by this Honourable Court if this Application is not allowed.*

6. *No prejudice will be caused to any party by this Honourable Court granting the application.*

The Interested Parties were enjoined as such vide orders of court issued on 10th March, 2017.

The 1st Respondent vide 1st Respondent's Grounds of Opposition to the petition dated 21st February, 2017 avers that the petition is misconceived, mischievous and an abuse of the process of court. Further, the petition does not disclose a cause of action against the 1st Respondent in that the issues of resignation and retraction of resignation are employer/employee matters to which she is stranger. The Grounds of Opposition are dated 8th March, 2017 and filed on even date.

It is the 1st Respondent's other case that to achieve the objectives of Article 232, 73 and 75 of the Constitution of Kenya, 2010, section 43(5) of the Elections Act must be read together with S.12(1) (c) Political Parties Act, Cap 7B, laws of Kenya as well as S.23 (3) of the Leadership and Integrity Act. S.43 (6) exempts elected state officers.

The 1st Respondent's further case is that the Constitution allows differentiation for legitimate purpose as in S.43 (6) of the Elections Act and that the statutory provisions of S. 43 (5) are premised on constitutional values that seek to promote good governance, integrity in leadership and values of public service as enjoined in the Constitution. Again, the right to equality and protection of the law and freedom from discrimination under Article 27 is a qualified right under Article 24 and not absolute as enshrined under Article 25 thereof.

The 1st Respondent further avers that the period of six months provided under S.43 (5) for resignation by public servants seeking elective office is reasonable bearing in mind election timelines as set out.

Curiously, she reintroduces the issue of jurisdiction with an averment that this court lacks jurisdiction on issues of interpretation of the constitution and further that the subject matter has been determined by a court of competent jurisdiction in the authority of **Charles Omanga & Another vs Independent Electoral and Boundaries Commission & Another, [2012] eKLR**.

I note that there is some discrepancy in the line-up for the respondents in Petition No.2 of 2017. Here, the Hon. Attorney-General comes in as the 1st respondent, while the Independent Electoral and Boundaries Commission is listed as the 2nd. This is however cured in the consolidation of the matters on 27th February, 2017 where the parties resume their original positions as parties, that is, IEBC as the 1st and the Hon. Attorney-General as the 3rd respondents respectively.

By a 2nd Respondent's Replying Affidavit (now IEBC and pre consolidation) sworn by Ruth Kavuo Makuthi on 24th February, 2017 in response to the petition dated 21st February, 2017, the 2nd respondent (now 1st respondent) avers that the petition is without merit, vexatious and an abuse of the process of court and should be dismissed with costs to herself. This is on grounds that the enactment of S.43(5) of the Elections Act, 2011 was rightly done by parliament in pursuance of authority imbued by Article 82(1)(b) of the Constitution. This validates both the enactment and the action of parliament.

It is her further case that Articles 137(2)(b) and (3), (99)(2)(a), 180(2) and 193(2)(a) provide the requisite and qualifications for elections of President, Members of Parliament (MPs), Governors, and Members of the County Assembly (MCAs). It is her case that all these are disqualified from election if they are a state officer or other public officer for MPs, Governors and MCAs. The president requires a higher standard in that he will be disqualified from nomination if he does not meet the criteria above. The 2nd respondent therefore justifies S.43(5) of the Elections Act for providing resignation of public officers as set out so as to facilitate their eligibility for elections.

The 2nd Respondent's (the Hon. Attorney-General's) case is set out in the Replying Affidavit by James Njoroge Mwangi sworn on 8th March, 2017. Here, she avers that S.2 (1) (b) of the sixth schedule to the constitution had suspended the provisions of chapter eight of the Constitution until the first elections of 2013. This therefore ousted the application of Article 118 on public participation in legislative drafting and other business of parliament. It was not in effect in August, 2011 during the enactment of the Elections Act, 2011.

The 2nd Respondent indeed foments a case of public participation as reported by Hon. Martha Karua in the Hansard, 20th August, 2011 and avers that, in any event, parliament had acted reasonably in enacting of the Elections Act, 2011.

Her other case is that the 1st Petitioner has approached court on the eleventh hour of the second general election under the constitution and this amounts to inordinate delay.

The 2nd Respondent further justifies the statutory provisions for resignation six months prior to the election date on the ground that Article 232 of the constitution requires high standards of professional ethics, provision of impartial services and efficiency and further that a public servant involved in political campaigns is incapable of providing responsive, prompt, effective and impartial services to the people as expected of Article 232.

She further cites Article 24 of the constitution as providing that in reasonable and justifiable circumstances as in the instant case, political rights provided under Article 38 can be limited.

In the penultimate, the 2nd Respondent also cites Article 10 of the Constitution as providing good governance as one of the national values and principles of good governance. Again, S.16 of the Public Ethics Act, in line with the principles of good governance provides that a public officer shall not in the performance of his duties act as an agent so as to further the interests of a political party or indicate support for an opposition to any political party.

This Petition would open for hearing on 20th March, 2017, after failing on several other attempts. This was done by way of highlighting the written submissions of the parties.

The 1st Petitioner opened his highlight by recognizing and acknowledging his written submissions filed on 22nd February, 2017 and a supplementary version on 20th March 2017.

The petitioner then set out the following as issues for determination;

1. *Whether S. 43(5) and 43(6) of the Elections Act No.24 of 2011 was enacted with or without public participation in contravention of Articles 10(2) (a) and 118 (1) (b) of the Constitution of Kenya, 2010.*
2. *Whether S.43 (5) and 43(6) of the Elections Act creates a legislative framework this discriminates public servants and hereby introduces unfair practices.*
3. *Whether the limitation of public servants rights to Employment and participation in political activity is justifiable under Articles 27, 38 and 41 of the constitution.*

On the 1st issue, the 1st petitioner submits that the impugned provisions of law were enacted in 2011. This enactment was expected to comply with Articles 10(2) (a) and Article 118(1) (b) of the constitution. This (public participation) would have addressed the following issues;

- i) *Why should public servants resign six months to the date of elections?*
- ii) *What is the rationale for demanding that public servants resign?*
- iii) *What about allowing public servants to take leave to participate in the country's electoral process?, and*
- iv) *What happens to the concerns of public servants who loose elections?*

It is the petitioner's further submission that these issues would only have been addressed through a meaningful public participation process that would also involve the views of public servants. In the absence of evidence of public participation in the enactment of S. 43 (5) and (6) herein, the provisions would not meet the constitutional threshold of legislation.

The 1st Petitioner rubbishes the 2nd – 4th respondents attempts to bring out a case of public participation as follows;

Paragraph 7 (at page 66) of the affidavit sworn by Alice Otwala for the 2nd Respondent, on 27 January 2017, merely denies with no report of public participation being attached to evidencing the same. The 2nd – 4th Respondents further contend in their Replying Affidavits that the Applicant had an opportunity to raise the lack of public participation soon after the Act was passed and that the Applicant's application coming six years later is made too late. This, ... is implying that they confirm that there was no public participation in the enactment of the above mentioned sections. Their defence is effluxion of time, a line of defence that is not available in a constitutional imperative such as this.

The 1st petitioner submits a case of lack of evidence of public participation even in the attempt to do this vide the 1st Respondent's Replying affidavit of James Njoroge Mwangi in that this only evidences representative participation as opposed to public participation. It is his submission that even the suggested report of public participation by Hon Martha Karua on involvement of public is not backed by a material evidence as the Hansard report of 23rd August, 2011 is not availed by the 2nd respondent. This would only have been established by a report of public participation outside parliament.

The 1st Petitioner again submits that this would not be ousted by the inactivity of Article 118(1) (b) as Article 10(2) (a) equally calls for and requires public

participation as a tool of good governance. This should have been applied in the absence of Article 118(1) (b) but was not.

He relies on the authority of **Mercy Munee Kingoo vs Safaricom Limited & Another, 2016 eKLR** where my brother, Chitembwe, J. observed as follow;

“... where the new introductions alter the original Act to a great extent and introduces new substantive provisions that were not in place before, then such amendments ought to be subjected to public participation...Article 10(2)(a) on National values and Principles of Governance calls for participation of the Kenyans in all spheres of life. Similarly, Article 118 calls for parliament to conduct its business and the business of its committees in an open manner to facilitate public participation... it is not expected that all Kenyans will participate in the enactment of legislation...However, by enacting the 2010 Constitution, Kenyans still felt that they should be engaged once and again when Parliament is conducting its affairs. That is why Article 118 was placed in the Constitution. Such Article calls for engagement with stakeholders of each particular sector affected by a specific legislation whenever such legislation is amended or where a new legislation is enacted.”

Again, the 1st Petitioner sought to rely on the authority of **Matatiele Municipality and others vs President of the Republic of South Africa**, where Ngcobo, J. sitting in the Constitutional Court of South Africa observed as follows;

“... the provincial legislatures have broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case, so long as it is reasonable to do so. Undoubtedly, this obligation may be fulfilled in different ways and is open to innovation on the part of the legislatures. In the end, however, the duty to facilitate public involvement will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them. Our constitution demands no less. In determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the Court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances. And factors relevant to determining reasonableness would include rules, if any, adopted by Parliament to facilitate public participation, the nature of the legislation under consideration, and whether the legislation needed to be enacted urgently. Ultimately, what parliament must determine in each case is what methods of facilitating public participation would be appropriate. In determining whether what parliament has done is reasonable, the Court will pay respect to what Parliament has assessed as being the appropriate method. In determining the appropriate level of scrutiny of Parliament’s duty to facilitate public involvement, the Court must balance, on the one hand, the need to respect Parliamentary institutional autonomy, and on the other, the right of the public to participate in the public affairs. In my view, this balance is best struck by this Court considering whether what Parliament does in each case is reasonable.”

The 1st Petitioner further seeks to distinguish representative and participatory democracy by submitting that the constitution of Kenya, 2010 has brought out a hybrid of representative and participatory democracy vide Articles 10(2) (a) and Article 118(1) (b). It is his submission that Article 118(1) (b) is shared word for word with the Constitution of the Republic of South Africa and therefore the reference to South African case law.

It is the 1st Petitioner’s submissions that the report of the Constitution Implementation Commission is a demonstration and admission of lack of public participation due to frustration by government departments in pursuing the right procedure in enacting legislation. It is more of lamentation of lack or facilitation and support than a demonstration of public participation. He therefore urges the court to invalidate S.43 (5) and (6) for the foregoing reasons.

On the second issue, discrimination, the 1st Petitioner submits that Article 236 of the constitution debars victimization and discrimination of public officers in

any manner. He then goes on to pose the question as to whether it is fair to enact legislation that interferes with public servants contracts of employment for merely expressing interest in politics.

Further, the petitioner brings in a case of international treaties and conventions ratified by Kenya by dint of Article 2(6) of the Constitution. Of these, Article 23(1) of the Universal Declaration of Human Rights should be read with Article 41 of the Constitution to clearly understand the meaning of fair labour practices. Article 23 (1) provides as follows;

Everyone has a right to work, to free choice of employment, to just and favourable conditions of the work, and to protection against unemployment.

He further poses four issues for consideration in this debate as follows;

- a) Was it fair for the 2nd respondent to introduce provisions to the Elections Act, 2011 that will render public servants unemployed just because they desire to run for public office?
- b) Is it fair to expect a public servant to resign from office just because they have expressed interest to run for a political office?
- c) Is it fair to ask public servants to terminate their contracts of employment 6 months before elections date while their competitors occupy office up to 6 hours to the opening of polls?
- d) Is it fair to expect a public servant to terminate his contract of employment by resigning when less onerous options such as leave of absence are available?

The 1st Petitioner answers the above issues in the negative and submits that S.43 (5) and 6 of the Elections Act, 2011 is discriminative for terminating contracts of employment of a section of public officers. In this, he sought to rely on the authority of **Johnstone Muthama vs Minister of Justice, 2012 eKLR** as follows;

The provision also violates the Constitution and international law by limiting the exercise of the rights set out under Article 38(2) (c) to “ be a candidate for a public office, or office within a political party of which the citizen is a member and, if elected, to ‘hold office.’ At paragraph 15 of the General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art.25) :.07/12/1996.CCPR/C/21/Rev.1/Add.7, General comment No. 25. (General Comments) which is a comment on Article 25 of the International Covenant on Civil and Political Rights, it is observed as follows:

‘The effective implementation of the right and the opportunity to stand for elective office ensures that persons entitled to vote have a free choice of candidates. Any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective and reasonable criteria. Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation.

It is his submission that the National Assembly in the enactment of S. 43(5) and (6) introduced additional threshold for disqualification of aspirants and affected their contracts of employment in contravention of Article 41 of the Constitution. It also files against Article 236.

He further submits that disqualification would only apply only at the time of declaration of election results by a returning officer if the public officer was still in office, and not any earlier for MCAs, MPs and Governors. The criteria set for disqualification for a presidential candidate by Article 137(2) is being a public or state officer. This is at nomination and is not applicable to other cadre of aspirants.

The 1st Petitioner in the penultimate concedes to the fact that curtailment of entry into the political fray is not forbidden as expressed in the authority of *Johnstone Muthama vs Minister of Justice* above. The circumstances of this curtailment in the present circumstances are unreasonable and unjustifiable under Articles 38, 41 and 24(1) of the constitution and therefore concludes with a prayer for a finding in favour of the petition.

The last issue of submission for the 1st Petitioner is whether the limitation of public servants rights to Employment and participation in political activity is justifiable under Articles 27, 38 and 41 of the constitution. This is the question as to whether Section 43(5) and (6) are reasonable and justifiable.

It is his submission that for there to be limitation to Article 38 of the Constitution, regarding political rights of public servants, there must be justifiable objective and reasonable criteria. A limitation of Article 38 and 41 of public servants rights has to be subjected to Article 24(1) considerations. In this regard, Section 43(5) and (6) operate as a severe limitation to the number of public servants who can exercise their political right to seek elective office.

The respondents are duty bound under Article 24(3) to demonstrate that the limitation is reasonable and justifiable in an open and democratic society. He further raises the following observations;

a. While there is a suggestion that public officers will abuse their offices for personal political ends, there is no demonstrable instance that constitutional and statutory safeguards become dysfunctional 6 months to elections. The Ethics and Anti-corruption Commission, the Efficiency Monitoring Unit and Kenya National Audit Office are just but examples of a plethora of institutions that can check any potential abuse of office by public servants who abuse public office as they run for elective office.

b. The very institutions of governance mentioned above keep an eye on Members of Parliament, Members of County Assembly and Governors until they leave office 6 hours to opening of polling stations.

c. What prejudice would the public or indeed anyone suffer if public officer's contracts of employment are preserved? With the governance institutions referred to above in place, there is no demonstrable prejudice that will be suffered by any one if public servants' contracts of employment are preserved until election time or beyond.

d. Are there less restrictive means to achieve the purpose intended? If indeed there is fear that public servants would abuse their positions to the detriment of the public, then Parliament should have adopted less restrictive measures such as leave of absence for concerned public servants as opposed to career killing resignation.

In conclusion to a case of unreasonableness and lack of justification of Section 43(5) and 6, the 1st petitioner submits that there are less restrictive means of attaining political neutrality of public servants like;

a) Enforcement of Chapter 6 of the constitution,

b) Enforcement of Public offices and Ethics Act, 2003,

c) Enforcement of Civil Service Code of Conduct,

d)Requiring the rule should apply after elections, and

e) Leave of absence by civil servant(s) the commencement of the election process.

He therefore urges this court to allow the petition as set out.

The 2nd - 4th Petitioners open their highlight to written submission by introducing their Petition and Amended Petition filed on 22nd February, 2017 and 10th March, 2017 respectively.

They further submit to an appreciation the submissions of the 1st Petitioner and submit that they largely agree with these with slight but notable differences. They submit on a five pointed observation as follows;

Firstly, the Petitioners are employees and public servants with the meaning of the County Governments Act, 2012, the Employment Act, 2007 and the Constitution of Kenya, 2010. They have filed a petition under Articles 20 – 23 of the constitution alleging violation of their fundamental rights. They aver that they are before the right court in relation to their grievances. This is established by existing jurisprudence on employment matters.

Secondly, the fundamental rights and freedoms complained of breach revolve around their status as employees or workers. The discrimination and political rights revolve around the work place and environment.

Thirdly, the constitutionality of S.43 (5) of the Elections Act, 2011 is being challenged to the extent that it affects the political rights of public servants.

It is their submission that there is no evidence of a court in Kenya that has determined the constitutionality of S.43 (5) in the manner and sense that is appearing in this litigation; that is, contextualizing the subject matter with work place relations.

The 4th is the question of jurisdiction. On this, counsel for the 2nd – 4th Petitioners. Mr.Mungai submitted to being aware of the provisions of Article 165 of the Constitution on jurisdiction as it relates to the jurisdiction of the High Court and special jurisdiction courts specified under Article 162. This is as follows;

It is easy to understand the correct interpretation of Article 165(3) and 5 of the Constitution by simply noting that Article 165 (3) commences with the words -subject to clause 5 – and then moves on to issue jurisdiction to the High Court.

Clause 5 – Article 165 (5) provides for matters in relation to which the High Court has no jurisdiction. These are two;

(i) Matters reserved for the exclusive jurisdiction of the Supreme Court – if one is aggrieved by the chief justices rules, relating to Election Petition in the Supreme Court, this would not be material for the High Court’s jurisdiction. It is restricted to the Supreme Court.

ii) Matters falling under the jurisdiction of courts contemplated under Article 162, these would fall under these courts. This is so in the present circumstances.

...this court has jurisdiction to interpret any law relating to rights of workers. The argument that this court lacks jurisdiction in this matter therefore is standing on clay feet.

The 5th and last issue delves into the mandate of parliament in enacting S. 43 (5) of the Elections Act. The Elections Act seems to be an expression of Article 82 of the Constitution. It is their other submission that in enacting legislation under Article 82, parliament was required to comply with Article 2(4) on the consistency of the law to the constitution and again, ensure consistency of such with Articles 24 – Limitation of Rights and Fundamental Freedoms.

The issue here is the qualification of public servants seeking elective office as expressed in Articles 99, 137, 180 and 193 of the Constitution.

Section 43(5) is intended to provide a time frame by which a public servant or state officer must relinquish public office in order to seek elective office in accordance with the constitution. This is as set out by the constitution and the 2nd – 4th concede that in so doing, parliament enjoys legitimacy.

The 2nd – 4th Petitioners submit that exercising this function, parliament must bear in mind that it is acting to facilitate a prohibition set out in the constitution. It must also bear in mind the provision of Article 24 of the constitution. It has no discretion for setting reasons at all. All constitutional parameters for so doing are set out and the omission of this by parliament is causative of this litigation. It did not comply with the constitution in setting the six months pre-election resignation period, they submit.

Further, in shortening the period to six months from the original seven, parliament should even take into consideration the issue of reasonable and unreasonable as observed by Lenaola, J.(as he then was), in the Charles Omanga decision as this is not a matter to be determined by a judge or parliament but the constitution itself. One has to pursue standards stipulated by the said constitution.

The 2nd – 4th petitioners further submit that the constitution only prohibits candidates to elective office from being state or public officers. Candidature for elective office occurs at nomination where one submits his or her nomination papers to the Independent Electoral and Boundaries Commission,(IEBC.) Nomination takes place on the designated date for the nomination. This is as yet to be gazetted. It is their submission that a public servant should remain in office up to a day before nominations.

In their written submissions, the 2nd – 4th Petitioners raised six issues for determination as follows;

- a) Whether Section 43(5) of the Elections Act, is consistent with the Constitution.*
- b) Whether Section 43(5) of the Elections Act, 2011 is discriminatory within the meaning of Article 27 of the Constitution.*
- c) Whether the requirement for resignation seven months to the general election is reasonable and justifiable in a democratic society.*
- d) Whether the County Government of Embu lawfully rejected the 2nd – 4th Petitioners respective letters of revocation of resignation.*
- e) Whether the reliefs of the petitioners should be granted.*
- f) Cost of the Petition.*

On the 1st issue for determination, the 2nd - 4th Petitioners contend and submit that Section 43(5) is unconstitutional in that it does not meet the threshold set out in Article 25 of the Constitution. Again, the provision violates the rights and freedoms of the Petitioners in Article 27, 38 and 41 of the Constitution as follows;

i) *The seven-month resignation period is not reasonable and justifiable basis to limit the Petitioners rights under Article 41 read with Articles 27 and 38 of the Constitution.*

ii) *There are less restrictive means to achieve the political neutrality of civil servants including the following;*

a) *Enforcement of Chapter Six of the Constitution.*

b) *Enforcement of the Public Officers and Ethics Act, 2003.*

c) *Enforcement of civil service code of conduct.*

d) *Requiring that the Rule should apply after nomination.*

e) *Leave of absence by civil servants at the commencement of the nomination process.*

iii) *Section 43(5) of the Elections Act does not specifically express the intention to limit the rights of political aspirants protected by Articles 41 and 24(2) (a) of the Constitution.*

iv) *Section 43(5) of the Elections Act derogates from the core and essential contents of the rights of the Petitioners and other political aspirants protected by Article 41 merely because they are public officers.*

The 2nd – 4th Petitioners further submit and fault the finding by Lenaola, J. (as then was) in the authority of **Charles Omanga & Another vs IEBC & Another (2013) eKLR** on the issue of reasonableness and justification in order to prevent a conflict of interest and preserve political neutrality of state and public officers. By upholding parliamentary discretion in fixing the seven month period by stating that *a longer period would be unreasonable and a shorter period would be more unreasonable* as follows;

With all due respect to Lenaola J.(as he then was) our considered view is that what is reasonable and justifiable must be determined on the basis of objective and rational criteria as opposed to mere whims and assumptions. In the instant case the critical thing to note is that we are dealing with the election calendar and the Constitution has already provided for the period during which the prohibition should take effect namely eligibility for either nomination in case of presidential election or eligibility for election in case of all other elective positions.

With a constitutional disqualification at nomination, the petitioners submit that the period stipulated by Section 43(5) is neither reasonable nor justifiable in the circumstances. It also violates the Petitioners rights under Articles 41 for being unfair. Lastly, it comes out as a violation of Article 27, 38 and 41 rights in its purpose and intent.

As to whether Section 43(5) of Elections Act, 2011 is discriminatory within the meaning of Article 27 of the Constitution, the petitioners submit as follows;

i) *All persons are equal before the law.*

ii) *All persons have the right to equal protection and equal benefit of the law.*

iii) *All persons are entitled to full and equal enjoyment of all rights and fundamental freedoms.*

iv) *The state or any person shall not discriminate against any person on any ground, including race, ethnic or social origin, conscience, belief, birth et cetera.*

This is discriminatory in that it treats elected officers differently from the appointed colleagues or public servants. Again, the benefit of income and financial security is denied to public officers but retained by political (elected) officers aspiring for elective office. This serves as authority for discrimination of some aspirants for political office on grounds that they are state or public officers and thereby occasioning discrimination.

On the third issue, as to whether the requirement for resignation seven months to the general election is reasonable and justifiable in a democratic society, the 2nd – 4th Petitioners rely on Article 24 of the Constitution and submit that a limitation of fundamental freedoms in the Bill of Rights shall not be limited except by law. Moreover, such limitation shall only be valid where it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom and further taking in to account all relevant factors including;

a) *the nature of right of fundamental freedom.*

b) *the importance and purpose of the limitation.*

c) *the nature and extent of the limitation.*

d) *the need to ensure that the enjoyment of rights and fundamental freedoms does not prejudice the rights and fundamental freedoms of others*

The 2nd – 4th Petitioners in an amplification of the above sought to rely on the authority of **Obbo vs Attorney-General, [2004]5 LRC**, as follows;

In determining whether a limitation on the enjoyment of the freedom of expression properly defended the public interest against prejudice, as required by art 43(1) of the Constitution, and was acceptable and demonstrably justifiable in a free and democratic society, as required under art 43(2), the court had to balance the competing interests in a Constitution of the primary objective protecting guaranteed rights against the secondary objective of keeping the enjoyment of those individual rights in check on social considerations. Applying the principle that the freedom of expression ought not to be suppressed except where it endangered the community interest, the limitation on freedom of expression imposed by s 50 of the Penal Code Act, in both form and substance, failed the first test of constitutional validity under art 43(1), because it exceeded what that clause permitted: the danger against which it purported to protect the public was not substantial as to prejudice the public interest. Applying the second test of validity in art 43(2), and warrant limitation of freedom of expression, s 50 was not acceptable or demonstrably justifiable in a free and democratic society, because it imposed an unacceptable chilling effect on the freedom of the press by creating a dilemma for the press and other media whether to publish and face punishment or not to publish and withhold the information from the public, it did not serve any pressing or substantial social need which outweighed the need to protect freedom of expression, it was out proportion to the objective intended to be attained, it was not necessary to protect the rights of others or to protect the public interest, it gave unfettered discretion to the police or a state prosecutor to determine what constituted a criminal offence and, instead of prohibiting illegal and criminal conduct, it criminalized conduct which was an otherwise legitimate exercise of the constitutional protected right to freedom of expression. Accordingly, s 50 was inconsistent with art 29(1)(a) of the Constitution and therefore void because the offence of publishing false news under s 50 was too vague, wide and conjectural and therefore lacked the necessary certainty required to impose an acceptable limitation on the right to freedom of expression.

The Petitioners answered the 4th issue as to whether the County Government of Embu lawfully rejected the 2nd – 4th Petitioners respective letters of revocation of resignation by submitting that the Petitioners are entitled to equal protection of law as enacted and interpreted and applied by courts. The petitioners are therefore entitled to take and enjoy the orders of this court in Petition No.1 of 2017.

It is the Petitioners further submission that Section 43(5) violates their right to human dignity protected under Article 28 of the Constitution and therefore the decision of the County Governor violated this right. Again, the decision to reject the revocation of the petitioners resignations amounted to a violation of their rights to fair labour practices. The petitioners submit and contend that their resignations were never voluntary but a consequence of legal compulsion by Section 43(5) which they now challenge.

The 5th issue is whether the petitioners are entitled to the relief sought. It is the 2nd – 4th Petitioner's submissions that by reason of the submissions on issues (a) – (d), the action of the respondents' entitles them to the relief sought. This is because of the respondents' blatant violation as illustrated in their foregoing submissions. They choose to buttress by relying on the authority of **Macharia vs Murather & Another, (2008) 2 KLR (EP) 189 HCK**, where Mbogoli Msagha, J; observed as follows;

In a democratic Country governed by a written Constitution, it is the Constitution which is supreme and sovereign...it is no doubt true that the Constitution itself can be amended by the Parliament, but that is possible because...the Constitution can be validity made only by following the procedure prescribed by the... [Constitution]. That shows that even when Parliament purports to amend the Constitution itself. Legislators, Ministers and Judges take oath of allegiance to the Constitution for it is by the relevant provisions of the Constitution that they derive their authority and jurisdiction and it is to the provisions of the Constitution that they owe their allegiance.

The Petitioners further rely on their submissions that Section 43(5) of the Elections Act, 2011 is unconstitutional as a basis for entitlement to the relief sought.

The 2nd – 4th Respondents note the custom of political campaigns kicking out before nominations as ought to be the case. They submit that this is a constitutional aberration and should not be used to make law. Before nomination, one is a political aspirant and cannot be on the campaign trail. It is personal and in one's heart and therefore would not interfere with office or work. There is nothing criminal in aspiring for public office and those who fail at nomination would not be candidates and can therefore return to their work and offices.

The Interested Parties appeared and prosecuted their respective cases at the initial hearing of the matter. This however, ended at that, they did not show up for the eventual hearing or even file any submissions in support of their cases as earlier agreed and accepted. I suppose they were content with being bystanders and waiting for the outcome. This is allowed. And this closed the proposition case.

In opposition, the 1st Respondent began by submitting an opposition for the two petitions. This was in following up on her Replying Affidavits by Ruth Kavuo Makuti sworn on 16th February, 2017 and 20th February, 2017 respectively. This is in addition to her written submissions filed on 20th February, 2017. She framed two issues for determination as follows;

- i) *Whether the obtaining Kenya's Constitution and legal framework permits appointed public servants to engage in active politics?*
- ii) *Whether S. 43 (5) and (6) of the Elections Act, 2011, is constitutional?*

The 1st Respondent in her written submissions has set out a terms of office for elected officers, Members of County Assembly (MCAs) to President and contends that these are not available for any alteration by an act of parliament as they are ordained out by the Constitution.

The 1st Respondent brings out and submits that the terms of office for appointed public officers are guided by their respective employment contracts. These differ with office and are therefore *in persona* and not *in rem*. They are not capable of being taken judicial notice of.

The 1st Respondent submits that these contracts are not before court and therefore the respondents have not had a fair opportunity to respond

to them. She further submits that there is no collective contract of employment known as *a contract of employment for public officers*. The absence of these contracts disenables a determination of whether they allow involvement in politics and therefore this argument fails.

The 1st Respondent further submits that the challenge to the constitutionality of S.43 (5) on discrimination is untenable. This is because the discrimination emanates from the frame of the constitution and under Article 2 (3) and this is not challengeable before any court, including the Employment and Labour Relations Court.

It is her further submission that if there is any discrimination, the blame is not on Section 43(6) but the Constitution itself. This is because the Act is enacted to implement the Constitution in tandem with Articles 99(2) (a), 137(2) and (3), 180(1) and (2), 142, 102(1), 177(4) of the Constitution. This petition is therefore a non starter for challenging these sections of the Elections Act, 2011.

The 1st Respondent refers the court to S. 22 – 25 of Elections Act on disqualifications and contends that S. 24 (2) disqualifies state and other public officers other than a member of parliament.

The 1st Respondent's other submission is that clause 24 of the Public Service Code of Conduct and Ethics generally prohibits public officers from involvement in politics. Clause 24 (2) calls for political neutrality for all and is signed by all public officers. Further, S.23 (2) and (3) of the Leadership and Integrity Act bars appointed Public Officers from involvement in politics. S. 23(3) bars public officers from engaging in the activities of a political party and so does the Political

Parties Act. On this, she relies on the Supreme Court's interpretation of this section in the authority of **Fredrick Otieno Outa vs Jared Oduyo Okello [2014]eKLR** as follows;

“This provision recognizes the vital role that public officers hold, in the general scheme of leadership. Thus, such officers are restrained from engaging in political activities such as may compromise, or be seen to compromise the political neutrality of their office.”

On the issue of public participation, the 1st Respondent reiterates her earlier submission that parliament was a necessary party to this proceedings and that non joinder as a party to these proceedings only renders the matter irrelevant.

She further submits that the 2nd Respondent, the Attorney-General is not a member of parliament and therefore cannot carry the errors and other issues of parliament. Again, the suggestion that public servants take leave to engage in politics would not change their status and would in any case be illegal. They would not be legally eligible to engage in political activity.

On the issue of unconstitutionality, the 1st Respondent argues and submits that Article 25 of the Constitution provides for non derogable rights. Political and labour rights are not some such. The reasonableness and justification of the limitation is that this (it) is by law. It is her case that differential treatment is not discrimination and also that equality does not mean sameness.

The 1st respondent sought to rely on the authority of **MATSASENG RALEKOALA vs MINISTER OF JUSTICE AND HUMAN RIGHTS LAW AND CONSTITUTIONAL AFFAIRS & 3 OTHERS CONSTITUTIONAL CASE 03/11**, the High Court of Lesotho highlighted the delicate role courts have in a determination fundamental rights in a situation of conflicting rights as follows;

“It must be remembered that the business of government is a practical one.

The Constitution must be applied on a realistic basis having regard to the nature of the particular activity sought to be regulated and not on an abstract theoretical plane. (emphasis supplied) In interpreting the Constitution, courts must be sensitive to what Frankfurter J. in McGowan, calls ***“the practical living fact” to which a legislature must, respond.(emphasis supplied)***. That is especially so in a field of so many competing pressures as the one here in question. By the foregoing, I do not mean to suggest that this Court should, as a general rule, defer to legislative judgments when those judgments trench upon rights considered fundamental in a free and democratic society. Quite the contrary, I would have thought the Chapter established the opposite regime. On the other hand, ***having accepted the importance of the legislative objective, one must in the present context recognize that if the legislative goal is to be achieved, it will inevitably be achieved to the detriment of some. (emphasis supplied)***. Moreover, ***attempts to protect the rights of one group will also inevitably impose burdens on the rights of other groups. There is no perfect scenario in which all rights of all can be equally protected” (emphasis supplied)***.

The 1st Respondent further submits that it is not possible that a law may be constitutional in the constitutional court and be unconstitutional in the Employment and Labour Relations Court.

On jurisdiction, she submitted an adoption of her earlier submissions.

She in the penultimate submits that if this section was to be declared unconstitutional the law and even the Constitution would be declared unconstitutional.

The 2nd – 4th Respondents oppose the consolidated petition and relied on the Replying Affidavits of Alice Otwala and James Njoroge Mwangi filed on 27th January, 2017 and 10th August, 2017 respectively. They also filed a list of authorities on 27th January, 2017 and written submissions filed on 27th February, 2017, in respect to Petition No.1 of 2017.

On Petition No. 2 of 2017, they filed their Grounds of Opposition on 8th March, 2017 and submissions on 10th March, 2017. A list of authorities and a further list of authorities were also filed on 10th March, 2017 and 27th March, 2017 respectively.

The 2nd – 4th Respondents submitted an agreement with the 1st petitioner’s submissions and wholly agreed with the same.

The Respondents thereon further submitted that the 1st and 2nd Petitioners are not reading from the same script. This is because the 2nd – 4th Petitioners submit that they are only ninety-five (95%) percent in agreement. This is exemplified by the submissions where the 1st Petitioner submitted that public officers should resign on election while the 2nd – 4th Petitioners submit that this should be had at nomination.

The 2nd – 4th Respondents again submit that the 2nd – 4th Petitioners concedes on the legitimacy of parliament to specify periods of resignation as in S.43 (5) and further that S. 43 (5) is necessary to maintain impartially and political neutrality as provided for under Article 236 of the Constitution. This concession defeats the petition and the orders sought ought not to issue. Issues of reasonableness are the province of parliament and not court and that any party can approach parliament for this consideration.

The 2nd – 4th Respondents raised the following as issues for determination;

i) Whether there was a public participation in the enactment of S. 43(3) of the Elections, Act, 2011

ii) Whether S.43 of the Elections Act and the period of six months for resignation of public officer’s intent or contesting election is justifiable, reasonable and rational under the constitution.

iii) Whether S.43 (3) is discriminatory and a limitation of the public officers rights under Article 27, 38 and 41 of the Constitution.

On the 1st issue of public participation in the enactment of S. 43(5), the respondent submitted that there is no demonstration of its absence. It is the 2nd – 4th respondents’ submission that this is ably demonstrated in the Affidavit of Alice Otwala at paragraphs 5, 6 and 7 that take issue with the raising of any issues as this is six years down the line. The issue of constitutionality of S.43 (5) was raised in the Charles Omanga case (supra) and determined with a holding that this was constitutional. It was applied in the 2013 elections and therefore this delay is inordinate and prejudicial.

The respondents further submit on the joint involvement of the Constitution Implementation Commission and Attorney-General in drafting and providing bills to parliament which was done despite the tight deadline of one year. It is her contention that exhibit JNM 2 of the Affidavit of James Njoroge Mwangi – the Hansard pages 33 – 37 demonstrates enormous public participation before getting to the floor of the house. Again, this is demonstrated in the gazette notice of 10th May, 2013 as annexed to their written submissions.

On the issue of the reasonableness, justification and rationality of S 43 (5), the 2nd – 4th Respondents submit a case of agreement with the 2nd – 4th Petitioners on this in that this is necessary in an enhancement of political neutrality and impartiality of public officers as per Article 236 of the constitution, S. 23 of the Leadership and Integrity Act and S.12 of the Political Parties Act.

The respondents submit that contrary to the Petitioner’s submission that S.43 (5) is a limitation to public officer’s rights under Article 38, this is not the case. Instead, this is a reasonable and rational reason for enforcing Article 38 rights of public servants. Departure from office is such enjoyment of Article 41 rights because one cannot be a public officer and also espouse political bearings. This is a matter of personal choice - *stay in or leave*. She further submits that enjoyment of Article 38 rights must respect election timelines.

The 2nd – 4th Respondents further submit that S.22 Elections Act provides for qualifications for elections and that public servants are not eligible or qualified for this. These are;

- Article 137 (2) (a) and (b) - President
- Article 99 (2) (a) and S. 24 (2) (a) – Member of Parliament (MP)
- Article 193 (2) (a) – Member of County Assembly (MCA) and,
- Article 180 (2) - Governor

The 2nd – 4th respondents in a demonstration of reasonableness sought to rely on the authority of **Charles Omanga & Another vs Independent Electoral Commission & Another (2013)eKLR** where Lenaola, J. when referring to the provision of Section 43(5) and (6) had the following observation in agreement with the decision of the Supreme Court of India in **Hambardda Wakhana vs Union of India Air (1960) AIR 554;**

“In examining the constitutionality of a statute it must be assumed the legislature understands and appreciates the needs of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is therefore, in favour of the constitutionality of enactment”.

It is their ultimate submission that public officers do not qualify for elections or nominations as such and further insisting on a shorter period would be tantamount to asking this court to violate the constitution and constitutional timelines.

The 3rd issue as to whether S. 43 (5) is discriminatory and on unfair limitation of Article 27, 38 and 41 rights. The respondent herein returns a negative answer. This, they submit, is only differential treatment between appointed and elected officers as provided for by the constitution. Again, Article 232 on values and principles of public service delimits appointed officers from espousing political leanings. This is confirmed by Section 43(6) the subject matter of this dispute.

It is their position that from the foregoing submissions, and in view of Articles, 102, 177(4), 142, 148(6) and 182, the terms of elected state officers as set by the Constitution.

The 2nd – 4th Respondents in conclusion chose to adopt their earlier submission on the issue of jurisdiction.

The 5th – 6th Respondents narrowed down their submissions to two issues;

- i) *The rejection of retraction of resignation notices issued by the 2nd – 4th Petitioners.*
- ii) *Whether the 2nd – 4th Petitioners are entitled to the prayers sought in the petition.*

It is their submissions that by letters dated 5th January, 2017 and 6th January, 2017, the 2nd – 4th Petitioners issued one months notice of resignation from their respective positions held in the 5th and 6th Respondent's establishment. Their further submission is that upon receipt of these letters of notice, the 5th – 6th Respondent's duty was to either reject or accept them. These were accepted and communication made to the 2nd – 4th Petitioners vide letter dated 27th January, 2017. The petitioners cleared and handed in their offices.

The 5th – 6th Respondents further submit that upon expiry of notices issued by the 2nd – 4th Petitioners on 5th February, 2017 and 6th February, 2017 respectively, the employer/employee relationship *inter partes* stood terminated. In support of this submission the respondent sought to rely on the authority of **William Kariuki vs Kenya Civil Aviation, Civil Case No. 598/2008**.

The Petitioners have been paid their gratuities and therefore an end of the matter. Here, the 5th – 6th respondents sought to rely on the authority of **David Njuguna Mungai vs The Registered Trustees of the Sisters of Mercy T/A Matter Hospital, Industrial Cause No. 2008/2014** which correlates the principle relied on by the respondent.

The 5th – 6th respondents submit that their resignation having been voluntary and with no allegation or claim of duress, coercion or otherwise raised against themselves, there is no basis for allegation of violation of Articles 27, 28, 41, 47, and 50 of the constitution as against the 2nd – 4th Petitioners.

On the 2nd – 4th Petitioner's averment that these resignations were not voluntary as they were pegged on compliance with S.43 (5) of the Elections Act, the 5th – 6th respondents submit that they are not the makers of the said law and the resignations remain voluntary. The law was in force at the time of the notices and the respondents are duly bound and mandated to enforce the provision. Again, they relied on the authority of **Benson Nyamai vs TSC – Industrial Cause No. 167 of 2015** to illustrate this.

On the issue of rejection of the resignations, the respondents submit that these were not retractable after crystallization. The rejection of the letters of revocation of resignations therefore remains sound in law.

Further, by the time the orders of court relied on were issued, the 2nd – 4th Petitioners had resigned and these orders cannot apply retrospectively; they (petitioners) are estopped from relying on orders issued after the fact. They submit to reliance on the famous saying that *as you make your bed, so must you lie on it*. Their prayers for compensation must fail as there is no violation of their rights as alleged.

The 2nd – 4th Respondents in conclusion submit to the courts role in upholding public interest and pose the question as to what service the public is expected to gain from person's intent on running political office. The court being the custodian of public interest and public funds should not entertain a person with one foot out of the door.

They further rubbished the petitioners entitlement to relief sought and urged the court to dismiss the petition with costs. In the finality they associated with the submissions of the 1st – 4th respondents.

The 7th – 8th respondent's did not in any way participate in these proceedings.

We are not able to know why they chose silence as an answer. We may get answers to this someday, or so I suppose. This is best left as such.

The 1st Petitioner in reply, rebuttal and reaction to the respondent's highlight to written submissions presented the following;

- On the 1st Respondent's submissions that contracts of employment are *in persona* and not *in rem*, the claim before court is based on Article 22(1) and 41(1) of the Constitution and further the nature of these constitutional rights and the enforcement were contemplated as bundles of rights *in rem* and not *in persona* by the framers of the constitution.

The consequences of Section 43(5) are *in rem* and not *in persona*.

- On the 1st Respondents submission that Articles 22, 23 and 24 of the Elections Act, provide additional qualifications to run for political office by public servants, this is not so. This is because Article 2(4) of the Constitution articulates constitutional supremacy. These provisions of the Elections Act cannot override Articles 99(2), 137(2) and 193(2) in respect to disqualification.
- On the 1st Respondents submission that election is a process and not an event confined to 8th August, 2017, good counsel fail to appreciate the distinct user of the terms election and nomination. Articles 99(2) and 137(2) use the word election whereas Article 137(2) uses nomination. These terms are used to bring out two distinct functions; the nomination process and the actual election.

The framers of the constitution intended the above usage and meaning.

- On the issue of the national assembly not being a party to this petition, the 1st Petitioner submits that they have had a say in this through the affidavit of James Mwangi Njoroge sworn on 10th March, 2017.

Further, rule 5(b) of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provide that a petition shall not be defeated by a reason of misjoinder or nonjoinder.

- On the 1st Respondent's submission that a law cannot be constitutional before the High Court and unconstitutional before this court. The answer is that this matter is not as yet settled. This is because Mumbi, J. in *Gor Semelang'o* adopted the thinking of Lenaola, J. (as he then was) in the Charles Omanga case whereas in the union of civil servants case, Lenaola, J. departed from Mumbi, J. in *Semelang'o*.
- On the issue of limitation of action as raised by the 2nd – 4th Respondents the 1st petitioner submits that in matters of constitutional imperatives time does not apply. On this he relies on the authority of **Stanley Munga Githunguri vs Attorney-General, Criminal Appeal No.271 of 1985**.
- On the issue of unavailability of documents to demonstrate public participation, the court was referred to Section 6(1) of the Public Archives and Documentation Act, which binds its organs of government to keep records for thirty years. The respondent should have the requisite documents.

The 2nd - 4th Petitioners came up with the following response;

- The 2nd – 4th Petitioner's submission that the prohibition of public officers to participate or be candidates in elections takes effect after a nomination has not been challenged.
- The terms nomination and election have technical meanings. In resolving the issues in dispute, it is noteworthy that the constitution was made by lay persons, not lawyers and therefore its frame.
- A distinction must be had between party primaries (nominations) and actual nominations. Timelines for party primaries can be changed whereas actual nominations cannot.
- An interrogation of the issue in dispute is the constitutionality of Section 43(5) can only be referenced to the constitution and not any other law.
- The three authorities cited by respondents have contrasting decision. In the Union of Civil Servants case, Lenaola, J. found that Section 43(5) is unconstitutional as it relates to by-elections.

All these cases have not handled the rights of workers under Article 41 and also their political rights. This is the court of first instance in dealing with these issues.

- The issue in dispute in this petition is on the period anticipated by parliament for disqualification, not political neutrality and impartiality. These are dealt with elsewhere.
- The 2nd – 4th Petitioner's have not made any concession, their submission address facts and the law.
- Article 24 of the Constitution awards courts authority to determine issues of constitutionality-the Johnstone Muthama authority.
- Whoever loses in nominations should return to work.
- Aspirants and candidates are not the same.
- The Lenaola, J. decisions cited above are an indicator of lack of legal standards for determination of disqualification.
- On the 5th - 6th Respondent's submission of acceptance of resignations, the 2nd – 4th petitioners submit that resignation is a unilateral act that does not call for acceptance.
- In the instant case, resignation notices were to take effect on 7th February, 2017. There is emphatic contrast of this and the decisions alluded by the respondents.
- The 5th – 6th Respondents disown Section 43(5) of the Elections Act. This is not feasible as the law applies to everybody. The

resignations in issue were not related to the Employment Act or any contract but remain statutory resignations. They are borne out of statute.

- The amended petition does not invite the court to legislate but interpret the law to mean that this can only be on nomination day.
- Lastly, parliament amended the law after the decision by Lenaola, J and this should be the case here. It should deal with it depending on interpretation of the law on the subject.

The issue in dispute, the constitutionality of S.43 (5) and (6) of the Elections Act, 2011 comes in the midst of our very curious socio-political history. I emphasize this in reliance of the chorus by Robert Nesta Marley, popularly known as Bob Marley, the reggae maestro who in his classic number, *Buffalo Soldier* sang ... *if you know your history, then you would know where you are coming from* ...

In the 60's and 70's we witnessed situations where elected councilors would double as teachers where their election had been predated from careers as teachers. They would attend to their local authority functions as prescribed and also go to class and teach.

The same period also witnessed elected MPs who lost their bids at re-election go back to class and teach. Practice and custom allowed them to resume their original jobs and work in situations where they had sprang to elective office from the teaching profession. A classic example is the erstwhile son of the people of

Chuka, Ignatius Njue Mutua (Member for Meru South, 1969 – 1974 and Nithi 1988 – 1992) who returned to class after his failed attempt at the general elections of 14th October, 1974. On the same note, Bernard Mati(e) (pre- independence Minister of Health, and Member for Meru South, 1974 - 1979) on losing a re-election bid would trot to Kilimambogo Teachers College and do what he knew best, teach. What has so drastically changed?

This tradition abides in our political system to date. We have continued to witness political fallouts, being re-energized by appointment to public service and office on unclear and undocumented circumstances. Why then would we choose such a draconian cause of action against public servants to the extent that we find ourselves on a collision course with such a strategic section of our public affairs?

I also note that we are operating in an era where employment is a matter of life and death. Unemployment and its consequential cousin, poverty, are the order of the day for the ordinary people of Kenya. We must ask ourselves how we would like to view and interpret S.43 (5) and (6) of the Elections Act on such polarized background and history of which this court takes judicial notice. These are the lingering issues of jurisprudence in our midst today.

Perhaps we should visit the writing of my good friend, teacher and eminent scholar, Prof. H.W.O Okoth – Ogendo who in his classical masterpiece **Constitutions Without Constitutionalism** opined that;

African ruling elites are attracted relentlessly to the idea of constitution missing the noble idea of constitutionalism....

Further,

The exercise of state power must seek to advance the ends of society and the country that satisfies that role is a country that has a culture of constitutionalism ...

The good teacher further observed that African leaders are obsessed with constitutions which they use as legitimizing instruments in the crystallization of state power. Beyond this, there is no allegiance to the constitution or constitutionalism. He adds;

... The exercise of state power must be beyond mere acts in accordance to the constitution, that is, constitutionality, but betray fidelity to advance the ends of society. This is the essence of constitutionalism which branches republicanism from fascism; departs might from right and pillars modern constitutional republicanism. Hence, constitutionalism is not just about applying the written constitution (which is constitutionality), but making sure that the contents of the written constitution advances the interests of the people, and then applying the contents to actually advance those interests.

Again,

... Constitutionalism is a culture, and it must be both present in the document and lived in the application of governance. Africa faces successes and challenges for her constitutional undertakings. Dialogue amongst all African must continue to ensure that the three organs of state are strengthened and that mechanism for enabling independent and effective functioning of each one of them are not eroded...

Does this ring a bell?

The good professor of law preaches the gospel of constitutions and constitutionalism. This is calls for a situation where the state, her people and institutions pay homage to the written constitution and allegiance to constitutionalism: the culture of respect for the law and its basic concepts of justice, equity and equality so as to optimize the quality of life for the citizenry.

Constitutionalism is thus realized by ensuring that constitutions are interpreted and internalized to meet the ends of society and sustain the interests of the governed. Anything short of this would harbour despondency and a feeling of disaffection by the people.

In the circumstances of this case, parliament should have appreciated its bridging role between the Constitution, the people of Kenya and public servants as a class and sub set of our society. In enacting S.43 (5) of the Elections Act, 2011, the intent to do good should have been primal and the cornerstone of all parliamentary efforts and actions. It should have created a situation where the vicissitudes in the name of disqualifications are mitigated to imbue equity and fairness in such legislation. This would obviate passionate contests like we are experiencing now.

It is not in dispute that the framers of the Constitution intended to streamline the place of appointed public servant's political participation and indeed managed this through Articles 99(2) (a), 137(2) (b), 180(2) and 193(1) (b). Parliament, an institution vested with the constitutional authority to foster the letter and spirit of the constitution was expected to breathe life into this by bringing out a law that entrenches constitutionalism; that is, subservience to service of the interest of the people. The current scenario where S.43 (5) and 43(6) came out as a display of contrasted inequity would not have been the case.

Parliament should also appreciate that life is about self actualization. This would in effect imbue benefit to the larger society. I view a quest for political office as a stand towards career enhancement. This would not only be good for the individual public servant but also the society at large. The scenario arising out of S.43 (5) is a decimation of careers and is surely unwarranted. The tale of neutrality and political inactivity for public servants does not atone this eventuality. It is self defeating and unacceptable in any civilization. It is not constitutional, or at all.

It is possible to change the law so as to accommodate an acceptable and equitable situation for all. This is by enhancing liberty to all and by coming out with a middle ground position where everybody has something to pick from the basket. This is by coming with laws that take into consideration the concerns and lifelines of public servants. They are by all standards major stakeholders in the mainstay of our society. This is by way of affording them time and opportunity to exercise their rights under Article 38 – *political activity* and also Article 41 – *fair labour practices*. This would be a win win situation for us all.

The above (political participation) would involve actual participation in elections and return to office in the event of not being elected, but not, like in the present scenario: *stay in or stay out*. A situation like is afforded by S.43 (5) would have squandered the genius of John Njoroge Michuki and Daniel Toroitich Arap Moi who traversed the two sectors and this nation like colossuses to our merriment and great advantage.

Any dialogue on the relevance or lack of it [of Section 43(5) and (6)] would start with the appreciation that the constitution provides for two clear cut scenarios of disqualification for public servants intending to participate in elective politics. These are as follows;

- i). Disqualification at nomination stage for public servants intent on seeking the position of president.
- ii). Disqualification at declaration of election results by the Returning Officer for those public servants intent on seeking any other elective positions – MCAS, MPs and Governors.

The last (No. ii) would have to be scrutinized cautiously to ascertain viability and application in the scenario of elections in Kenya.

Again, Parliament should appreciate the place of competition in growth and prosperity. Competition brings out refinement. It is undisputable that public servants carry incommensurate wealth of intellectual property that they can offer society in other sectors including political leadership. Why would we wish to lock this out? Who is the ultimate beneficiary of the mischief?

And there we are... to the drawing board. The choice is ours: the returns too are ours. And it came to pass.

We would have nothing to lose... but everything to gain. This is by harmonising the will of the people and the law. *Give the people what they want*. This calls for a practication of the constitution: to make and see it work. This is our collective responsibility.

The issues for determination at the close of the day are;

1. Jurisdiction.
2. Whether there was public participation in the enactment of S.43 (5) of the Elections Act, 2011?
3. Whether S.43 (5) of the Elections Act, 2011 and the period of six months for resignation of public officers intend on contesting elections is justifiable, reasonable and rational under the Constitution?
4. Whether S.43 (5) is discriminatory or a limitation of public officers rights under Article 27, 38 and 41 of the Constitution.
5. Whether the rejection by 5th and 6th Respondents of the 2nd – 4th Petitioner's letters of revocation of resignation dated 9th February, 2017 to reject their revocation of resignation is justifiable and lawful
6. Whether there is a compelling public interest that demands mandatory resignation of public officers from public office?
7. Whether the Petitioners and Interested Parties are entitled to compensation for violation of fundamental rights and freedoms protected under Articles 27, 28, 38, 41, 47 and 50 of the Constitution.
8. Whether the Petitioners and Interested Parties are entitled to the relief sought?

9. Who bears the cost of this Petition?

The 1st issue for determination is one on jurisdiction. This matter was variously raised by the parties in their written submissions and highlights at the hearing. It even aroused derogatory submissions on the part of some of the parties.

I, however, note and observe that the matter is spent, this court having heard and determined the subject matter in its ruling of 14th February, 2017. Nonetheless, I associate with the submissions of the 2nd - 4th petitioners that no court has previously dealt with this matter in its current context: juxtaposition of the subject matter with an employment and work situation.

No amount of cajoling or excitement on part of the parties would justify a re-opening of the matter at this level. It shall remain closed for now.

The 2nd issue for determination is whether there was public participation in the enactment of S.43 (5) of the Elections Act, 2011. I have scrutinized the case of the 2nd – 4th respondent's as set out in the Replying Affidavits of Alice Otwala and James Njoroge Mwangi sworn on 27th January, 2017 and 10th March, 2017 respectively. Firstly, the affidavit of Alice Otwala does not offer any evidence of public participation in the enactment of Section 43(5) and (6) or even the entirety of the Elections Act, 2011. Instead, the affidavit questions the rationale behind bringing out this petition six years after the enactment of the Act and more so bearing in mind that this law was used in the 2013 general elections without any issues. This clearly brings out an issue of objection on grounds of limitation. The 1st petitioner ably answers this by a submission that in matters touching on fundamental rights and freedoms or Bill of Rights, limitation of action or time bar would not be an excuse or defence. I agree.

The 2nd – 4th Respondents again do not display a case of public participation through the affidavit of James Njoroge Mwangi aforesaid. Their annexed Gazette Notice is not confirmation of public participation but an appreciation of public participation by the Constitutional Implementation Commission. This dims the evidence in support of the defence.

They further in defence submit that the application of Article 118(1)(b) is an irrelevant argument by the petitioners in that Section 2(1) (b) of the Sixth Schedule – Transitional and Consequential Provisions oust the application of Chapter six and therefore Article 118 at the time of enactment of the Elections Act in 2011. This is an agreeable position in law but again, it is countered by a submission that Article 10(2)(a) of the Constitution was available to the respondents and this mandated them to partake public participation in the enactment of the Act.

The Petitioners, and particularly the 1st petitioner submit a case of lack of public participation or any evidence to this extent. This is the apparent case in the circumstances. This is because the evidence adduced in the affidavit of James Njoroge Mwangi is more of a lamentation of lack of facilitation and frustration by government departments in legislative matters. Again, the Gazette Notice No. 6465 dated 10th March, 2013 does not assist in this.

I therefore agree with the Petitioner's case and submissions that there was no public participation in the enactment of Section 43(5) and even 45(6) of the Elections Act, 2011. It therefore lacks any iota of constitutionality and I hold as such.

The third issue for determination is whether S.43 (5) of the Elections Act, 2011 and the period of six months for resignation of public officers intent on contesting elections is justifiable, reasonable and rational under the Constitution. It is the 1st petitioner's case and submissions that Section 43(5) and (6) of the Elections Act, 2011 limits public servants rights under Articles 38 and 41 of the Constitution.

The 1st Petitioner further submits that a limitation of Article 38 and 41 rights has to be subjected to Article 24(1) considerations. It is the onus of the person or party seeking to justify a limitation to demonstrate this to court as provided under Article 24(3) of the constitution.

Further, Section 43(5), the requirement that public servants wishing to engage in elective politics resign from office six months to the date of election stands out as severe limitation as to the number of public servants who can exercise their right to seek elective office. It also serves to stumble public servants right to fair labour practices as established under Article 41 of the constitution. This is besides hurting their livelihoods and careers which is fundamental right and freedom enshrined in the constitution and international conventions.

The 1st – 4th Respondents justify this exclusion and application of the law to public servants on grounds that public servants would abuse their office for political gain and hence also that public servants are expected to maintain neutrality and refrain from political activity during their term of office. However, the petitioners counter this by their submission that there are sufficient public institutions and other mechanisms that can check potential abuse of office by public servants.

The Petitioner's case is further augmented by a submission that there are less restrictive means of achieving the intended purposes and not necessarily scuttling the careers of public servants. Lastly, no prejudice will be suffered by a preservation of their contracts until election time or even beyond.

This is a delicate balancing act. The rights of public servants under Article 38 guarantees them equal political rights with other citizenry and this must be honoured. Article 41 rights are equally the entitlement of public servants and any law that purports to interfere with this must pass the test of reasonableness, justification and rationality. This is not demonstrated by the respective cases of the respondents. Neutrality and political inactivity by public servants is not enough justification for the lock out envisaged by Section 43(5)

The hardship of the disqualification for public servants seeking elective positions was intended to be mitigated by parliament in its legislation as directed by Article 82 of the constitution. It was not anticipated that parliament would enhance this disqualification by coming out with legislation that is unfriendly and limiting to the enjoyment of fundamental rights by public servants. I therefore find that Section 43(5) of the Elections Act is unjustifiable, irrational, most unreasonable, oppressive and hold as such.

The 4th issue for determination is whether S.43 (5) is discriminatory or a limitation of public officers rights under Article 27, 38 and 41.

The Petitioners submit a case of discrimination against public servants in that in the enactment of Section 43(5), parliament introduced additional threshold for disqualification of aspirants in public service. This is against Article 236 of the constitution which provides protection from discrimination and victimization of public servants in the performance of their duties. This also flies against Articles 24(1) and 25 which provide for abundant and unlimited access to fundamental rights and freedoms. Article 24(1) makes a case for conditional limitation and this is not met or established by the respondents.

It is the petitioner's case that it is unfair to make law that interferes with contracts of employment and that this contravenes Articles 41 and 38 by infringing public servant's rights to fair labour practices and political rights.

The respondents rebut the above submission with the argument that Section

43(5) only brings out differential treatment as espoused by the constitution and not discrimination. Article 232 of the constitution on Values and Principles of Public Service provides for high professional standards of public servants and that other enactments of parliament and the code of Conduct for Civil Servants delimit their involvement in political affairs. This is not convincing in light of evidence of deprivation of public servant's fundamental rights and freedoms established under the constitution. I therefore find a case of discrimination and undue limitation of the rights of public servants under Articles 27, 38 and 41 of the Constitution. Section 43(5) is therefore not constitutional in intent.

The 5th issue for determination is whether the rejection by 5th and 6th Respondents of the 2nd – 4th Petitioner's letters of revocation of resignation dated 9th February, 2017 to reject their revocation of resignation is justifiable and lawful.

The 5th – 6th Respondents forment and submit a case of acting fairly, justifiably and lawfully in that on receipt of the letters of resignation, the respondents accepted these and communicated to the 2nd – 4th petitioners accordingly. They further front a case of voluntary retirement by the petitioners which essentially eclipsed the employer/employee relationship at the time of acceptance of the resignation notices. It is their case that no employment relationship subsists as the petitioners have handed over office and received their gratuities.

The 2nd – 4th petitioners counter this by submitting that from the onset, their resignations were not voluntary but prompted by the operation of the law, to wit, Section 43(5) of the Elections Act, 2011 and the 4th respondents letter dated 1st December, 2016. These having been suspended by the orders of this court, they were entitled to resume work and earn their living. They therefore fault the rejection of revocation of their resignation and submit that this is unjustifiable and unlawful.

Section 43(5) adds another feather to resignation as mode of termination of employment. This is by creation of statutory as opposed to voluntarily resignation as was known to the law. Resignation from employment can come in many forms. They are cases of forced resignation where duress and undue influence are employed to force workers out of office. The Petitioners resignation in this case comes in the category of statutory resignation and therefore the element of free will or self volition does not arise.

I also agree with the submissions of the petitioners that resignation is a unilateral act that does not require acceptance. The respondents do not discharge their burden of proof of legitimate and justifiable rejection of revocation of termination of employment by the petitioners even in the midst of their entitlement to enjoyment of equal rights before the law as enshrined in the constitution. I therefore find the rejection of the petitioner's letters of revocation of resignation unjustifiable and unlawful and hold as such.

The sixth issue for consideration is whether there is a compelling public interest that demands mandatory resignation of public officers from public office. The submissions of the parties as presented and analyzed on issue numbers 2 to 5 do

not display a case of compelling public interest for demanding resignation of public servants from public office. These are pegged on existing alternatives for achieving the outcome of Section 43(5) and further that the gains of the law as it is are far outweighed by the laws occasioned to public servants.

The foregoing analysis has come out with a finding of unfair and unjustifiable legislative provisions compelling public servants resignation from office. It has also been found to be discriminatory and a violation of public servants rights under Articles 38 and 41 of the Constitution. I therefore find no compelling public interest for the inaction contemplated under Section 43(5) of the Elections, Act 2011 – resignation.

The 7th issue is whether the Petitioners and Interested Parties are entitled to compensation for violation of fundamental rights and freedoms protected under Articles 27, 28, 38, 41, 47 and 50 of the Constitution. They are. Having won on their respective cases under issues No. 2 – 6 above, they are entitled to compensation as above and as prayed for in Petition No.2 as consolidated.

I, however, feel that this is not an appropriate case for award of compensation as prayed. This is because this matter involves a large section of society and not the parties in this litigation alone. It would be extremely involving in a verification of the beneficiaries of the orders of court. It would also defeat public interest due to the cumbersome implementation of the same. Courts shall not make orders in vain.

The 8th issue for determination is whether the Petitioners and Interested Parties are entitled to the relief sought. They are. Having won on their respective cases under issues No. 2 – 7 above, they are entitled to the relief sought.

The 9th issue for determination is who bears the cost of this petition. Customarily, petitions and suits raising determinant public interest matters take a different consideration on the issue of costs. It would be unusual to condemn any of the parties to costs. This is for reasons that the litigation posed much wealth to the public on the issues at hand. Courts would ordinarily order the parties to bear their own costs of the cause.

However, in the instant case, I am forced to distinguish this practice in the case of the 2nd – 4th petitioners. I observe that through and through, the petitioners herein were dragged through a very unfortunate, time consuming and most likely expensive litigation. I say this because the 5th – 6th respondents were well placed to act proactively and decimate this litigation. They chose not to and therefore the suit. I therefore hold them to cost for the following reasons;

- Their inaction occasioned this confrontational encounter and litigation.
- The litigation could have been avoided by decisive action on their part at the time of consideration of the Petitioner's letters of revocation of resignation.
- The litigation could have been avoided by a compliance and settlement on service of the petition by the 2nd – 4th Petitioners.

I wish to further this interrogation of the constitutionality of Section 43(5) and (6) of the Elections Act, 2011 by a look at a scripture from the **Holy Bible, The Bible League, KJV 2000 Devotional Study Bible in 1 Kings, Chapter 21.** It reads;

And it came to pass after these things, that Naboth the Jezreelite had a vineyard, which was in Jezreel, near by the palace of Ahab Kind of Samaria. 2And Ahab spoke unto Naboth, saying, give me your vineyard, that I may have it for a garden of herbs, because it is near unto my house: and I will give you for it a better vineyard than it; or, if it seems good to you, I will give you the worth of it in money.

3 And Naboth said to Ahab, The LORD forbid that I should give the inheritance of my fathers unto you.

4 And Ahab came into his house sullen and displeased because of the word which Naboth the Jezreelite had spoken to him: for he had said, I will

not give you the inheritance of my fathers. And he laid himself down upon his bed, and turned away his face, and would eat no bread.

5 But Jezebel his wife came to him, and said unto him, why is your spirit to sad, that you eat no bread?

6 And he said unto her, Because I spoke unto Naboth Jezreelite, and said unto him, Give me your vineyard for money; or else, if it pleases you, I will give you another vineyard for it: and he answered, I will not give you my vineyard.

7 And Jezebel his wife said unto him, Do you now govern the kingdom of Israel? arise, and eat bread, and let your heart be merry: I will give you the vineyard of Naboth the Jezreelite.

8 So she wrote letters in Ahab's name, and sealed them with his seal, and sent the letters unto the elders and to the nobles that were in his city, dwelling with Naboth. 9 And she wrote in the letters saying

Proclaim a fast, and set Naboth on high among the people: 10 And set two men, sons of Belial, before him, to bear witness against him, saying, You did blaspheme God and the King. And then carry him out, and stone him, that he may die.

11 And the men of his city, even the elders and the nobles who were the inhabitants in his city, did as Jezebel had sent unto them, and as it was written in the letters which she had sent unto them. 12 They proclaimed a fast, and set Naboth on high among the people. 13 And there came in two men, children of Belial, and sat before him: and the men of Belial witnessed

against him, even against Naboth, in the presence of the people, saying, Naboth did blaspheme God and the king. Then they carried him forth out of the city, and stone him with stones, so that he died. 14 Then they sent to

Jezebel saying, Naboth is stoned, and is dead.

15 And it came to pass, when Jezebel heard that Naboth was stoned, and was dead, that Jezebel said to Ahab, Arise, take possession of the vineyard of Naboth the Jezreelite, which he refused to give you for money: for

Naboth is not alive, but dead. 16 And it came to pass, when Ahab heard that Naboth was dead, the Ahab rose up to go down to the vineyard of Naboth the Jezreelite, to take possession of it.

17 And the word of the LORD came to Elijah the Tishbite, saying, 18 Arise, go down to meet Ahab king of Israel, who is in Samaria: behold, he is in the vineyard of Naboth, where he has gone down to possess it. 19 And you shall speak unto him, saying, Thus says the LORD, in the place where dogs lick your blood, even yours. 20 And Ahab said to Elijah, Have you found me, O my enemy?

And he answered, I have found you: because you have sold yourself to work evil in sight of the LORD, 21 Behold, I will bring evil upon you, and will take away your posterity, and will cut off from Ahab every male, and he that is shut up and left in Israel, 22 And will make your house like the house of Jeroboam the son of Nebat, and like the house of Baasha the son

of Ahijah, for the provocation with which you have provoked me to anger, and made Israel to sin.

23 And of Jezebel also spoke the LORD, saying, The dogs shall eat Jezebel by the wall of Jezreel.

24 He that dies of Ahab in the city the dogs shall eat; and he that dies in the field shall the fowls of the air eat.

25 But there was none like unto Ahab, who did sell himself to work wickedness in the sight of the LORD, whom Jezebel his wife stirred up. 26 And he did very abominably in following idols according to all things as did the Amorites, whom the LORD cast out before the children of Israel.

27 And it came to pass, when Ahab heard those words, that he tore his clothes, and put sackcloth upon his flesh, and fasted, and lay in sackcloth, and went softly.

28 And the word of the LORD came to Elijah the Tishbite, saying, 29 see you how Ahab humbles himself before me, I will not bring the evil in his days: but in his son's days will I bring the evil upon his house.

Who is robbing who of their inheritance and birthright?

Fairness, justice and rationality are an integral element of constitutions and constitutionalism. Subsistence to a culture of justice, fairness and equality before the law for all persons would inculcate positive morality and breathe life and reality in society. This would go far in meeting the aspirations of the people and restore our spirits to calm and steadiness instead of the subsisting culture and life of suspicion and hostility.

On the other hand, injustice, like is demonstrated by the scripture of the stolen vineyard above can only bring out the wrath of God on our persons and society.

That is why society, including its institutions, offices and officers must endeavor to do justice with a view to imbuing goodness to all and sundry. This is more so to our children who form the bedrock of our future. Let us refrain from the glee of taking for ourselves other peoples lifelines, inheritance and birthrights. This is all too painful and a recipe for mistrust and chaos. It would result in disillusionment, a negative chapter in our biography as a nation.

Let everybody retain their vineyards, public servants included.

I am therefore inclined to allow the petition and order relief as follows;

- i. That a declaration be and is hereby issued that S. 43 (5) of the Elections Act, 2011 is unconstitutional and without any legal basis or force *ab initio*.
- ii. That Section 43 (6) of the Elections Act, 2011 is innocent and harmless. It is a replication of the Constitution on the subject.
- iii. That a declaration that public officers can only leave office to participate in the election process on nomination for the general election or conclusion of the nomination process for the said general election.
- iv. That a permanent injunction be and is hereby issued restraining the 1st – 4th Respondents by themselves, servants, agents, employees, assignees, proxies and or representatives from disqualifying public servants from the next or any other general election for not vacating office six months to election date.
- v. That an order of certiorari be and is hereby issued to bring into the Honourable court and quash the 4th Respondent's letter on resignation from office by public servants seeking elective posts in the 2017 General Elections dated 1st December, 2016.
- vi. That a declaration be and is hereby and is hereby issued declaring that the rejection of the 2nd – 4th Petitioner's letters of revocation of resignation vide the 5th Respondent's letter dated 9th February, 2017, is illegal and contravenes their rights enshrined in Articles 27, 28, 41, 47 and 50 of the Constitution.
- vii. That an order of certiorari be and is hereby issued to bring into this Honourable court and quash the decision of 5th – 6th Respondent's contained in their letters dated 9th February, 2017 to reject the 2nd – 4th Petitioner's respective revocation of their resignations pursuant to S.43 (5.)
- viii. That an order of permanent injunction be and is hereby issued restraining the 5th – 6th Respondent's from advertising or filling the positions of the 2nd – 4th Petitioner's until they are nominated to contest the general elections of 8th August, 2017.
- ix. That a declaration be and is hereby issued that under Article 24(1) and (2) of the Constitution, the requirement for a public officer who intends to contest on election to resign from public office six months before the date of election is unreasonable and unjustifiable in a democratic society.
- x. That a declaration be and is hereby issued that unless and until nomination, there is no compelling public interest that demands mandatory resignation of a public officer from public office.
- xi. That a declaration be and is hereby issued that the resignations of the 1st – 8th Interested Parties are unlawful, null and void and of no effect.

xii. That a declaration be and is hereby issued that all resignations consequential upon the 4th Respondent's letter dated 1st December, 2016 are unlawful, null, void and of no legal effect.

xiii. That the costs of this petition in respect of the 2nd – 4th petitioners shall be borne by the 5th – 6th Respondents.

xiv. That all the other parties to this petition shall bear their own costs of the petition.

xv. That the Registrar be and is hereby ordered to furnish separate copies of this judgement to the speakers of the National Assembly and Senate of the Republic of Kenya for notation.

Delivered, dated and signed this 29th day of March 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Simiyu instructed by Musyoka Murambi & Associates for the 1st Petitioner.
2. Mr. Mungai instructed by Kinoti & Kibe Company Advocates for 2nd – 4th petitioners.
3. Mr. Mugumia holding brief for Bitala instructed by Bitala & Company Advocates for the 1st - 4th Interested Parties.
4. Mr. Sang instructed by P. Sang & Company Advocates for the 5th – 7th Interested Parties.
5. Dr. Stephen Kiplangat Koskey – 8th Interested Party in person.
6. M/s. Kibet & Obondi instructed by Murugu, Rigoro & Company Advocates for the 1st Respondent.
7. M/s. Mutinda & Githinji & Miss Langat instructed by State Law Office for the 2nd – 4th Respondents.
8. M/s. Lippop instructed by Khisa & Company Advocates for the 5th - 6th Respondents.
9. No appearance for the 7th – 8th Respondents.