



**Livondo v General (Petition 14 of 2020) [2024] KEHC 8252 (KLR)
(Constitutional and Human Rights) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8252 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 14 OF 2020
LN MUGAMBI, J
JUNE 27, 2024**

BETWEEN

STANLEY LIVONDO PETITIONER

AND

ATTORNEY GENERAL RESPONDENT

JUDGMENT

1. This petition is dated 15th January 2020 and is supported by the petitioner’s verifying affidavit of even date. The gravamen of the Petition is the interpretation of Articles 130(1), 131 (1) (b), 137 (2) (b) & (3) and 148 (6) (a & b) of the Constitution. The petitioner seeks the following reliefs:
 - a. A declaration that Article 148 (6) (b) of the Constitution be interpreted to mean that a sitting deputy president will assume office of president only under the conditions provided for in Articles 139(1) and 146 (2, 3 & 4) of the Constitution.
 - b. A declaration that Articles 130(1), 131(1)(b) and 148 (6)(a) of the Constitution read together be interpreted to mean that a sitting deputy president having completed two full terms as the deputy president cannot stand for nomination as a presidential candidate.
 - c. A declaration that Article 137 (2) (b) and (3) of the Constitution be interpreted to mean that it applies to in the case of the president and the deputy president re-election at the completion of their first term and to a member Parliament at their re-election at following general elections.



- d. A declaration that Articles 129(1), 130(1) and 131(1) (b) of the Constitution when read together be interpreted to mean that none of the members of the Cabinet can stand for nomination as a presidential candidate.
- e. A declaration that the role of the current persons who constitute the National Executive as per Article 130 (1) of the Constitution, individually including past cabinet Secretaries collectively cease to have any executive role or any other role in the National or county governments and in any subsequent or future national or county governments in executive capacity or in any other capacity upon the swearing in of a new president in 2022 in accordance with the current constitution read as whole and interpreted having regard to Article 259 of the Constitution.
- f. The petitioner is deserving of costs.

Petitioner's Case

2. The Petitioner commences by pin-pointing the key Constitutional provisions that he deemed relevant to his Petition. He cited Article 132 (2) the Constitution which gives the President the power to nominate and appoint his Cabinet as envisaged under Article 152(1) of the Constitution. Further, Article 129(1) which underscores that Executive Authority is derived from the people and should only be exercised in accordance with the Constitution.
3. The Petitioner stated that the national executive of the Republic is provided for in Article 130 (1) and comprises of the President, his deputy and the Cabinet and it is Article 131 (1) (b) that gives the President the power to exercise the executive authority of the Republic with the assistance of the Deputy President and Cabinet Secretaries.
4. It was the Petitioner's assertion that the president and the deputy president and the cabinet secretaries bear collective responsibility to the President for all actions and decisions they make (under Article 153 (2)). Further, that under Article 147 (2), the duties and functions of President under Article 132 and 133 are easily transferable to the Deputy President hence all act as unit.
5. It was the Petitioner's case therefore the two-terms limit that applies to the President under Article 142 (2) also applies to the Deputy President and the Cabinet Secretaries. That the only way the Deputy President can ascend to the Office of President is by dint of Article 148(6) (b) of the Constitution, and which cannot extend to a Deputy President who has served two full terms as this path is not through an election but other specified circumstances.
6. The Petitioner thus urged the Court to interpretate of Articles 130(1), 131 (1) (b), 137 (2) (b) & (3) and 148 (6) (a & b) of the Constitution in regard to eligibility of the Deputy President and Cabinet Secretaries to vie for the presidency.
7. The petitioner averred that the under the repealed Constitution, Section 23(1) was specific that executive authority vested in the President. It provided that: 'The executive authority of the Government of Kenya shall vest in the President...' a position that is contrasted by the current Constitution which under Article 129 (1) which refers to 'executive authority' that is vested in the 'national executive' under Article 131 (1)(b) comprising the President, Deputy president and with the assistance of the Cabinet.
8. The petitioner stated that in the absence of definition of 'executive authority' or 'national executive'; Article 260 of the Constitution allows an open interpretation of the terms with a view to promote the



meaning and spirit of the Constitution. Further that Article 259 of the Constitution is worded in general terms leaving it to elaboration to meet the changing conditions.

9. Moreover, the petitioner asserts that, the oath of office provided under the Third Schedule, in which the Deputy President swears “...at all times, when so required, faithfully and truly give my counsel and advise to the President of the Republic ...” when read with Article 147 (1) & (2) of the Constitution indicate that the President and the Deputy President work together as single unit.
10. It is the petitioner’s cases therefore that since the term of the president was set to expire in August 2022, the Deputy President and persons in the Cabinet terms concurrently served their terms. For this reason, he contends that these persons could not vie in the general elections (already concluded) as presidential candidates.
11. The petitioner further argues that by virtue of Article 142(2) of the Constitution, the then president was barred from standing for nomination as a presidential candidate while Article 148(6)(a) of the Constitution barred the then sitting deputy president from also vying as a presidential candidate. It is the petitioner’s assertion therefore Article 27 of the Constitution would not be infringed as the right to be candidate in the general under Article 38(3) (c) of the Constitution is are neither universal nor unconditional and the limitation is not unreasonable.

Respondent’s Case

12. In response, the respondent filed its grounds of opposition dated 10th November 2020 on the basis that:
 - i. In as far as the petition herein restates the Constitution and seeks in prayer (a), for a restatement of the same by this Court in the form of a Declaration/ Order; the same is not opposed given that it is a constitutional question for determination.
 - ii. In as far as prayers (b) and (c), in the petition, seek to bar the holder of a position of deputy president from offering his/her candidature for the position of president upon doing his/her two terms, purely in account of this Court’s interpretation of the Constitution is not only a violation to the candidate’s right under Articles 38 of the Constitution but it is also an interdiction of the clear provisions of Article 137 of the Constitution in as far as the qualifications of an individual for purposes of nominations as a presidential candidate.
 - iii. Further that the Constitution is quite deliberate on constitutional office holders whose time of service is time limited. (See: Inter alia Articles 142,157, 167,228 and 229 pf the Constitution).No such provision exists in respect to the position of deputy president.
 - iv. In as far as prayers (b), (d) and (e) of the petition seek an interpretation to Articles 129, 130, 131 and 137 of the Constitution, to make provision and meaning that is contrary to the literal interpretation of the said provisions, the same should not be issued. It contradicts Article 259 of the Constitution.
 - v. The petition as presented seeks to impeach Articles 132 and 137 of the Constitution; in as far as it attempts to amend the functions of the president and the qualifications/disqualifications for persons who intend to contest for the position of president. This contradicts the sovereign authority of the people as captured in the preamble to the Constitution in Articles 1 and 2 thereof.



- vi. Granting the Orders and Declarations sought herein will be akin to amending the Constitution, particularly Articles 129, 130, 131, 137 and 179 of the Constitution outside the strictures of Articles 255, 256 and 257 of the Constitution which will be unconstitutional.
- vii. In as far as the candidature of the current deputy president for the position of president in the August 2022 election is the petitioner reference point in this election, the same is speculative and it cannot form the basis for a constitutional petition. Further annexure 'SL -1' annexed to the Affidavit done in verification of the factual depositions in the petition, deponed by the petitioner and dated 15th h January 2020 is inadmissible. We will be seeking this Court's leave to have the same expunged from the record.
- viii. In as far as the issue of appointment and formation of the Executive Arms of Governments, at both the National and County Levels of Government, is concerned – the same remains strictly a concern of the Executive Arms and this court lacks the requisite jurisdiction to change the same through either declarations or orders. Respectfully, granting the Orders and Declarations sought will be an affront to the twin doctrines of deference and separation of powers.
- ix. This court lacks the jurisdiction to entertain this petition in as far as its main concern is a back-hand amendment of the Constitution. The jurisdiction invoked is not within the provisions of Article 165 of the Constitution and in toto it is an abuse to this Court's process, it is unmerited and we urge for its dismissed with costs.

Parties' Submissions

13. Khaminwa and Khaminwa Advocates for the petitioner filed submissions dated 6th June 2023. Counsel on the first issue, whether the president and deputy president are eligible to run for another term, submitted that this would be contrary to Articles 142(2) and 148(8) of the Constitution. It is submitted that the essence of a democracy in this context should be reflected in limits to the presidential term.
14. Accordingly, it is argued that leadership structure should not be premised on a system that allows a leader to lead indefinitely. In Counsel's view, the deputy president's term of office is pegged on the president's term. Hence where a deputy president has served two terms concurrently with the sitting president, then it should be interpreted that the deputy president has served the envisaged two terms and hence not be allowed to vie for presidency if desirous to do so. In Counsel's view the strictures of these two provisions are not unreasonable restrictions rather reflective of the values of our nation.
15. As to the qualifications and disqualifications for election as president, Counsel in this second issue submitted that Article 137 of the Constitution provides the basis upon which one can be eligible to vie for presidency. Correspondingly of importance is that Section 22 (1) of the Elections Act provides that a person may be nominated as a candidate for election under the Act only if that person is qualified to be elected to that office under the Constitution. It is stated that these provisions are also applicable to the office of the deputy president.



Respondent's Submissions

16. In the submissions dated 5th May 2023, Senior State Counsel, Patricia Chibole for the respondent highlighted the two issues for discussion as whether a sitting Deputy President can only be nominated for the office of President only under the conditions provided for in Articles 139(1) and 146(2)(3)(4) of the Constitution and whether the current persons who constitute the National Executive as per Article 130(1) of the Constitution, individually including past Cabinet Secretaries collectively cease to have any executive role in the National or County Governments and in any subsequent or future National or County Governments in Executive capacity or in any other capacity upon the swearing in of the new President in 2022.
17. On the first issue, Counsel asserted that in interpreting these provisions the petitioner had formulated his own interpretation which is imprudent and incorrect. Counsel states that the Constitution under Article 259 provides the manner in which the Constitution should be interpreted. Further that this Court under Article 159(2) (e) of the Constitution is required while exercising its authority to do so in a manner that protects and promote the purposes and principles of the Constitution.
18. Likewise that the Court is to be guided by the various constitutional interpretation principles. For instance, the liberal purposive interpretation principle adopted in *Re The Matter of Interim Independent Electoral Commission Constitutional Application No. 2 of 2011*. The Supreme Court in this matter opined as follows:

“the Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a mirror reflecting the national soul; the identification of ideas and... aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must, therefore, preside and permeate the processes of judicial interpretation and judicial discretion.”
19. Counsel further highlighted the principle that the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other as emphasized in *Tinyefuza v Attorney General of Uganda Constitutional Petition No. 1 of 1997 (1997 UGCC 3)*. Equally that the Constitution is a living instrument with a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must therefore endeavor to avoid crippling it by construing it technically or in a narrow spirit as held in *Re Kadhis' Court: The Very Right Rev Dr. Jesse Kamau & Others v The Hon. Attorney General & Another Nairobi HCMCA No. 890 of 2004*.
20. Turning to the second issue, Counsel stated that the petitioner's interpretation of this provision is in error. This is because the cited provisions do not disqualify the deputy president and the cabinet secretaries from being nominated for the office of President after completion of their terms. In fact, Counsel noted that the only provision that bars a deputy president from being nominated as a presidential candidate is under Article 146(4) of the Constitution. Accordingly any other bar not legally ordained will be in violation of Article 24 of the Constitution and discriminative to such a candidate.
21. Counsel further rebutted that allegation that executive power is not defined. Counsel pointed out that this authority is vested in the president as the dictates of Article 131 (1)(b) of the Constitution state that 'the President exercises the executive authority of the Republic, with the assistance of the Deputy President and Cabinet Secretaries'



22. Counsel as well took issue with the petitioner's proposition that this Court interferes with the provisions of nomination of persons to the Executive. This was said to be offensive to the doctrine of separation of power. Reliance was placed in *Jayne Mati & Another v. Attorney General and Another* - Nairobi Petition No. 108 of 2011 where it was held that:

“It this juncture I must emphasise that separation of powers between the judiciary, executive and legislature is one of the hallmarks of our Constitution. Each body or organ of state is bound by the *Constitution* and should at all times acquaint itself of its provisions as it works within its sphere of competence.”

23. Like dependence was placed in *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* (2017) eKLR.

24. Counsel in closing as well pointed out that some of the prayers sought have since been overtaken by events following the conclusion of the August 2022 general elections. Equally, Counsel noted that it is the jurisprudential norm that public interest suits do not attract an award of costs.

Analysis and Determination

25. Two major issues for determination in this Petition are:

- i. Whether this Court has jurisdiction to hear this petition.
- ii. Construal of Articles 130(1), 131 (1) (b), 137 (2) (b) & (3) and 148 (6) (a & b) of the *Constitution*.
- iii. Whether this Court should award costs in this suit.

Whether the Court has jurisdiction to hear the Petition

26. Jurisdiction connotes the authority of the Court to hear a dispute. It is either granted by the *Constitution* or the Statute and the Court can only adjudicate over disputes within its own scope of authority. The jurisdiction of the High Court to hear and determine constitutional disputes is granted by Article 165(3) of the *Constitution*.

27. In the grounds of opposition dated 10/11/2020; the Respondents stated in part as follows:

“In as far as the candidature of the current deputy president for the position of president in the August 2022 election is the petitioner reference point in this election, the same is speculative and it cannot form the basis for a constitutional petition”

28. The above opposition is what is embedded in the doctrine of ripeness which is a part of the principle of justiciability. In the *Black Law Dictionary*, 10th Edition; ‘ripeness’ is defined as “the state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made.”

29. Simply put, doctrine prevents a party from seeking judicial relief when the threatened harm is merely speculative, imaginary or contingent.

30. Reading through the entire Petition and the affidavit in support, there is no evidence to indicate that at that point time nominations for presidential elections were happening or about to happen and that the Deputy President in office then was actually taking part. Nevertheless, I take judicial notice that



about one and half years later (the then Deputy President and who is now President, did in fact submit to the nomination process and won the election).

31. As and when the Petition was filed however, almost two years to election, was it ripe for the Court to be invited to determine the Petition in respect to a dispute that was not of the moment but which based on hypothesis that a controversy might erupt at a future? At the time, there was no concrete proof that the then Deputy President was unequivocally going to tender his nomination to vie for the position of President. In fact even the newspaper cuttings provided by the Petitioner do not confirm that for a fact. To illustrate, a newspaper extract annexed to the Petitioner's affidavit; SL-1 at pg. 14 and 15, the then Deputy President, (now President) makes it to the headline in the Standard Newspaper of 27th September, 2019 that reads: "Ruto: Why I can quit 2022 race."

The reporter then writes:

"Deputy President William Ruto has thrown President Uhuru Kenyatta into a spin with the stunning declaration that he is ready to stand down from 2022 Presidential race if his candidacy would spark chaos"

32. The issue had thus not developed into a real factual issue or controversy capable of being adjudicated by the Court as at the time Petition was filed. It was futuristic. Even now, Dr. Khaminwa (SC) posited in his oral highlights that the decision that the Court would make is futuristic. He urged the Court thus:

"...Take courage and give the Country a good decision and future generations will have no vested interests, all we want is a good decision..."

33. The jurisdiction of this Court is limited to resolving disputes and not advising on what the law should be, hence there must be a real controversy. At that moment in time, I would have held that there was no real controversy for what the Petitioner was seeking was an opinion of a contingent event in the future and hence would have dismissed the Petition at that stage.

34. However, I consider it necessary to also address the Petitioner's contention, since, though the matter was not ripe at that time; it in fact came to pass since the then Deputy President submitted his nomination for the position of the President and vied and won. Time thus proved it was not a mere speculation.

35. The question then becomes, can the term limit of the President be used apply to Deputy President or Cabinet Secretaries who aspire to be President through an election. Is that argument tenable?

36. Article 259 of the Constitution guides that the Constitution shall be interpreted in a manner that

- a. promotes its purposes, values and principles;
- b. advances the rule of law, human rights and fundamental freedoms in the Bill of Rights;
- c. permits the development of the law and
- d. contributes to good governance.

37. The Supreme Court in the case of Katiba Institute v Attorney General & 9 Others (2023) KESC 47 KLR guided that the Constitution must be interpreted as an integrated whole with each provision supporting and not destroying the other.



38. It is also important to note that speaks through its words and the Court must ensure that it does not abrogate from the meaning and object of Constitution through construction. In the Indian case of *SP Gupta v Union of India & Anor* 1982 AIR 149, 1982 SCR 365; P.N. Bhagwati J, cautioned thus:
- “...We can always find some reason for bending the language of the Constitution to our will, if we want, but that would be rewriting the Constitution in the guise of interpretation. We must remember that the Constitution is an organic instrument intended to endure and its provisions must be interpreted having regard to constitutional objectives and goals of how a particular Government may be acting at a given point in time. Judicial response to constitutional interpretation must not suffer the fault of emotionalism or sentimentalism which is likely to cloud the vision when judges are confronted with issues of monumental importance...”
39. Having regard to the above principles, I must now answer the question of whether the Presidential term limit also extends to a Deputy President who has served two terms with the President or even members of the Cabinet as contended by the Petitioner.
40. Under Article 142 (2); of the President is eligible to serve two full terms. There is a defined Constitutional path of how one becomes President and one can does not become President merely by being associated with or being closer to the Presidency, that would be a constitutional absurdity. No constitutional construction can make one a President, be it be the Deputy President unless by the validly decreed Constitutional process. The Constitutional position under Article 147 (1) is that the Deputy President is the Principal Assistant who deputizes the President in the execution of President’s functions. He cannot thus be barred from ascending to the Presidency based by dint of Article 142 (2) because he/she is not the President. The term limit that specifically attaches to the office of Deputy President under Article 148 (8) only blocks person holding the office as Deputy President for more than two terms, it does not transcend to blocking him/her from holding any other position in Government including that of President.
41. Further and contrary to the submissions by the Petitioner that executive authority is vested on the national executive and the contention that the term national executive is not defined; Article 131 (1) makes it crystal clear that the President exercises executive authority of the Republic, with the assistance of the Deputy President and Cabinet Secretaries. the Constitution thus deliberately places the executive authority of the Republic on the President to be assisted in discharging it by the Deputy President and the Cabinet Secretaries. The executive authority that reposes on President is detailed in Chapter 9 of the Constitution which provides how the President is to exercise it. Some of the other aspects of executive functions may also be subject to other legal norms or could be vested in different organs of State through legislation. The President has the immediate persons that are constitutionally designated to assist him in the exercise executive authority and they include the Deputy President and Cabinet Secretaries who together the Constitution collectively refers to as the ‘national executive’ under Article 130 (1).
42. It is my considered opinion that the text of our Constitution speaks with clarity and makes a definite distinction between the President and the Deputy President. The framers of our Constitution did not lump together the Deputy President and President as a single unit for purposes of Article 142 (2) as advocated by the Petitioner. The two full terms served by the President can only apply separately and individually to a person who has served in the official capacity of President and cannot be extended to the members of the national executive, namely, the Deputy President and the Cabinet Secretaries so as to prevent them from vying for the position of President merely because they have served under the President who has completed his two full terms. If this was what the framers of the Constitution



intended, they would have precisely stated so. This Court cannot read words into the Constitution that are tantamount to rewriting the Constitution through a judgment. Such will be an act of judicial overreach.

43. In view of the above analysis, I humbly and respectfully reject the contention that a President's two-term limit covers the Deputy President or members of his Cabinet who may have served under President who has completed his two full terms from vying for the position of President. That proposition is constitutionally ill-conceived and untenable.
44. In regard to the award of costs, I am guided by the decision of the Supreme Court in Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 others [2014] eKLR which affirmed the view that matters brought in public interest may be exempt from the principle that costs on follow the event in regard to the party that has lost. The Court held:

“... An examination of evolving practices on this question, shows that, as an example, matters in the domain of public-interest litigation tend to be exempted from award of costs. In *Amoni Thomas Amfry and Another v. The Minister for Lands and Another*, Nairobi High Court Petition No. 6 of 2013, Majanja, J concurred with the decision in *Harun Mwau and Others v. Attorney-General and Others*, Nairobi High Court Petition No. 65 of 2011, [2012] eKLR, in which it was held [para.180]:

“In matters concerning public-interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the State but lost. Equally, there is no reason why the State should not be ordered to pay costs to a successful litigant.

“It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.”

45. The upshot is that this Petition is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 27TH DAY OF JUNE, 2024.

L N MUGAMBI

JUDGE

