



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI  
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION  
PETITION NO. 288 OF 2014

BETWEEN

HON. WILLIAM OMONDI.....PETITIONER

AND

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

THE ATTORNEY GENERAL.....2ND RESPONDENT

REGISTRAR OF POLITICAL PARTIES.....3RD RESPONDENT

JUDGMENT

Introduction

1. The Petitioner, Hon. William Omondi is a former Member of Parliament for Kasarani Constituency and who has expressed his decision and intention to vie for the Mathare Constituency by-election slated for 7<sup>th</sup> August 2014 as an independent candidate. On 17th June 2014, he applied for clearance from the Registrar of Political Parties (*hereinafter "the Registrar"*) to enable him vie in the said by-election but the Registrar in her letter dated 18th June 2014 declined to issue the clearance certificate because the Petitioner had allegedly violated **Section 14(3)** of the **Political Parties Act** of 2011. Subsequently, the Independent, Electoral and Boundaries Commission (*hereinafter "the IEBC"*) by a letter dated 19th June 2014 wrote to the Petitioner and stated that he had not met the requirements to enable him vie for the Mathare Constituency by-election because he had allegedly contravened the said **Section 14(3)** of the **Political Parties Act** as read with **Regulation 15** of the **Elections (General) Regulations 2012**, **Section 33** of the **Elections Act** and **Article 85** of the **Constitution**.

2. The Petitioner, being dissatisfied with the above decisions, then filed the Petition dated 26th June 2014 seeking *inter alia* a declaration that the IEBC's decision to deny him the right to contest the Mathare Constituency by-election is a violation of his fundamental rights and freedoms and for an order that the IEBC do admit him to contest in the said by-election. Together with the Petition, he filed a Chamber Summons Application dated 26th June 2014 where he sought an interlocutory order restraining the 1st Respondent from carrying on the Mathare Constituency by-election.

3. In determining that Application and by a ruling dated 9th July 2014, I found that this Court had no jurisdiction to determine the issue of nomination as between the Petitioner and the Registrar of Political Parties as that was a preserve of the IEBC in the first instance under **Article 88(4) (e)** of the **Constitution**. The said **Article** for avoidance of doubt states as follows;

*“(1) ...*

*(2) ...*

*(3) ...*

*(4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for –*

*(a) ...*

*(b) ...*

*(c) ...*

*(d) ...*

*(e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.”*

4. Following that ruling, the Petitioner filed a complaint with the IEBC and in a ruling dated 10th July 2014, the IEBC Dispute Resolution Committee found that the Petitioner was ineligible to vie as an independent candidate in the Mathare by-election for reasons that he was not qualified to do so as an independent candidate in that he had violated the provisions of **Article 85(1)** of the **Constitution**, **Section 33** of the **Elections Act** and **Regulation 15** of the **Election (General) Regulations 2012**. The exact alleged violation will shortly become apparent.

5. Subsequently, the Petitioner amended his Petition and in the Amended Petition dated 11th July 2014, he is now claiming that **Section 14(3)** of the **Political Parties Act** is inconsistent with **Article 85** of the **Constitution** and is therefore invalid and unconstitutional. He thus seeks the following specific orders;

*“(1) A declaration that the Respondents’ decision to deny the Petitioner the right to contest the Mathare constituency by-election violates the Petitioner’s rights.*

*(1A) A declaration that the provisions of the Political Parties Act Section 14(3) is inconsistent with Articles 85 of the Constitution and is therefore invalid and unconstitutional. (sic)*

*(2) A permanent injunction restraining the Respondents from denying the Petitioner the right to contest as an independent candidate in the Mathare Constituency by-election.*

*(3) The Respondents to forthwith admit and list the Petitioner as a contestant in the Mathare Constituency by-election as scheduled/or as the Court may direct.*

**(4) Such other orders as this Honourable Court shall deem fit or just.**

**(5) Costs of the Petition.”**

#### **Case for the Petitioner**

6. The Petitioner's case is straight forward and Mr. Omino who presented his case submitted that barring a candidate from contesting an election is against the spirit of the Constitution and the Elections Act. That the Petitioner has a right to participate in elections under **Article 38** of the **Constitution** and it would be a violation of his right to do so if the said right is limited under **Article 24** of the **Constitution**.

7. He claims further that the Political Parties Act cannot take away his political rights as enshrined in the Constitution and to that extent therefore, **Section 14(3)** of the **Political Parties Act** is inferior and subservient to the constitutional provisions on the nomination of independent candidates as set out in **Article 85** of the **Constitution** and is thus unconstitutional, null and void.

8. It is also Mr. Omino's contention that the Petitioner had not been a member of any political party three months prior to the Mathare Constituency by-election and that under **Section 14(2)** of the **Political Parties Act**, his resignation from the Orange Democratic Movement (ODM) took effect when the said political party received the resignation and not when the notice of resignation from ODM was received by the Registrar. That Form 12 which was allegedly created by the Registrar as a prototype letter of resignation from political parties does not state the date when a member of the political party actually resigns but states the date when the letter of resignation is received by the political party. He alleges therefore that the Registrar does not have any role in the resignation process and once the Petitioner had resigned from ODM, then he should be allowed to vie for the by-election as an independent candidate. The orders sought should therefore be granted as prayed.

#### **Case for the 1<sup>st</sup> Respondent**

9. The 1st Respondent, IEBC, opposes the Petition through the Replying Affidavit of Mohamud Jabane, the IEBC Legal Services Manager, sworn on 18th July 2014.

10. It is the IEBC's position in that regard that it only received the 3rd Respondent's letter indicating that the Petitioner had ceased to be a member of the ODM party on 13th June 2014. That therefore, in accordance with the provisions of **Article 85(1)** of the **Constitution**, **Section 33** of the **Elections Act** and **Regulation 15** of the **Election (General) Regulations 2012**, and noting the above date, the Petitioner did not qualify to be an independent candidate until three months had lapsed from 13th June 2014. Further, that the Petitioner's allegations that he had resigned from the Orange Democratic Movement party on 21st January 2013 was without basis and that the IEBC amongst others, relies on the clearance certificate obtained from the 3rd Respondent in determining the eligibility of a person to vie in an election.

11. On the constitutionality or otherwise of **Section 14(3)** of the **Political Parties Act**, Mr. Mukele, learned advocate for the IEBC submits that **Section 14(3)** was enacted by Parliament pursuant to the provisions of **Article 92** of the **Constitution** with full consideration of **Articles 38** and **85** of the **Constitution** and the said Section was intended to prevent electoral candidates from party-hopping without informing the requisite legal authorities of the changes in their party allegiances and to effect the provisions of **Article 85** of the **Constitution**. He adds that if the said section was to be declared unconstitutional, then the Registrar would be unable to perform her duties under **Section 34(d)** and **(f)** of the **Political Parties Act** and lastly that the political rights under **Article 38** of the **Constitution** can be

limited in the manner provided for under **Article 24** of the **Constitution**. The IEBC therefore prays that the Petition should be dismissed with costs.

### **Case for the 2<sup>nd</sup> Respondent**

12. The 2nd Respondent, the Attorney General opposes the Petition by his Grounds of Opposition dated 18th July 2014 which read as follows;

***“(1) That the Political Parties Act, 2011 was promulgated pursuant to Article 92 of the Constitution. The intent of both the Constitution and the Act is to facilitate the regulation and supervision of the activities of political parties.***

***(2) That the right to participate in an election as an independent candidate is derogable and limited, by the Constitution, particularly Article 85. Section 14(3) of the Political Parties Act, 2011 is a detail operationalizing Article 85 and 92 of the Constitution.***

***(3) That Article 85 of the Constitution sets the eligibility requirement for independent candidates to include one not being a member of [a] registered political party and/or one not having been a member of a political party for at least three months immediately before the date of the election.***

***(4) That the notification of one's resignation from a political party's membership postulated by Section 14(3) of the Political Parties Act, 2011 is one such information that the 3rd Respondent should be given for purposes of its records under Section 4 of the Act; and it is within the larger scheme of Article 85 of the Constitution.***

***(5) That allowing the Petition will defeat the general purpose of the act, as encapsulated in its long title, inter alia as, the regulation of political parties;***

***(6) That the Petitioner, and his former political party, were duty bound to notify the 3rd Respondent of the Petitioner's resignation in January 2013. Indolence on their party does not form sufficient reason to impugn Section 14(3) of the Political Parties Act, 2011.***

***(7) That the Petition filed herein is an abuse of the Court process as it should be dismissed.”***

13. Mr. Moimbo presented the case for the Attorney General and he agrees with the 1st Respondent's submission in substance but added that if the orders sought by the Petitioner were to be granted then they would in essence defeat the purpose of the Political Parties Act and that it was the duty of the Petitioner to notify the Registrar of Political Parties of his resignation. In that regard therefore, his rights had been limited because he was still a member of ODM as of the 13<sup>th</sup> June 2014 when the Registrar received notification of the Petitioner's resignation from ODM. Lastly, that therefore the Petition was misguided and should be dismissed with costs.

### **Case for the 3<sup>rd</sup> Respondent**

14. The Registrar who is the 3<sup>rd</sup> Respondent in the Petition was enjoined to the proceedings upon the Petition being amended. In submissions, Mr. Makolwal, Counsel appearing for the Registrar argued that;

i. **Section 14(2)** of the **Political Parties** is intended to instill discipline among members of political parties and by 13<sup>th</sup> June 2014, **Section 14(2)** and **(3)** was the law regarding resignations from Political

Parties and in declaring the Petitioner unfit to vie for the Mathare by-election, the Registrar was merely complying with that law.

ii. Although the letter of resignation signed by the Petitioner was said to have been created by the Registrar, there is no evidence to authenticate that fact.

iii. The procedure for movement from one party to another is for individual political parties and their members to determine and upon resignation of a member from any party, the Registrar only receives a copy of the letter of resignation as happened in the present case. The Registrar thereafter becomes the custodian of the records and the final arbiter as to whether one is a member of any political party or not.

iv. There would be no prejudice caused if the Court were to declare **Section 14(3)** as unconstitutional but as at 13<sup>th</sup> June 2014, the Petitioner was ineligible to vie as an independent candidate.

### **Determination**

15. Having set out the Parties' contentions as above, it follows that the main issue for determination in this matter is whether **Section 14(3)** of the **Political Parties Act** is unconstitutional for being inconsistent with **Article 85** of the **Constitution**. As a corollary to that issue, I must also address the issue whether the Petitioner's political rights under **Article 38** of the **Constitution** have been violated.

16. It has been argued in the above regard by the Petitioner that **Section 14(3)** of the **Political Parties Act** is in conflict with **Article 85** of the **Constitution**. Before I proceed to determine the constitutionality or otherwise of the impugned Section, I find it important to set out the relevant principles which guide the court in such a task. Firstly, there is a general presumption in the interpretation of any Statute vis-à-vis the Constitution that every Act of Parliament is constitutional. The burden of proving otherwise lies on any person who alleges the contrary save that where there are limitations to fundamental rights, the onus is on the body alleging a restriction to the right to show that such limitation was constitutionally justified - See **Ndyanabo v Attorney General [2001] EA 495**.

In that regard, in **Pearlberg v Varty [1972] 1 WLR 534**, as cited in **Re Application Bahadur [1986] LRC 545 (Const.)** the learned Judge stated as follows;

***"I would only emphasise that one should not start by assuming that what Parliament has done in a lengthy process of legislation is unfair. One should rather assume that what has been done is fair until the contrary is shown..."***

I agree and would only add that this Court in the present Petition will start from the presumption that the **Political Parties Act** as enacted by Parliament is constitutional and is fair unless the contrary is shown by the facts tabled before the Court.

17. Secondly, in determining whether a Statute or any provision of it is constitutional or not, the overall object and purpose of the Statute or provision must be considered. That is why in **Hamdardda Wakhama v Union of India AIR 1960 at 554** the Court stated as follows;

***"..when an enactment is impugned on the ground that it is ultra vires and unconstitutional, what has to be ascertained is the true character of the legislation and for that purpose regard must be had to the enactment as a whole to its objects, purpose and true intention and the scope and effect of its provisions or what they are directed against and what they aim at"***

The above principle has been restated and upheld by local Courts in a number of cases including **Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 (Unreported)**, **Samuel G. Momanyi v Attorney General and Another Nairobi Petition No. 341 of 2011 (Unreported)** and **Hon. Chirau Ali Mwakwere v Robert Mabera & 4 others, Nairobi Petition No. 6 of 2012 (Unreported)**.

18. The third principle is that the Constitution should be given a purposive and liberal interpretation as was stated *inter-alia* in **John Harun Mwau and Others v Independent Electoral and Boundaries Commission and Others [2012] eKLR** and approved by the Supreme Court in the case of **Re the Matter of the Interim Independent Electoral Commission Constitutional Application No.2 of 2011**.

19. Lastly, it is now settled and a principle of constitutional interpretation that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying another but each sustaining the other - See **Tinyefuza v The Attorney General of Uganda, Constitutional Appeal No. 1 of 1997** and **CIC vs Parliament of Kenya & Anor [2013] eKLR**.

20. Having therefore set out the applicable principles of law and applying them to the present Petition, I now embark on the determination of the constitutionality or otherwise of **Section 14** of the **Political Parties Act**. For one to appreciate the place of **Section 14(3)**, it is important to put it into its proper perspective. The marginal note to that Section states; “**resignation from political parties**” and it reads verbatim as follows;

***“14. (1) A member of a political party who intends to resign from the political party shall give a written notice prior to his resignation to -***

***(a) the political party***

***(b) the clerk of the relevant House of Parliament, if the member is a member of Parliament***

***(c) the clerk of a county assembly, if the member is a member of a county assembly***

***(2) The resignation of the member of the political party shall take effect upon receipt of such notice by the political party or clerk of the relevant House or County Assembly***

***(3) The political party to which the person is a member, the member or the clerk of the relevant House of Parliament or of a county assembly of which the person is a member shall notify the Registrar of such resignation within three days of the resignation”.***

21. In my view, this provision is clear and requires no more than a literal interpretation. **Section 14(3)** in effect demands a member of a political party who intends to resign from the Political Party must, and is obliged, to give a written notice of his resignation to his Political Party, and if he is a sitting member of Parliament, to give the written notice to the Clerk of the relevant house (The Senate or The National Assembly) and if he is a member of the County Assembly, to the Clerk of the County Assembly. That resignation according to the provisions of **Section 14(2)** **takes effects upon the same being received by the Political Party** or the Clerk of the relevant House. Upon receiving that notice, the Political Party or the Clerk of the relevant House shall then notify the Registrar within three days of the receipt of the resignation.

22. However, this is not the end of the matter because of the submissions made by the Petitioner that **Section 14(3)** of the **Political Parties Act** is in conflict with **Article 85** of the **Constitution** and I must

now address my mind to that issue. In that regard, **Article 85** of the **Constitution** provides that;

***“85. Any person is eligible to stand as an independent candidate for election if the person-***

***(a) is not a member of a registered political party and has not been a member for at least three months immediately before the date of the election; and***

***(b) ....”***

23. Looking at the provisions of Article 85, they are clear and straight forward and require no more than a literal interpretation; a person who is desirous of contesting an election as an Independent Candidate must not be a member of a registered political party and ought not to have been a member of a political party three months preceding the date of the election.

24. As is the practice, the above provision has also been operationalized by **Section 33** of the **Elections Act** which provides thus;

***“33. A person qualifies to be nominated as an independent candidate for presidential, parliamentary and county elections for the purposes of Articles 97, 98, 137, 177 and 180 of the Constitution if that person;***

***(a) has not been a member of any political party for at least three months preceding the date of the election”.***

25. To my mind therefore and reading at the provisions of **Section 14(3)** of the **Political Parties Act**, while **Section 33** of the **Elections Act** and **Article 85** of the **Constitution** together, **Section 14** deal with resignation of a member of a political party from his party; **Section 33** of the **Elections Act** and **Article 85** of the **Constitution** deals with the eligibility of any person as an independent candidate in an election. The question that then arises is, when does time start running for purposes of both **Article 85** and **Section 33** aforesaid"

26. To answer that question, I recall that **Section 14(2)** of the **Political Parties Act** provides that resignation from a political party takes effect upon a written notice being served on the political party. But what is the meaning of **“taking effect”**? The **Blacks Law Dictionary, 8th Edition** defines **'take effect'** as follows;

***“To become operative or executed. To be in force, to go into operation ”***

Applying that definition in the context of this Petition, it means that the decision to resign from a political party comes into force and becomes operational the minute the Political Party receives the written notice of resignation.

27. From a reading of the pleadings and submissions before me, none of the Parties took any issue with that provision and Mr. Omindo in fact pointed out the fact that **Section 14(3)** is superfluous in the face of **Section 14(2)**. For avoidance of doubt **Section 14(3)** reads thus;

***“(3) The political party to which the person is a member, the member or the clerk of the relevant House of Parliament or of a county assembly of which the person is a member shall notify the Registrar of such resignation within three days of the resignation.”***

In view of the Petitioner's arguments, the issue now is what purpose was that provision intended to serve"

28. To paraphrase the above question, what really is the object of **Section 14(3)** of the **Political Parties Act**" I have already stated elsewhere above that Parliament does not legislate in a vacuum but within an overall framework and a provision in a statute intends to achieve a certain objective. From submissions by Mr. Mukele, **Section 14(3)** is intended to safeguard the integrity of the list of members of a political party and to ensure that no person becomes a member of more than one political party. The Registrar, under **Section 34** of the **Political parties Act** therefore has several functions, *inter alia* as follows;

***"The functions of the Registrar shall be to—***

***(a) register, regulate, monitor, investigate and supervise political parties to ensure compliance with this Act;***

***(b) administer the Fund;***

***(c) ensure publication of audited annual accounts of political parties;***

***(d) verify and make publicly available the list of all members of political parties;***

***(d) maintain a register of political parties and the symbols of the political parties;***

***(e) ensure and verify that no person is a member of more than one political party and notify the Commission of his findings;***

***(f) investigate complaints received under this Act; and***

***(g) perform such other functions as may be conferred by this Act or any other written law."***

As can be seen from the above, the IEBC, under **Section 34(f)** acts on the report or findings of the Registrar in determining whether a person or a political party has complied with the requirements of the **Political Parties Act** as the Registrar is the custodian of the list of members of political parties and keeps and updates the register of all political parties in Kenya. It is therefore important for the Registrar to be notified of the changes of the list of members of political parties within a reasonable time and the three days given after the resignation has been said to be sufficient time and in fact no Party took issue with that period even after I enquired on the reasoning behind it.

29. Turning to the present Petition therefore, when did the Petitioner cease being a member of ODM so that he could be eligible to contest under **Article 85** of the **Constitution** as well as **Section 33** of the **Elections Act**" As regards the evidence in support of his claim that he had resigned from ODM three months prior to the election, I expressed myself as follows in the ruling dated 9th July 2014;

***"What evidence has been tendered in the above regard" At this stage, I am only obligated to view the evidence at a prima facie threshold and see whether a case has been made out in favour of the Applicant. In support of his case therefore, the Applicant has tendered a resignation letter which has no date but addressed to the "ODM Party, P.O. Box 2478-00200 Nairobi" and copied to the Registrar of Political Parties. The same letter has two stamps in acknowledgment of receipt. The ODM stamp reads "21 Jan 2013" while the Registrar's stamp reads "13 Jun 2014".***

*In addition, a hand-written letter “from the Desk of Hon. William Omondi, former Member of Parliament for Kasarani Constituency” dated 17th June 2014 has been exhibited to the Supporting Affidavit. It seeks a clearance certificate to vie for the Mathare by-election. The receipt stamp from the Registrars of Political Parties has the date “18 Jun 2014”. On the same letter, there is a handwritten statement that “Mr. Omondi is not a member of any political party.” It is unclear who made the writings.*

*The Applicant has relied on the latter statement to argue that the Registrar of Political Parties had made a decision that he was indeed not a member of any Political Party. That argument is flawed for the simple reason that such a statement on a hand-written letter by the Applicant cannot be authoritative on the Registrar's position because I cannot tell who inscribed that statement on the letter authored by the Applicant.”*

30. What I gathered then and I still do now is that the Petitioner resigned from ODM on 21st January 2013 as evidenced by the ODM stamp on the resignation letter. The authenticity of that stamp has not been doubted by the Respondents and I believe the Petitioner in that respect. I say so because based on the evidence before me and ODM not being a party in these proceedings so as to clarify the authenticity or otherwise of the stamp and since none of the Respondents in any event questioned its authenticity, I find it to be authentic.

31. Having so found, it is also not in doubt that for some reason, the 3rd Respondent only received the resignation letter on 13th June 2014. As to that issue, I stated as follows in my ruling aforesaid;

*“Further, it is obvious to me that although the undated letter of resignation was copied to the Registrar of Political Parties, it is unclear why it was received on 13th June 2014 and not a date nearer 21st January 2013 when ODM also received it. Mr. Kakoi for the 2nd Respondent is quite correct therefore when he stated in his Grounds of Opposition that the date when the Registrar took cognizance of the Applicant's resignation was not the date that ODM received the letter of resignation but the date the Registrar received the said letter. That date was 13th June 2014 which was a month and six days from the 7th May 2014 when the three months' constitutional period was to take effect.*

*Mr. Omino made a lot out of the letter dated 19th June 2014 addressed to the Applicant by the Chairman of IEBC. The apparent reference to the fact that the Registrar received the letter of resignation in June 2013 was of course an error but that error is of no benefit to the Applicant when it is obvious that the said letter was received by the Registrar on 13th June 2014 and not “June 2013” as erroneously indicated by the Chairman. The position therefore remains that the Applicant only brought his resignation to the notice of the Registrar of Political Parties on the date his letter was received by that office and not on the day it was received by ODM.”*

In that context, how then do I reconcile the two dates *vis a vis* **Section 14(2)** and **Article 85** as read with **Section 33** of the **Elections Act** aforesaid”

32. In answering that question, I should revert to the meaning of “take effect” as elsewhere stated above. **Section 14(2)** is clear that a resignation becomes operative and comes into force when the Political Party receives the letter of resignation. In the present Petition, that date is without doubt, **“21<sup>st</sup> January 2013”**.

On the other hand, the notification to the Registrar should have been within three days after that date (under **Section 14(3)**) and therefore by 24<sup>th</sup> January 2013.

33. Both **Section 14(2)**, **Section 14(3)** and **Section 33** of the **Elections Act** were however enacted to operationalize **Article 85** of the **Constitution** which requires that for one to vie for an election as an independent candidate, he must not have been a member of a political party at least three months before the election and in this case before 7<sup>th</sup> May 2014 since the election is slated for 7<sup>th</sup> August 2014. Was the Petitioner a member of any political party by 7<sup>th</sup> May 2014" Undoubtedly not. His resignation from ODM took effect on 21<sup>st</sup> January 2013 and not on 24<sup>th</sup> January 2013 when the Registrar ought to have been notified of the resignation. If that be so, can the lack of notification override the fact that he had actually resigned from his political party and was partyless thereafter" Therein lies the difficulty of reading **Section 14(2)** and **Section 14(3)** as one.

34. In that regard, I wholly agree with both Mr. Mukele and Mr. Makolwal that the two Sections were inserted in the law to instill discipline among party members and to stop the untidy practice of party-hopping towards the end of the nomination process leading to an election. That is a reasonable purpose and I said so in my Ruling of 9<sup>th</sup> July 2014. However, can that fact alone override the fact that the Constitution envisaged that an independent candidate should have been partyless three months before an election" I think not.

35. I say so because take the example of a member who resigns from his party three months and two days before an election and who notifies the Registrar of his resignation three days after his resignation. Should he be shut out because of late notification or should he be allowed to run because he had resigned more than three months before the date of election" It is obvious that the three months' qualification will prevail and the mere lack of notification cannot be a bar to the constitutional qualification, which has no other reservation than the said three months' partyless period.

In concluding this aspect of the Petition, **Article 2(4)** of the **Constitution** provides as follows;

**"(1) ...**

**(2) ...**

**(3) ...**

**(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid."**

It is clear to me that reading the above Article alongside **Article 85** of the **Constitution**, **Section 33** of the **Elections Act** and **Sections 14(2)** and **14(3)**, **Section 14(3)** grants the Registrar no powers to declare that although the Petitioner's resignation had taken effect on 21<sup>st</sup> January 2013, the mere lack of notification to her within three days of such resignation invalidates his candidature. To that extent only, then **Section 14(3)** is unconstitutional and I so declare.

36. Having expressed myself as above, I must now address the second issue i.e. whether **Section 14(3)** of the Political Parties Act and **Section 33** of the **Elections Act** limit the Petitioner's fundamental rights and freedoms to contest in the Mathare by-election as provided for under **Article 38** of the **Constitution** which provides as follows;

**"(1) Every citizen is free to make political choices, which includes the right—**

**(a) to form, or participate in forming, a political party;**

**(b) to participate in the activities of, or recruit members for, a political party; or**

**(c) to campaign for a political party or cause.**

**(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—**

**(a) any elective public body or office established under this Constitution; or**

**(b) any office of any political party of which the citizen is a member.**

**(3) Every adult citizen has the right, without unreasonable restrictions—**

**(a) to be registered as a voter;**

**(b) to vote by secret ballot in any election or referendum; and**

**(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.”**

37. To determine that question, I will also have to address my mind to the provisions of **Article 24** which provides for the limitation of rights. Article 24 provides thus;

**“(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—**

**(a) the nature of the right or fundamental freedom;**

**(b) the importance of the 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 by any individual does not prejudice the rights and fundamental freedoms of others; and**

**(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.**

**(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—**

**(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;**

**(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and**

**(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.**

**(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.**

**(4) The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance**

**(5) Despite clause (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service—**

**(a) Article 31—Privacy;**

**(b) Article 36—Freedom of association;**

**(c) Article 37—Assembly, demonstration, picketing and Petition;**

**(d) Article 41—Labour relations;**

**(e) Article 43—Economic and social rights; and**

**(f) Article 49—Rights of arrested persons.”**

38. On a casual reading of Article 24, it is clear that a right or a fundamental freedom in the Bill of Rights cannot be limited except by law and in that regard, the Constitution itself at **Article 85** has limited the right of a person to contest for an election as an independent candidate. The Article states clearly that the person must not be a member of a political party or if he has been, he must have resigned from the political party three months preceding the election. My position in regard to this argument is therefore quite simple; the Constitution has limited the right of an independent candidate to contest for the election by providing certain qualifications for one to be eligible to contest.

The limitation does not include the issue of notification to the Registrar as a bar to that person's candidacy. Notification was meant to ensure that the Registrar is able to monitor party membership and have custody of all political party records but not to be the sole basis for an independent candidate's disqualification as happened in the present Petition.

39. I also note that in submissions, Mr. Makolwal did not strongly contest the unconstitutionality of **Section 14(3)** and instead argued that there would be no prejudice to any party if the said Section is declared unconstitutional. His only issue was whether by 18<sup>th</sup> June 2014, the Petitioner was eligible to vie as a candidate since that section was still law. My answer is that what is invalid and null is invalid and null ab initio and does not become invalid only from the date it is so declared.

It is obvious to me therefore that the Petitioner's political rights under **Section 38(3)** of the **Constitution** were violated by the Registrar's actions and I so declare.

## **Conclusion**

40. This case brings to the fore both the need to instill discipline among Kenyan politicians and to stop party-hopping in a desperate bid to clinch Party nominations. However, **Article 85** of the **Constitution** actually grants them the luxury of being political party members including from party to party but so long as they do so three months before an election. While one can see the reasoning behind the Registrar being notified of any resignation from a Political Party, the three day notification period should not override the three months period expressly granted by the Constitution.

41. Regarding Independent Candidates, their place has not yet been felt in our political sphere which is still largely political party controlled. Independent candidates should not therefore be unduly and unlawfully stopped from vying for elections as their right to do so is only fettered by the Constitution and not by the IEBC, the Registrar of Political Parties or by the Courts,

42. In the end, although I saw little merit in the Petition dated 26<sup>th</sup> June 2014, the same was amended by Consent on 11<sup>th</sup> July 2014 to bring to the forefront the issues determined above.

The final orders to be granted to the Petitioner are therefore the following;

***“(1) A declaration is hereby issued that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents’ decision to deny the Petitioner the right to contest the Mathare Constituency by-election is a violation of the Petitioner’s rights under Article 38 of the Constitution.***

***(2) A declaration is hereby issued that the provisions of Section 14(3) of the Political Parties Act to the extent only that it purports to grant the Registrar of Political Parties the right to bar an independent candidate from vying for an election by reason of non-notification of resignation from a political party is inconsistent with Article 85 of the Constitution and is invalid and unconstitutional.***

***(3) A permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from denying the Petitioner the right to contest as an independent candidate in the Mathare Constituency by-election.***

***(4) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are hereby ordered to forthwith admit and list the Petitioner as a contestant in the Mathare Constituency by-election as scheduled on 7<sup>th</sup> August 2014 or on any other date that IEBC may schedule it.”***

43. I make the above orders well aware that the election is scheduled for 7<sup>th</sup> August 2014 but the Constitution must always prevail whatever the obtaining circumstances, including time and convenience.

44. As for costs, let each party bear its own costs as none is to blame for the unconstitutional enactment of any legislation.

45. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JULY, 2014**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Kariuki – Court clerk

Mr. Omino for Petitioner

Mr. Makolwal for 2nd Respondent and Mr. Kamwendora holding brief for Mr. Mukele for 1<sup>st</sup> Respondent

**Order**

Judgment duly delivered.

**ISAAC LENAOLA**

**JUDGE**



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