



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.281 OF 2014

BETWEEN

THE UNION OF CIVIL SERVANTS.....1ST PETITIONER
TOM.M. ODEGE.....2ND PETITIONER

AND

AND
THE INDEPENDENT ELECTORAL

BOUNDARIES COMMISSION (IEBC)1ST RESPONDENT
THE ATTORNEY GENERAL..... 2ND RESPONDENT

TOGETHER WITH

PETITION NO.70 OF 2015

BETWEEN

WILSON KANG'ETHE MBURU.....PETITIONER
THE HONOURABLE ATTORNEY GENERAL.....RESPONDENT

AND

THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION (IEBC)INTERESTED PARTY

(Consolidated on 11th March 2015)

REASONS FOR JUDGMENT

Introduction

1. **Petition No.281 of 2014** concerns the Constitutionality or otherwise of **Section 43(5)** of the **Elections Act, 2011** which provides that a public officer must resign six months before a by- election date if he wishes to contest such an election. That the said law thus unfairly bars such an officer from lawfully contesting for a position in a by-election because it is practically impossible to meet its expectations. They also allege that **Section 43(5)** of the **Elections Act** is discriminatory as read with **Section 43(6)** if applied in general elections regarding public officers.

I should note here that **Section 43(5)** which I shall reproduce later, refers to seven months and not six months as contended by the Petitioners.

2. In the Petition dated 25th June 2014, the Petitioners therefore proposed the following questions for determination by this Court;

i. **Whether the provisions of the Elections Act, 2011 and the Independent Electoral and Boundaries Commission Act, 2011 are unconstitutional for being discriminatory *vis-a-sis* the provisions of the Constitution of Kenya, 2010 regarding the holding of by-elections for Members of the Senate, the National Assembly and County Assemblies for public officers who must by law resign from their offices, six months before the date of the by-elections, given the scenario in the occurrence of a vacancy in the Senate, the National Assembly and the County Assembly and the subsequent statutory notices by the respective Speakers of the Senate, the National Assembly and the County Assembly and the subsequent notice by the Independent Electoral and Boundaries Commission for the date of the respective by-election, a time-frame that a public officer intending to contest in a by-election cannot comply with.**

ii. **Whether the scenario referred to in (i) hereinabove amounts to a violation, denial, infringement upon or threat to the constitutional and fundamental rights of public officers who intend to contest in by-elections.**

Petitioners' Case in Petition No.281 of 2014

3. The 1st Petitioner, the Union of Kenya Civil Servants is a trade union registered under the **Trade Unions Act, Cap 233 Laws of Kenya** (now repealed and replaced with the **Labour Relations Act, 2007**) and the 2nd Petitioner, Tom M. Odege is its Secretary General. Their case is set out in their Petition and Mr. Odege's Affidavit sworn on 25th June 2014 as well as written submissions dated 8th October 2014. That case can be summarized as follows;

i. That a vacancy in the elective membership of either Parliament or County Assemblies generally arises in unforeseeable circumstances such as the death of a member, lawful resignation of a member from either House of Parliament or County Assembly and from a political party, absence of a member from House business for eight sessions or if a member becomes disqualified for election to Parliament on account, *inter alia* of being of unsound mind, an undischarged bankrupt or is subject to a sentence of imprisonment of at least six months. That therefore, the need for, the time of and the opportunity to contest in a by-election are all predicated upon uncertain and unpredictable acts.

ii. That **Section 43(5)** of the **Elections Act** lacks room to accommodate candidates who would still be in public office when a vacancy occurs in elective membership of either Parliament or County Assemblies

because such candidates would not have resigned from public office at least six months before the by-election. They thus allege that for that reason, a public officer cannot be allowed to contest in a by-election thus amounting to a violation of the public officer's political rights as enshrined under **Article 38(3)(c)** of the **Constitution**. Further, that the said law is discriminatory as against public officers *vis-à-vis* incumbent Members of Parliament and Members of County Assemblies because it does not apply to them and therefore violates the public officers' right to equality and freedom from discrimination as provided for under **Article 27** of the **Constitution**.

4. In addition to the above, it was the submission of Mr. Odhiambo, Learned Counsel for the Petitioners that the limitation imposed on public officers' rights has not met the requirements of **Article 24** of the **Constitution** on the criteria for limiting rights and that **Section 43(5)** cannot be justified in accordance with that criteria. In any event, he submitted further that **Section 43(5)** of the **Elections Act** derogates from the core or essence of the right to contest positions in by-elections given the circumstances under which by-elections arise and as set out above.

5. On the issue that the Petition is barred by the doctrine of *res judicata*, Mr. Odhiambo contended that the said Petition raises different issues as compared to those in **Charles Omanga & Another vs Independent Electoral and Boundaries Commission & Another (2012) e KLR**, **Evans Gor Semelang'o vs Independent Electoral and Boundaries Commission & Another (2014) e KLR** and **Patrick Muhia Kamilu vs Independent Electoral and Boundaries Commission & Another (2013) e KLR**. That the question of the constitutionality or otherwise of **Section 43(5)** of the **Elections Act, 2011**, *vis-à-vis* **Articles 27** and **38(3) (c)** of the **Constitution** in the context of all Parliamentary and County Assembly by-elections has never been canvassed or adjudicated upon in the aforesaid cases or in any other case.

6. Mr. Odhiambo therefore urged the Court to determine the questions posed elsewhere above and upon the Court answering them in the Petitioners' favour, prayed for the grant of the following orders;

“(a) A declaration that the provisions of the Elections Act, 2011, the Independent Electoral and Boundaries Commission Act and all other enabling provisions of the law in respect of by-elections for Senate, National Assembly and County Assembly with respect to public officers vis-à-vis the provisions of the Constitution of Kenya, 2010 are discriminatory, unfair, unreasonable, disproportionate, go against the doctrine of legitimate expectation, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, hence unconstitutional and unlawful as the six months' resignation period before the by-election is not practically tenable.

(b) Consequent upon prayer (a) hereinabove, a Permanent Injunction restraining the IEBC from preventing, stopping or in any other way barring any public officer from contesting, in a by-election, for the position of Member of Parliament (Senate or National Assembly) and Member of County Assembly on the grounds that the public officer has not resigned from his public office six months before the by-election, as the six-months' resignation period would not be practically tenable.

(c) Costs of the Petition to be borne by the IEBC and the Attorney General, the First and Second Respondents herein, respectively.”

The 1st Respondent's Case

7. The 1st Respondent, The Independent Electoral and Boundaries Commission (IEBC), is a

constitutional commission duly established under **Article 88** of the **Constitution** and operationalized by the **IEBC Act** as the body constitutionally mandated to oversee elections in Kenya. In reply to the Petition, it filed an affidavit sworn by Mr. Mahamud Jabane on 8th July 2014 and also filed written submissions dated 16th December 2014.

8. In adopting the contents of the said Affidavit, in his submissions, Mr. Mukele, Learned Counsel for the IEBC stated that **Section 43(5)** of the **Elections Act** was enacted to prevent the culture of interference in the electoral process by public officers and also to curb misuse of public funds by public officers in the electoral process. In that regard, he relied on the decisions in **Patrick Mutua Kimilu (supra) and Gor Semelang'o (supra)** where the High Court addressed that issue.

9. He further submitted that the mischief sought to be cured by the provisions of **Section 43(5)** of the **Elections Act** can only be understood if that Section is read together with the provisions of **Section 12(1) (c) and (d)** of the **Political Parties Act** which precludes a public officer from engaging in political activity that may compromise or be seen to compromise the political neutrality of that person's office or publicly indicate support for or in opposition to any political party or candidate in an election. In addition, he relied on the provisions of **Section 23(3)** of the Leadership and Integrity Act which prohibit public officers from engaging in the activities of any political party or acting as an agent of a political party or candidate in an election and publicly supporting or opposing any political party or candidate participating in an election. Accordingly, it was Mr. Mukele's submission that public servants are elevated to a unique position of trust that requires them to meet certain standards in the discharge of their duties and are obligated to observe the values and principles of public service set out under **Articles 73 and 232** of the **Constitution**.

10. As regards the interplay between political rights guaranteed under **Article 38** of the **Constitution** of Kenya and limitations under **Article 24** of the **Constitution**, Mr. Mukele submitted that the purpose of the limitation in **Section 43(5)** is justified as the mischief it sought to be curtailed has been properly explained above. In that regard he relied on the Indian Supreme Court case of **Hambrada Wakhana vs Union of India Air (1960) AIR 554** where it was held that in determining the constitutionality of a statute, Courts must assume that the legislature understood and appreciated the needs of the people and that the laws it enacts are directed to problems which are manifest in any given society.

11. In considering whether the apparent limitation of the right to equal treatment as set out in **Sections 43(5) and (6)** of the **Elections Act** is reasonable and justifiable, Mr. Mukele urged the Court to be guided by the principle set out in the case of **State of Kerala and Anor vs N. M Thomas and Others (1976) AIR 490, 1970 SCR (1) (906)** that the principle of equality does not mean that every law must have universal application for all persons. He also relied on the case of **S vs Makwanyane and Another CCT 3/94(1995) 2A CC3** and the Supreme Court case of **Fredrick Otieno Outa vs Jared Odoyo Okello & 3 Others Petition No.6 of 2014** for the same proposition.

12. As to whether the provisions of **Section 43(5)** are discriminatory or not, Mr. Mukele contended that they are not discriminatory and that equality is not violated if it rests on a reasonable basis and he referred the Court to the case of **State of Kerala & Anor v N.M Thomas & others (supra)** in support of that submission.

13. Mr. Mukele therefore urged the Court to dismiss the Petition and find that the limitation provided under **Section 43(5)** of the **Election Act** is reasonable and justifiable and in line with the provisions of **Article 24** of the **Constitution**.

The 2nd Respondent's case

14. The 2nd Respondent, the Attorney General, opposed the Petition through the grounds of opposition dated 27th August 2014 which are as follows;

(1) That the issues raised in the Petition herein are *res judicata*, the same having been indirectly and substantially in issue in **Charles Omanga & Another vs Independent Electoral & Boundaries Commission & Another [2012] eKLR**, **Evans GorSemelang'o vs Independent Electoral & Boundaries Commission & Another [2014] eKLR** and in **Patrick Mutua Kimilu vs Independent Electoral & Boundaries Commission & 3 others, Machakos High Court Petition No.12 of 2013**.

(2) Specifically, that to the extent that the Petitioners herein were parties in **Charles Omanga & Another vs Independent Electoral & Boundaries Commission & Another [2012] eKLR**, this Petition is *res judicata*.

(3) Further, that to the extent that the Petitioners herein were parties in **Charles Omanga & Another vs Independent Electoral & Boundaries Commission & Another [2012] eKLR**, this Petition is an abuse of this Court's process.

(4) That **Section 43(5)** of the **Elections Act** is a normative derivative of **Article 82** of the **Constitution** which provides for the enactment of legislation to govern elections.

(5) That by dint of **Articles 24** and **38(2)** of the **Constitution**, the right to contest in an election, which includes by a by-election, is not absolute.

(6) Further, that a by-election is not a 'regular' election contemplated under **Article 38(2)** of the **Constitution** and therefore a limited right accrues to individuals who would want to participate in a by-election as candidates.

(7) That the statutory limitation imposed by **Section 43(5)** of the **Election Act** has the obvious intent of curtailing public officers from interfering with elections, fostering and maintaining the dignity of public offices and forestalling the possibility of deploying public resources in elections. That this is a reasonable constitutional safeguard.

(8) That *in toto*, the Petition herein is an abuse of the Court process and the same should be dismissed with costs.

15. Mr. Moimbo presented the Attorney General's case and associated himself with the submissions of Mr. Mukele but added that the right to contest in a by-election is limited by law and is also reasonable. He relied on the **Charles Omanga Case** to support of that submission.

16. Both Respondents in a nutshell submitted that the Petition lacked merit and ought to be dismissed with costs.

Petition No.70 of 2015

17. **Petition No.70 of 2015** raises the same issues as **Petition No.281 of 2015** save that the Petitioner, Wilson Kangethe Mburu, was a public officer serving in the National Treasury until his resignation on 9th February 2015. He averred that he was desirous of contesting the Kabete Constituency schedule for 4th May 2015 and he was apprehensive that because of the existence of **Section 43(5)** of the **Elections Act**, his rights under **Article 38(3)** of the **Constitution** were at the risk of being violated.

He now seeks the following prayers;

“(1) A declaration that the provisions of Section 43(5) of the Election Act, 2011 in respect of a by-election conducted as directed by Article 101(4) are unconstitutional.

(2) A declaration that the provisions of Section 43(5) of the Election Act, 2011, as pertains a by-election, are discriminatory, accords an unfair advantage to a category of individuals, breaches the requirement for fairness, equality and proportionality, contrary to Article 27 of the Constitution, and is therefore unconstitutional.

(3) A declaration that the provisions of Section 43(5) of the Election Act, as regards a by-election, is a violation of the right of every adult citizen 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 as enshrined under Article 38(3)(c) of the Constitution, and is therefore unconstitutional.

(4) A declaration that Section 43(5) of the Elections Act is a nullity with respect to vacancies arising from Article 103(1)(a), (b), (c), (d), (e) and (g).

(5) A declaration that save for any other lawful reasons, the Petitioner is qualified to contest the by-election of the Member of National Assembly, Kabete Constituency.

(6) Cost of this Petition.

(7) Any other order that this Honourable Court deems fit and just in the circumstances.”

The Submissions

18. I have perused the Petition dated 24th February 2015, the Supporting Affidavit of Wilson Kang’ethe Mburu sworn on the same day (together with its annexures), the Submissions filed by Mr. Nyamodi, Counsel for the Petitioner on 11th March 2015 together with a list of authorities.

19. I have also perused Grounds of Opposition and the Submissions on 12th March 2015 filed by Ms. Irari for the Respondent (the Attorney General) as well as Submissions and List of Authorities filed on the same day by Mr. Mukele for the Interested Party (the IEBC).

20. The submissions made are largely the same as those made in **Petition 218 of 2014** and which I have summarized above. However, two additional issues were raised and they are the following;

i. The submission by Ms. Irari that if public officers were allowed to resign willy-willy to contest by-elections, the State will suffer prejudice if no sufficient notice is issued by the resigning public officer. Further, that the time taken in getting a replacement for the resigning public officer would prejudice the State.

ii. The submission by Mr. Mukele that even if a Statute were to be found to be ambiguous, contradictory or difficult to implement, that fact alone cannot be the basis for declaring any Section of it unconstitutional. He relied on the decision in **Ruturi & Anor vs Minister of Finance (2001) I KLR 84** for that submission.

I will address the above issues as I determine the Consolidated Petition in a holistic manner.

Determination

21. Before I consider the merits or otherwise of the Petitions before me, I recall that the Respondents urged this Court to find that the doctrine of *res judicata* barred the Court from entertaining **Petition No.281 of 2014**. This is where I therefore must begin.

22. More and more, parties are invoking the doctrine of *re judicata* to oppose the need for the High Court to hear and determine constitutional matters. Few litigants or counsel however distinguish the application of the doctrine in civil law and constitutional law.

In addressing that issue, in **Section 7** of the **Civil Procedure Act** 2011 *res judicata* is concretised as follows;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

23. Further, and in applying the above law, in **Kaaria and Another vs the Attorney General and Others (2005) 1EA 83** the Court of Appeal stated that for *res judicata* to be invoked in a civil matter, firstly, the issue in a current suit must have been decided by a competent court. Secondly, the matter in dispute in the prior suit must be directly or substantially in dispute between the parties in a current suit and where the doctrine is pleaded as a bar. Lastly, the parties in the former suit should have been the same parties in the current suit, or parties under whom they or any of them claim or are litigating.

24. The basis for the doctrine of *res judicata* is therefore that if a controversy in issue has been finally settled or has been determined by a Court of competent jurisdiction, it cannot be re-opened. The doctrine is further based on two fundamental principles; that there must be an end to litigation and that a party should not be vexed twice over the same cause; See **Omondi vs National Bank of Kenya Ltd and Others (2001) EA 177**.

25. These are the essentials of *res judicata* in civil law and in constitutional matters, it has generally been the position of this Court that *res judicata* should only be invoked in the clearest of cases and only where a party is litigating the same issue twice, on the same conditions as above. In rights based litigation particularly, the invocation of the principle should only be done very sparingly and in the most obvious of cases; see **Okoiti Omtata & Anor vs A.G & 3 Others, Petition No.593 of 2014**. In other words, in constitutional matters, Courts should be slow to invoke *res judicata* or risk violating the same rights, including that of access to justice, which they ought to jealously guard.

26. Applying the above principles to the present circumstances, can the present Petition therefore and in the above regard, be said to be barred by the doctrine of *res judicata*? The question is posed in the context of the argument by the Respondents that this and other Courts have previously and fully rendered themselves on the constitutionality or otherwise of **Section 43(5)** of the **Elections Act** as regards by-elections.

27. Having considered the rival arguments made before me, it is obvious that firstly, the parties in this Petition are not quite the same as those in ***Charles Omanga (supra)***, ***Gor Semelang'o (supra)*** and ***Patrick Muhia Kamilu (supra)*** although the Respondents have largely remained the same. In fact, whereas Charles Omanga filed his Petition without any personal interest in any by-election, both Gor

Semelang'o and Patrick Muhia Kamilyu were prospective contestants in by-elections. The first hurdle has thus been passed.

28. The next issue to address is whether the Petition raises the same issue as those in **Charles Omanga, Gor Semelang'o** and **Patrick Muhia Kamilu**. In that regard, in **Charles Omanga**, the Petitioner had sought the Court's intervention in the determination of the question whether **Section 43(5)** was unconstitutional in circumstance relating to public officers vying for a General Election as opposed to a by-election

29. In **Gor Semelang'o**, the substantive issue for determination was whether **Section 43(5)** of the **Elections Act** was applicable to the circumstances of the Petitioner who had previously been a public officer (as the Chairman of the Youth Enterprises Development Fund) but had ceased to hold that position prior to the declaration of a vacancy but within six months of the by-election.

30. In **Patrick Muhia Kamilu**, the issue before the Court was whether the Petitioner who was a public officer serving as a teacher was qualified to vie in the Ilima Ward within Makueni County by-election as a County Representative.

31. In none of the two last cases involving by-elections was the constitutionality of **Section 45(3)** addressed in depth neither was a categorical decision made on the issue and therefore on a serious consideration of the matter and in the specific circumstances of this Petition, I am certain that the issue before me is live and has not been previously determined. I say so because while all the mentioned Petitions basically concerned eligibility to contest in an election (save for **Charles Omanga** which was narrowed down to a general election) the instant Petition seeks a determination of the constitutionality or otherwise of **Section 43(5)** of the **Elections Act** in so far as eligibility of a public officer to contest in a by-election is concerned. While an interpretation of **Section 43(5)** of the **Elections Act** may have therefore been an issue in all Petitions, the real issue in contest now is different and this being a constitutional Petition, this Court finds it difficult to bar the Petitioners in **Petition No.281 of 2014** from being heard and the principle of *res judicata* cannot be invoked and I so find. In making this finding, I need to clarify for avoidance of doubt, that parts of the judgment in **Semelang'o** and **Patrick Muhia Kimilu** touch on some of the issues I am now addressing but the authorities are only persuasive to that extent and not in the application or otherwise of the doctrine of *res judicata*.

32. With that clarification in mind, I am of the firm view and find that this Court has jurisdiction to entertain the Petitioners' claim in **Petition No.281 of 2014** and so I will. Having so held and as stated earlier, the Petitioners' cases in both Petitions seem to mainly rotate around the constitutionality of **Section 43(5)** of the **Elections Act** to the extent that it bars a public officer from vying in a by-election. I now turn to determine that issue.

Whether Section 43(5) of the Elections Act is Unconstitutional

33. The crux of the Petitioners' case as I understand it is that **Section 43(5)** of the **Elections Act** is unconstitutional as it violates public officers' right to contest a by-election as stipulated under **Article 38** of the **Constitution** and also that it violates their right to equality and freedom from discrimination as provided under **Article 27** of the **Constitution**. Further, that the limitation imposed on the public officers' rights does not meet the requirements stipulated under **Article 24** of the **Constitution**.

34. For clarity, **Section 43(5)** of the **Elections Act** provides as follows;

"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”.

The above provision of the law is plain and simple but its applicability in the context of a by-election is not as easy as it may seem for reasons to be seen shortly.

35. In addressing the issue of political rights under **Article 38** of the **Constitution**, **Article 38(3)** is relevant for purposes of the present Petition and it provides as follows;

“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.” (Emphasis added)

Regarding equality and freedom from discrimination, **Article 27** of the **Constitution** provides as follows;

“(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) ...

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) ...

(7) ...

(8)”

28. The above background is important because the Petitioners have no complaint with the provisions of **Section 43(5)** of **Elections Act** as regards its applicability to public officers to contest in a general election and I reiterate the interpretation of the law by this Court in the **Charles Omanga Case (supra)** on whether the said section is discriminatory as against public officers. For avoidance of doubt, in that case I expressed myself as follows;

“It is their common argument that public officers need to be restricted in their political activities so that while in office they should not be seen to be engaged in partisan political activities and which may impede the objective discharge of their duties. That the requirement that they should resign from public office seven months before the date of elections is therefore reasonable and Section 43(5) and (6) are not in contravention of the Constitution.”

I then added as follows on the issue whether there was discrimination against certain public officers only;

“I have considered the rival arguments and it does not take much persuasion for me to agree with the Respondents. I say so, with respect to the petitioners and the interested parties, because the purpose of the two Sections is obvious to me. For the Government at the national and devolved levels to function during an election period, certain functions cannot be suspended including those of the President and county Governor, otherwise there would be chaos. How would the Government function without the Head of State and other such Officers” The same Constitution in any event also differentiates between elected officials and other public officials because the former have specific time frames within which they must serve – invariably for five years.”

As to whether the requirement that public officers should resign from office within seven months to the general election is reasonable I stated as follows;

“I am cognizant that this matter is of considerable interest to public officers who may wish to run for elective positions, let this judgment sound as a preparatory gong to them; they cannot have one leg in public service and another at their elective area. The law was designed to aid them make up their minds on where they want to maximize their energies. Seven months before the election date is sufficient time for them to prepare themselves to meet their fate at the election box. A longer period would be unreasonable and a shorter period would be more unreasonable.”(Emphasis added)

36. I reiterate my findings above in the instant Petitions in as far as it applies to a general election and I also hold and find that the same findings must apply to a by-election and without saying more, I am satisfied that there cannot be a sound argument that the said section is discriminatory as alleged. The only thing I need to add is that it matters not whether the discrimination alleged is between different categories of public officers or between public officers and the general populace. The finding remains the same.

37. As to whether the provisions of **Section 43(5)** are reasonable, practical and tenable in relation to a by-election, I will begin by looking at the provisions of **Article 99** of the **Constitution** which provides for the qualifications and disqualification for election as a Member of Parliament. That Article provides as follows;

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

(a) is registered as a voter;

(b) satisfies any educational, moral and ethical requirement prescribed by this Constitution or by an Act of Parliament; and

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

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

or

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

(2) A person is disqualified from being elected a member of Parliament if the person—

(a) is a State officer or other public officer, other than a member of Parliament;

(b) has, at any time within the five years immediately preceding the date of election, held office as a member of the Independent Electoral and Boundaries Commission;

(c) has not been a citizen of Kenya for at least the ten years immediately preceding the date of election;

(d) is a member of a county assembly;

(e) is of unsound mind;

(f) is an undischarged bankrupt;

(g) is subject to a sentence of imprisonment of at least six months, as at the date of registration as a candidate, or at the date of election; or

(h) is found, in accordance with any law, to have misused or abused a State office or public office or in any way to have contravened Chapter Six.

(3) A person is not disqualified under clause (2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted.”

38. The disqualification of a public officer is important because it can only refer to a public officer who at the time that the election is being conducted, is still a public officer serving as such except a Member of Parliament. One who has resigned or has lawfully left the office of a public officer at the said time cannot be disqualified to be elected as Member of Parliament subject to other lawful conditions being met (See for example the findings in **Gor Semelang’o**). In that regard is the period set for resignation by **Section 43(5)** reasonable when no specific date of a by-election can be set in advance"

39. In the context of a general election and by comparison, there is certainty as to the date of such an election because **Article 101(1)** of the **Constitution** provides as follows;

“(1) A general election of members of Parliament shall be held on the second Tuesday in August in every fifth year.”

Reading the above provision, it means that a public officer in the context of my findings in **Charles Omanga** has sufficient notice of an election date and can properly resign within the period given which I maintain is otherwise reasonable. What of a public servant who, upon a by-election being called for, has the desire to contest a seat in such an election"

40. In that regard, the provisions of **Article 101 (4)** and **(5)** are relevant and read as follows;

“(1) ...

(2) ...

(3) ...

(4) Whenever a vacancy occurs in the office of a member of the National Assembly elected under Article 97 (1) (a) or (b), or of the Senate elected under Article 98 (1) (a)—

(a) the respective Speaker shall, within twenty-one days after the occurrence of the vacancy, give notice in writing of the vacancy to the Independent Electoral and Boundaries Commission; and

(b) a by-election shall be held within ninety days of the occurrence of the vacancy, subject to clause (5).

(5) A vacancy referred to in clause (4) shall not be filled within the three months immediately before a general election.”

41. Juxtaposing the above provision and my interpretation of the law in the **Charles Omanga case (supra)**, I heard the Petitioners' to be contending **Section 43(5)** of the **Elections Act**, in so far as it limits the qualification of public officers to contest in a by-election is unconstitutional because the limitation is not justifiable under **Article 24** of the **Constitution**. The issue I must now determine is therefore whether the limitation imposed by **Section 43(5)** of the **Elections Act** is reasonable and justifiable in the context of a by-election. In doing so, I note that the Petitioners contended that the limitation was not reasonable given the nature of a by election which is uncertain and unpredictable unlike a general election.

42. I should begin by making reference to **Article 24(1)** and **(3)** of the **Constitution** which provides as follows in regard to limitation of fundamental rights;

“(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) ...

(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.”

43. **Article 24** above must be read alongside **Article 25** of the **Constitution** which provides thus;

“Despite any other provision in this Constitution, the following rights and fundamental freedoms

shall not be limited—

(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;

(b) freedom from slavery or servitude; Fundamental Rights and freedoms that may not be limited.

(c) the right to a fair trial; and

(d) the right to an order of habeas corpus”.

44. As can be seen from the above provisions, the rights to equality and freedom from discrimination and political rights under **Articles 27** and **38**, respectively, can be limited.

45. Further, **Article 24** of the **Constitution**, permits the limitation of certain rights but under a strict and elaborate scrutiny anchored upon the test of reasonability and justifiability. The issue therefore is whether **Section 43(5)** of the **Election Act** in as far as by-elections are concerned, fits within the criteria established under **Article 24**. In that regard, in the case of **S vs Makwanyane and Another (supra)** Chaskalson J stated as follows;

“The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provision of Section 33(1). The fact that different rights have different implications for democracy, and in the case of our Constitution, for “an open and democratic society based on freedom and equality”; means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests.”

He went on to state that;

“In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.”

46. I am in agreement and once a limitation of a fundamental right and freedom has been pleaded as has happened in the present Petition, (on grounds of equality and freedom from discrimination under **Article 27** of the **Constitution** and political rights under **Article 38** of the **Constitution**), then the party which would benefit from such a limitation must demonstrate a justification for the limitation. In demonstrating that the limitation is justifiable, such a party must demonstrate that the societal need for the limitation of the right outweighs the individual's right to enjoy the right or freedom in question; See **S vs Zuma & Others (1995) 2 SA 642(CC)**

47. In addressing the same issue of justification for limitation of rights, the High Court in the case of **Coalition for Reform and Democracy & 2 Others vs The Republic and Others Petition No. 628 of 2014**, stated as follows;

“If a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test. They must be rationally connected to the objective sought to be achieved, and must not be arbitrary, unfair or based on irrational considerations. Secondly, they must limit the right or freedom as little as possible, and their effects on the limitation of rights and freedoms are proportional to the objectives.”

The Court went on to state that;

“...such a limitation must be reasonable and justifiable in a free and democratic society, and that all relevant factors are taken into account, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the need to balance the rights and freedoms of an individual against the rights of others, and the relation between the limitation and its purpose, and whether there are less restrictive means to achieve the purpose.”

I wholly agree and I will apply the principles enunciated above in determining the Petition before me.

48. In answer to the issue of limitation of rights, the Respondents contended that **Section 43(5) of Elections Act** limits the political rights of public officers to contest in by-elections, and indeed all elections, since there is a need to prevent the culture of interference of public officers in the electoral process and also to curb misuse of public funds by public officers in the said process. The question that arises therefore is whether that limitation is justifiable in the context of a by-election, specifically.

49. In that context, I am aware of the provisions of **Section 12(1) of the Political Parties Act** which provide thus;

“(1) A public officer shall not –

a. Be eligible to be a founding member of a political party;

b. be eligible to hold office in a political party;

c. Engage in political activity that may compromise or be seen to compromise the political neutrality of that person’s office; or

d. Publicly indicate support for or opposition to any political party or candidate in an election”

In interpreting the above Section, the Supreme Court in **Fredrick Otieno Outa Case (supra)** stated thus;

“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.”

In addition to the above, **Section 23 of the Leadership and Integrity Act** reinforces the call for political neutrality of public officers as follows;

“(1) An appointed State officer, other than a Cabinet Secretary or a member of a County executive committee shall not, in the performance of their duties –

(a) Act as an agent for, or further the interests of a political party or candidate in an election; or

(b) Manifest support for or opposition to any political party or candidate in an election.

(2) An appointed State officer or public officer shall not engage in any political activity that may compromise or be seen to compromise the political neutrality of the office subject to any laws relating to elections

(3) Without prejudice to the generality of subsection (2) a public officer shall not-

(a) engage in the activities of any political party or candidate or act as an agent of a political party or a candidate in an election;

(b) Publicly indicate support for or opposition against any political party or candidate participating in an election"

50. As to the place of political neutrality of public officers and the need for them to leave office before engaging in any political activity, in **Charles Omanga (supra)** I stated as follows;

"I also wish to state that the impartiality of public servants is a cardinal value enshrined in Article 232(1)(a) of the Constitution which provides a public servant and service must be "responsive, prompt, efficient, impartial and equitable" in the provision of services. How can a public servant espouse those principles if he is allowed to remain in office until the election date"

I then added;

"Suppose a Judge who intends to run for an elective post (it is his right) is allowed to sit on the bench and preside over election related cases until the election date" Where is his impartiality" Similarly, how can a commissioner in the Independent Election and Boundaries Commission (IEBC) serving his last year in office and with ambition to run for elective office, be allowed to remain in office and oversee an election in which he is a candidate" The absurdity of both dissolutions merely serves to show the justifiability of the need for public servants to leave public office within a reasonable time before the election in which they will be candidates.(Emphasis added)

I then opined that;

"In the Kenyan arena now and for a long time to come, whether one runs for elective office as an independent candidate or a nominee of a political party, election campaigns are a must. This includes movements around the elective area to popularize oneself with the electorate. It cannot be the intent of the law that such a candidate should also be pursuing his public service duties and obligations during the campaign period."

As to the reasonability of the seven months' resignation period under **Section 43(5)** I stated as follows;

"I should now turn to one other issue which no another party, save the Respondent touched on; whether the period of seven months' period in Section 43(5) is reasonable. From what I have said above, I am certain that taking into account the requirements of the Constitution and the Elections Act as well as related legislation like the Political Parties Act, 2011, I am convinced that the period is sufficient for a candidate to prepare himself for an election and in any event, it is only a cut-off point and one may voluntarily choose to resign earlier as is the case in all employment situations."

On the same issue, Mumbi Ngugi J in *Gor Semelan'go (supra)* stated thus;

“In my view, the intent behind these provisions was to lessen the considerable influence that public officers have historically yielded in public affairs which was deemed to give them an unfair advantage over others in the electoral context. While the Section deals with resignation of a public officer, what must have been in contemplation was that a public officer would not vie for elective office until after six months from the date he or she ceased to hold public office....”

51. On the need for neutrality of public servants, the limitation in the law is reasonable and I adopt the above holdings to that extent only. However, the issue confronting me now is whether the apparent limitation of the right to enjoyment of political rights as set out in **Section 43(5)** of the **Elections Act**, is reasonable and justifiable in the context of a by-election" I think not.

52. I say so because as can be discerned from the provisions of **Article 101(4)** of the **Constitution**, a by-election is conducted subject to a vacancy arising in circumstances contemplated under **Article 103** of the **Constitution**. Taking those circumstances into account i.e. death, resignation, disqualification etc., it would be difficult to predict and foresee the possibility of a vacancy arising in Parliament or a County Assembly so that a public officer can prepare to contest in that by-election. Those circumstances are also uncertain.

53. Despite the above uncertainties, the law as stipulated in **Article 101(4)(b)** of the **Constitution** as stated elsewhere above, is clear that a by-election must be held within three months of a vacancy arising. How then can one say that seven months is reasonable and justifiable, when the period envisaged under **Section 43(5)** is longer than that stipulated under **Article 101(4)(b)** of the Constitution"

54. I pose the question because **Section 43(5)** uses the words **“resign from public office at least seven months before the date of election.”**

“Election” is defined in **Section 2** of the **Elections Act** as meaning **“a presidential, parliamentary or County election and includes a by-election”**

55. The contradiction created, not by the Constitution but by both **Sections 2** and **43(5)** of the **Election Act** has not been explained by the Respondents. It cannot have been the intention of the drafters of the Constitution that the enjoyment of the rights under **Article Section 38 (3)(c)** should be limited differently; in the case of a general election and in the case of a by-election. That contradiction and the limitation is certainly unreasonable and I am unable to find any justification for it specifically in the case of a by-election.

56. In any event, the contradiction created by **Section 43(5)** and **2** of the **Elections Act**, cannot override the provisions of **Article 101(4) (b)** of the **Constitution**. **Article 2** of the **Constitution** is clear in that regard, that the Constitution is the Supreme Law and any law inconsistent with the Constitution is void to the extent of that inconsistency.

57. In saying so, the words of the Supreme Court of India in the case of *Hambardda Wakhana vs Union of India Air (supra)* ring in my ears. The Court stated that;

“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 enact laws which they consider to be reasonable for the purpose for which they are enacted.”

58. I wholly agree and the above holding is in line with my earlier finding that the Legislature in enacting laws, must show that a limitation imposed by law is reasonable and justifiable. In **NTN Pty Ltd and NBN Ltd vs State (1988) LRC 333**, the Court stated as follows in that regard;

“What is reasonable and justifiable in democratic society is not a concrete or precise concept. It entails different policy and executive considerations. Traditionally, Court is kept out of this field. This is a new field of intrusion by the Constitution. The Court is to be careful in saying what it is. I do not think it is a concept which can be precisely defined by the Courts. There is no legal yardstick. What has been decided by Courts can only be guide as to the nature of this illusive principle. However, the fundamental thread which runs through all this is that it must have regard for a ‘proper respect for the rights and dignity of mankind’. It is this context that I adopt what I said in Supreme Court Reference of 1982. In Re Organic Law On National Election as [1982] PNGLR 214, I have one correction to make. After I discussed the proper principles, I stated that a proper test was a subjective one. The test really is an objective one. What I should have said was the Application of the proper test must be considered within the context of the subject matter or circumstance of each case.”

59. I am in agreement with the learned judge and try as I have, I do not see any justification for denying a public officer the right to contest a vacant seat in by-election if he has resigned as soon as a vacancy has occurred and that is as soon as the Speaker of either House of Parliament has given notice of the vacancy to the IEBC under **Article 101(4)(a)** of the **Constitution**. To hold otherwise would be to promote an absurdity that was never intended by the drafters of the **Constitution** and Mr. Mukele’s submission on this point does not therefore meet this Court’s favour, attractive as it sounded.

60. Having said so, I also heard the Attorney General to be saying that it would be impossible for public officers to resign and be ready for a by-election because a public officer must issue and serve sufficient notice before resignation. Even if it that were so, I still do not see any difficulties with that situation because a by-election has no connection with employment and in any event, employment disputes can be resolved through other avenues known in law.

Conclusion

61. I have applied the reasonability test to the circumstances of the two Petitions before me and I am fully satisfied that **Section 43(5)** of the **Elections Act** does not meet the fairness and reasonability test as provided for under **Article 24** of the **Constitution** and the Respondent’s submission to the contrary cannot be sustained.

62. Having held as I have, the last issue to address is that of the appropriate remedies in the circumstances.

63. In **Petition No.218 of 2014**, the Petitioners’ sought three prayers. First, that a declaration be issued to the effect that the provisions of **Elections Act, 2011, IEBC Act** and all other enabling provisions of the law in respect of by- elections for Senate, National Assembly and County Assembly with respect to public officers *vis-à-vis* the provisions of the Constitution are discriminatory, unfair, unreasonable and disproportionate hence unconstitutional as the six months’ resignation period before the by-election is untenable. This prayer is long and windy and does not specify the particular provision of the **Elections Act** or the **IEBC Act** that the Court should declare as unconstitutional. Be that as it may, the Respondents as well as the Court understood the Petitioners to be attacking **Section 43(5)** of the **Elections Act** and nothing in particular in the **IEBC Act**. Indeed, that is the presumption against which the Respondents proceeded and as can be seen above, that is what formed the subject of this judgment.

64. **Article 159(2) (d)** of the **Constitution** is relevant in such a situation as it empowers this Court to administer justice without undue regard to technicalities and having found **Section 43(5)** of the **Elections Act** to be unreasonable in limiting the political rights of public officers under **Article 38** of the **Constitution** to contest a by-election, it is therefore declared unconstitutional only to the extent that it applies to a by-election.

65. The second prayer sought a permanent injunction to restrain the 1st Respondent from barring a public officer from contesting a by-election for the positions of Member of Parliament etc on grounds that the public officer did not resign from office six months before the election. I see no difficulty with this prayer and having found **Section 43(5)** of the **Elections Act** to be unreasonable, it therefore follows that this prayer must issue.

66. The last order sought was that of costs. Each of the Parties pursued an order for costs but given the nature of the Petition and the public interest involved, this is one such matter that the Court would exercise its discretion and not award costs to any party. Let each Party therefore bear its own costs in **Petition No.281 of 2014**.

67. In **Petition No.70 of 2015**, the only additional order sought is that the Petitioner is qualified to contest the by-election of member of National Assembly for Kabete Constituency. Again, from what I have said above, I see no reason to deny that prayer.

Disposition

68. Given my findings as above, I direct that a copy of this judgment be served on the IEBC and the Attorney General so that they can move with haste and address the anomaly created by **Section 43(5)** of the **Elections Act** with respect to a by-election. If any guidance is needed, they may take heed from the provisions of **Article 101(4)** of the **Elections Act** as I have explained in this Judgment.

69. On 12th March 2015, all Parties agreed that although the Judgment in **Petition No.281 of 2015** was due for delivery on 20th March 2015, in view of impending nominations for the vacant position of Member of the National Assembly for Kabete Constituency (the subject of **Petition No.70 of 2015**), a decision on the merits of the two Petitions, as consolidated, should be delivered on 13th March 2015 and the reasons thereof to be delivered thereafter.

70. In the event, the reasons for the decision delivered on 13th March 2015 are as above and the final orders are as follows;

(1) **Section 43(5)** of the **Elections Act** is unreasonable in its limitation of the rights of public officers under **Article 38(3)(c)** of the **Constitution** to vie in a by-election and to that extent only is hereby declared unconstitutional.

(2) A declaration is hereby issued that save for any other lawful reason, Wilson Kang'ethe Mburu is qualified to contest the by-election for Member of the National Assembly for Kabete Constituency.

(3) A permanent injunction is hereby issued to restrain the IEBC from barring a public officer from contesting a by-election under **Article 101(4)** of the **Constitution** on grounds that the public officer did not resign from office within seven months of the by-election as such a period would be untenable and impractical under the said **Article 101(4)** of the **Constitution**.

(4) A copy of this judgment shall be forwarded to the IEBC and the Attorney General to consider

amendments to **Section 43(5) of the Elections Act** to bring it in line, preferably, with the 90 day period under **Article 101(4) of the Constitution** in the event of a by-election and taking into account all other factors including reasonable notice of resignation by the public officer.

71. Each party should bear its own costs.

72. Orders Accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 18TH DAY OF MARCH, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Kariuki – Court clerk

Mr. Odhiambo for Petitioner

Mr. Moimbo for 2nd Respondent

Mr. Oyuke holding brief for 1st Respondent

Order

Reasons delivered.

ISAAC LENAOLA

JUDGE



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