



REPUBLIC OF KENYA

High Court at Malindi

Petition 16 of 2012

**IN THE MATTER OF: INTERPRETATION AND APPLICATION OF THE FUNDAMENTAL RIGHTS
UNDER TH CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF: ARTICLE 38 OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF: THE JUDGMENT OF THE 29TH DAY OF JUNE 2012 BY JUSTICE MUMBI
NGUGI**

AND

IN THE MATTER OF: THE ELECTION ACT AND THE ELECTION RULES AND REGULATIONS

BETWEEN

ALI BAKARI MOHAMED.....PETITIONER

VERSUS

IEBC.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

(1) The Petitioner, a former nominated councillor for the years 2007-2008 and who has sat for the Kenya National Examinations Council's Kenya Certificate of Secondary Education 2012 but whose results are yet to be released seek a declaration that he has a constitutional right to vie for a county representative seat in the General Elections in March 2013.

(2) The Petitioner contends that the provisions of section 22 (1) (b) Election Act which require that the candidates possess post secondary qualification are contrary to Article 38 of the Constitution and have been so declared by a previous decision of the High Court in **Nairobi H.C. Pet. No. 198 of 2011, Hon. Johnson Muthama MP. v. Minister for Justice & Another**

(3) Counsel for the Petitioner, Mr. Otara, submitted that following the declaration of unconstitutionality of the section 22 (1) (b) of the Election Act, which decision had not been overruled on appeal or otherwise set aside, the decision is in force and applicable to all citizens in the country.

(4) Mr. Ngari for 2nd Respondent while conceding that the decision of the High Court in Pet. No. 198 of 2011 applied to all citizens opposed the Petition on the ground that it was presumptive because the Petitioner had not provided evidence that his right to vie for a political seat had in any way been infringed, and that it would set a bad precedent as it would open a flood gate for everyone to rush to court on speculative grounds.

(5) The 1st Respondent although served did not attend the hearing.

(6) I have considered the application and the decision of the High Court in Pet. No. 198 of 2011, Nairobi in which Mumbi Ngugi, J held that **“sections 22 (1) (b) and section 24 (1) (b) of the Elections Act 2011 which bar persons not holding a post secondary school qualification from being nominated as candidate or elective office or for nomination to Parliament to be unconstitutional and in violation of the Petitioners' rights under the Constitution.”** To my knowledge the decision has not been perfected on appeal or review and it is still in force.

(7) It may be that the Petitioner herein is *ex abundanti cautela* seeking a confirmation that he is eligible for nomination to vie for the county representative seat. However, without confirmation by the 1st Respondent which is in charge of the Elections of March 2013, his fears that he may be locked out in view of the provisions of the Election Act cannot be said to be unfounded and speculative. Moreover, the danger posed by this uncertainty on this last day of nominations on 21st December 2012 is that if the Petitioner is locked out, there will no time for him to approach the court for redress in good time before expiry of the nomination period.

(8) I find that the section 22 (1) (b) of the Election Act having been declared unconstitutional by the High Court and that decision being still in force, the Applicant is entitled to the declaration sought in the Petition. Article 20 (3) of the Constitution requires the court to “**adopt the interpretation that most favours the enforcement of a right or fundamental freedom.**” I therefore find that the Petitioner's cautious action in seeking this declaration should not be deemed presumptive, speculative and likely to open flood gates of Petitions. It is the court's duty to promote the spirit, purport and objects of the Bill of Rights for all individuals.

(9) As the Petitioner did not urge prayers 1 and 2 of the Petition dated 6th December 2012, the same are not granted. I however grant the 2nd prayer of the Petition in terms that the Petitioner has a constitutional right to vie for a county representative seat in the General Elections, subject to meeting all other qualifications save the section 22 (1) (b) of the Elections Act requirement for a post secondary school qualification.

(10) There will be no order as to costs of the Petition.

Dated and delivered this 21st day of December 2012.

EDWAD M. MURIITHI

JUDGE

In the presence of:

Mr. Otara for the Petitioner

Mr. Ngari for the 2nd Respondents

No appearance for 1st Respondent

Miss Linda Osundwa - Court Clerk⁵



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