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| History Docket Number: | Petition No. 389 OF 2012 |
| Case Outcome: | Appeal Allowed |
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| Sum Awarded: | - |

**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: AZANGALALA, KIAGE & J. MOHAMMED, JJ.A)**

**CIVIL APPEAL NO. 351 OF 2012**

**BETWEEN**

**COMMISSIONER FOR THE IMPLEMENTATION OF THE CONSTITUTION ……APPELLANT**

**VERSUS**

**THE ATTORNEY GENERAL ……..…….. 1ST RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ……..…….. 2ND RESPONDENT**

**AND**

**KENYA PARAPLEGIC ORGANISATION ……..…….. INTERESTED PARTY**

***(Appeal from Judgment and order of the High Court of Kenya at Nairobi (Mr. Justice David Majanja) dated 15th November 2012***

***In***

**Petition *No. 389 OF 2012)***

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**JUDGMENT OF THE COURT**

The appeal before us was provoked by a judgment of the High Court (Majanja, J.) delivered on 15th November, 2012 by which the learned judge dismissed Petition No. 389 of 2012 filed by the Commission for the Implementation of the Constitution (CIC), the appellant herein, against the Attorney General and the Independent Electoral and Boundaries Commission, the 1st and 2nd respondents, respectively. Also enjoined in that suit was the Kenya Paraplegic Organization which was, there as here, an Interested Party.

Dismissed alongside the appellant's suit was Petition No. 268 of 2012, which had been filed by MICAH KIGEN, HASSAN OMAR HASSAN and ELIUD OWALO who sued in their respective capacities as Chairman, Deputy chairman and Secretary - General of a lobby group styled the Friends of Raila (FORA) 2012. This latter suit was against the two respondents in the former, as well as the appellant herein which was sued as the 3rd respondent. The suit had two Interested Parties namely, the Party of National Unity and the Alliance Party of Kenya.

As the issues raised in the two petitions were substantially the same, they were consolidated by

consent of all parties thereto.

The dispute before the High Court related to the constitutionality of Section 34 of the Elections Act which we set out in full even though the point of grievance centred around sub-section 9 thereof;

**"34(1) The election of members for the National Assembly, Senate and county assemblies for party list seats specified under Articles 97 (1) (c) and 98 (1) (b) (c) and (d) and Article 177 (1) (b) and (c) of the Constitution shall be on the basis of proportional representation and in accordance with Article 90 of the Constitution.**

**(2) A political party which nominates a candidate for election under Article 97 (1) (a) and (b) shall submit to the Commission a party list in accordance with Article 97 (1) (c) of the Constitution.**

**(3) A political party which nominates a candidate for election under Article 98 (1) (a) shall submit to the Commission a party list in accordance with Article 98 (1) (b) and (c) of the Constitution.**

**(4) A political party which nominates a candidate for election under Article 177 (1) (a) shall submit to the Commission a party list in accordance with Article 177 (1) (b) and (c) of the Constitution.**

**(5) The party lists under subsection (2), (3) and (4) shall be submitted in order of priority.**

**(6) The party lists submitted to the Commission under this section shall be in accordance with the constitution or nomination rules of the political party concerned.**

**(7) The party lists submitted to the Commission shall be valid for the term of Parliament.**

**(8) A person who is nominated by a political party under subsection (2), (3) and (4) shall have been a member of the political party for at least three months preceding the date of submission of the party list by the political party.**

**(9) The party list may contain a name of any Presidential or Deputy Presidential candidate nominated for an election under this Act.**

**(10) A party list submitted for purposes of subsection (2), (3) (4) and (5) shall not be amended during the term of Parliament or the county assembly, as the cause may be, of which the candidates are elected.**

It is worth noting that when the foregoing statute was first published, **Section 34(9)** read that the party list may **not** contain a name of any Presidential or Deputy Presidential Candidate. In that state, the petitioners were quite happy and had nothing to complain about. All that changed, however, when the Attorney-General, in exercise of his powers under the Revision of Laws Act (Cap 2, Laws of Kenya) published, vide Legal Notice No. 142 of 2011, the Laws of Kenya (Rectification) Order, 2011, which deleted the word **'not'** in **Section 34(9)** and thereby permitted the inclusion of a name of any Presidential or Deputy Presidential candidate for nomination under the Section. It is not in dispute that the change or rectification effected by the Attorney-General brought the Section into conformity with the debates and conclusions or vote effected by Parliament.

The appellant challenged **Section 34(9)** for various reasons set out in its petition under certain paragraphs as follows;

"22. **Section 34 (9) of the Elections Act** is inconsistent with **Article 90 (1), Article 90 (2), Article 97 (1) (c), Article 98 (1) (b) (c) and (d) and Article 177 (1) (b) and (c)** of the Constitution in so far as it provides that a Political Party may nominate the same person as a candidate for election to the post of President (or his Deputy) and simultaneously as a candidate for election to represent the youth, persons with disabilities, women, workers, marginalized communities or ethnic and other minorities in the National Assembly.

23. **Section 34 (9) of the Elections Act** is inconsistent with **Article 90, Articles 97 (1) (c), Article 98 (1) (b) (c) and (d) and 177 (1) (b) and (c)** of the Constitution in so far as it purports to include the names of candidates nominated for election for the posts of President and Deputy President by a political party in the differentiated class of persons nominated to represent special interests and vulnerable groups.

29. **Section 34 (9) of the Elections Act** is inconsistent with and contravenes **Articles 54 (2)** of the Constitution as it denies persons with disabilities their rights to participate in political life through representation in the National Assembly and the Senate under **Article 97 (1) (c), Article 98 (1) and (c)** of the Constitution.

31. **Section 34 (9) of the Elections Act** is inconsistent with **Article 55(b)** of the Constitution as it denies the youth their rights to participate in political life through representation in the National Assembly, the Senate and County Assembly under **Article 97(1) (c), 98 (1) (c),** and **177(1) (c)** of the Constitution.

33. **Section 34 (9)** of the Elections Act is inconsistent with **Article 56 (a)** of the Constitution as it denies minorities and marginalized groups their rights under the Constitution to participate in governance through representation in the County Assembly under **Article 177 (1) (c)** of the Constitution.

34. **Section 34 (9)** of the Elections Act is inconsistent with **Article 27 (8), 97 (1) (c), 98 (1) (b), 98 (1) (c) and 177 (1) (b)** of the Constitution in so far as it denies women their rights to participate in political life and governance through representation in Parliament and the Country Assembly.

35. **Section 34 (9)** of the Elections Act is inconsistent with the Constitution in so far as it denies workers their rights to participate in political life and governance through representation in Parliament under **Article 97 (1) (c).**

36. The Petitioner avers that **Section 34 (9) of the Elections Act** does not satisfy the test of Constitutionality.

37. Section 34 (9) of the Elections Act threatens, denies, defeats, dilutes, contravenes and or negates the legitimate purpose of representation of special interests and vulnerable groups in the National Assembly, the Senate and the County Assembly as envisaged by **Articles 97 (1) (c), Article 98 (1) (b) (c) and (d)** and **Article 177 (1) (b) and (c).**

41. **Section 34 (9)** of the Elections Act contravenes Article 100 of the Constitution as the National Assembly had enacted a law that dilutes, infringes, negates or contravenes its obligations to pass legislation that promotes the representation in Parliament of women, persons with disabilities, the youth, ethnic and other minorities and marginalized communities.

49. **Section 34 (9) of the Elections Act** is inconsistent and contravenes **Article 91 (1) (h), Article 91 (1) (c)** of the Constitution and **Section 6 (2) (e) of the Political Parties Act** and **Clause 6 (k) and (6) of the Code of Conduct Political Parties** that seek to ensure that political parties conduct regular, fair, free and credible internal elections and respect the rights of all persons to participate in political processes including minorities and marginalized groups.

51. **Section 34 (9) of the Elections Act** is inconsistent with Article 81 of the Constitution of Kenya in so far as it purports to classify persons for inclusion in the party list under **Article 90 and Section 34 (1) of the Elections Act** other than those contemplated by and provided for under the Constitution.

52. **Section 34 (9)** of the Elections Act is inconsistent with the provisions for nomination by political parties of candidates for election to the posts of the President and the Deputy President and the functions and authority of the President and Deputy President under **Articles 129, 130, 136, 137, 138, 147, and 148** of the Constitution.

55. The Petitioner avers that in so far as **Section 34 (9**) of **the Elections Act** classifies the Presidential Candidate and his deputy as persons who may be nominated and simultaneously offer themselves for elections to represent special interests and vulnerable groups under **Article 90, 97 (1) (c), 98(1) (b) (c) and (d) and 177 (1) (b) and (c),** it is irrational, arbitrary, inconsistent with and contravenes the Constitution."

The Petition concluded with prayers for declarations along the assertions contained in the fore quoted paragraphs.

After the respondents filed their pleadings in reply and the Interested Parties filed theirs, it was agreed by all the parties in the two petitions that the issues for determination by the learned judge were as follows;

a. **Whether Section 34(9) of the Elections Act as amended by Legal Notice No. 142 of 2011 is inconsistent with various provisions of the Constitution.**

b. **Whether Section 34(9) of the Elections Act contravenes fundamental rights or freedoms of the petitioners as pleaded in Petition No. 268 of 2012.**

c. **Whether the National Assembly and the Attorney-General are under a Constitutional duty to cor-ordinate with and consult the Commission on the implementation of the Constitution pursuit to Section 5 (6) of the Sixth Schedule to the Constitution.**

d. **Whether there is a dispute for determination by the court and in absence of a dispute does the court have jurisdiction to interpret the constitution.**

e. **Who should bear the costs of the petitions.**

After hearing the parties and considering the representations and submissions made before him, the learned judge declined to grant the declarations sought in the two petitions which he consequently dismissed but with no order as to costs given the nature of the matters as having been brought in the public interest.

In its appeal to this Court, the appellant has distilled five grounds on the basis of which it seeks to set aside Majanja J's judgment in its entirety and have substituted therefor a judgment granting its Petition No. 389 of 2012 as prayed. The Memorandum of Appeal states the said grounds as;

**"1. THAT the learned judge erred in failing to correctly interpret as a whole the provisions of the Constitution regarding the nomination of the youth, persons with disabilities, ethnic and other minorities and women to the National Assembly and County Assembly under Articles 90. 97 (1) (c), 98 (1) (b) (c) and (d) 100 and 177 (1) (b) and (c) of the Constitution.**

**2. THAT the learned judge erred in his interpretation of the words 'special interests' under Article 97 (1) (c) of the Constitution.**

**3. THAT the learned judge erred in interpreting the words 'special interests' in Article 97 (1) (c) in isolation from Articles 10, 26 (c), 27, 55, 56, 81, 98 (a) (b) (c) and (d), 100 and 177 (a) (b) and (c) of the Constitution.**

**4. THAT the learned judge erred in categorizing candidates who failed in a presidential election and their deputies as persons falling under the category of 'special interests' under Article 7(1) (c) of the Constitution.**

**5. THAT the learned judge erred in finding that the political interests of political parties fall under the category of the 'special interests' set out under Article 97 (1) (c) of the Constitution."**

Miss Keith Kilonzo, learned counsel for the appellant, urged the appeal before us and her submissions, which impressed us for being erudite and succinct, were that **Section 34 (9)** of the Elections Act was plainly unconstitutional and the learned judge arrived at the opposite and contrary conclusion due to a number of errors. The first error, in Ms. Kilonzo's submission, was that whereas **Section 34** of the Elections Act deals with three Articles of the Constitution namely **97 (1) (c); 98 (1) (b) (c) and (d)** and **177 (1) (a) (b) and (c)** in addressing the issues of party lists, the judge tested the Section against **Article 97 (1) (c)** alone, only and in isolation.

The appellant's submission was that the learned judge misapprehended and misunderstood the petitions before him as concerned with fidelity to that one article alone and found it not violated whereas,

had he tested the complaints against the other Articles as well, he would have arrived at a different result. It was submitted that in this respect the learned judge failed to uphold and apply the principle of harmonization in constitutional interpretation.

To buttress the argument that the judge fell into an error of law, Ms. Kilonzo referred to the learned judge's judgment which starts thus;

**"Introduction**.

1. **This case concerns representation of special interests in the National Assembly and the issue for consideration is what constitutes representation of special interests for the purpose of Article 97(1) (c) of the Constitution and whether Section 39(4) (sic!) of the Elections Act (Act No. 24 of 2011) is unconstitutional for permitting the political parties to include candidates for the position of President and Deputy President in the party list for nomination."**

(Emphasis Ours)

She reminded us that whereas the judge focused on Article **97(1) (c)** as the sole criterion for the constitutionality or otherwise of **Section 34(9**) of the Elections Act (which, as can be seen from the foregoing paragraph, the judge misquoted as **39(4))** the Petition before the learned judge had cited and been based on several other articles of the Constitution namely **98 (1) (b) (c); 177 (1) (b) and (c); 10(2) (b); 21 (3); 27 (6); 54 (2); 55 (B) 56 (A) 81 (c) and 100**. All of these articles, which it is charged the learned judge did not consider, have a consistent theme namely the protection of vulnerable groups in society and the representation of their political interests in the political spheres of government.

It was contended for the appellant that Articles **97 (1) (c); 98 (1) (b) (c) and (d) and 177 (1) (b) and (c)** are designed and intended to offer a window for persons with disability, women, the youth, ethnic minorities and marginalized groups to be nominated to the National Assembly, the Senate and the county assemblies and were definitely not intended to extend that special protection to benefit losers in presidential elections.

The appellant's contention is that the protection of vulnerable groups such as afforded by the aforementioned Articles of the Constitution is an important pillar of the Constitution and it cannot be open to Parliament to legislate it away. Ms. Kilonzo sought to draw a distinction between the position and character of the various vulnerable groups on the one hand and presidential candidates on the other in that the former are where they are by fate or circumstance while the latter make conscious choices to contest the specific political positions thereby choosing to take the attendant risks.

The appellant totally faulted the learned judge's interpretation of special interests to include the political interests of political parties. It was contended on its behalf that the Constitution makes adequate and sufficient provision for those interests in the form of all the competitive electoral seats and it cannot be proper for them to also take the few seats reserved for vulnerable groups as members of society. To demonstrate the point, Ms. Kilonzo drew our attention to the debate in Parliament that led to the impugned legislation and submitted that the August House did not once mention vulnerable groups but seemed pre-occupied with the desire to present the political careers of Presidential and Deputy Presidential candidates. To Counsel, the debate evinced absolutely no connection to the rationale for protecting vulnerable groups as envisioned by the Constitution.

The appellant further urged us to find that the learned judge went off on limb in purporting to offer an explanation of the legislative enactment that was totally at variance with the evidence presented by way of affidavit as to the true reasons for the enactment that were articulated by Parliament. In short, Ms. Kilonzo argued that the law passed by Parliament as **Section 34 (9)** of the Elections Act failed the test of reasonable connection intended, and should further fail on the basis of the principles for determining the validity of a discriminating law as set out in various authorities including the persuasive one of **MALAYSIAN BAR & ANOR Vs. GOVERNMENT OF MALAYSIA** [1988] LRC 428 which was cited with approval by our own High Court in **HON. JOHNSON MUTHAMA MP Vs. MINISTER FOR JUSTICE AND CONSTITUTIONAL AFFAIRS & A.G.** Pet No. 198 of 2011.

Ms. Kilonzo concluded her submissions by submitting simply that in interpreting "special interests" as used in, **inter alia,** Article **97 (1) (c)** of the Constitution, the High Court should have applied the interpretational principle of ***ejusdem generis*** so that to qualify for inclusion, any additional or special interest needed to have a rational connection with **youth, persons** with **disabilities** and **workers** or else it would not fit in and Presidential and Deputy presidential candidates certainly did not belong in the categories of special interests or vulnerabilities listed in the Constitution.

Learned Counsel for the Interested Party, Mr. Chigiti, commenced his submissions by declaring support for the position taken and submissions made by the appellant. He then proceeded to make broad submissions to the effect that democracy can only be achieved in Kenya if the principles set out in **Article 1** of the Constitution as read with **Article 10** are allowed to take root and flourish. To him, inclusivity is a value to be embraced and celebrated while equality as envisioned by **Article 27** and the spirit of affirmative action compel the honouring and actualization of participation rights of persons with disabilities.

Mr. Chigiti was emphatic that the political party lists in **Section 34** of the Elections Act is an important tool and vehicle designed to achieve that inclusive and egalitarian dream for the benefit of the persons contemplated falling under persons with special needs. He did not think candidates for the highest political offices in the land belonged to those categories and besought us to uphold this appeal.

Rising to oppose the appeal, Mr. Bitta, learned counsel for the Hon. Attorney-General, submitted centrally that our democracy is parties based and that political parties were the vehicles for political participation. To him, political parties have a special place in the Constitution and that explains why **Article 91** thereof regulates the general contours of the membership, values and basic character that they must possess. As we shall be returning to this provision cited by Mr. Bitta, it is convenient to have set it out in full;

**"91. (1) Every political party shall –**

a. **Have a national character as prescribed by an Act of Parliament;**

b. **Have a democratically elected governing body;**

c. **Promote and uphold national unity;**

d. **Abide by the democratic principles of good governance, promote and practice democracy thorough regular, fair and free elections within the party;**

e. **Respect the right of all persons to participate in the political process, including minorities and marginalised groups;**

f. **Respect and promote human rights and fundamental freedoms, and gender equality and equity;**

g. **Promote the objects and principles of this Constitution and the rule of law; and**

h. **Subscribe to and observe the code of conduct for political parties.**

Turning to the vexed issue of special interests, learned counsel's submission was that the list of special interests set out in **Article 97 (1) (c)** of the Constitution as being represented by the members of the National Assembly to be nominated by political parties is not exclusive.

The provision simply states;

**"twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disability and workers."**

To further buttress his submission, Mr. Bitta sought to draw a distinction between the open ended wording of **Article 97 (1) (c)** with the exact and closed phraseology of **Article 98** which left no

room for manouvre by the political parties when it comes to the composition of the members of the Senate in the following terms;

**"98. (1) The Senate consists of –**

a. **forty-seven members each elected by the registered voters of the counties, each county constituting a single member constituency;**

b. **sixteen women members who shall be nominated by political parties according to their proportion of members of the Senate elected under clause (a) in accordance with Article 90;**

c. **two members, being one man and one woman, representing the youth;**

d. **two members, being one man and one woman, representing persons with disabilities; and**

e. **the Speaker, who shall be an *ex officio* member.**

He contended that where the framers of the Constitution intended a particular category to be nominated, they made specific and express provision for it in the Constitution, which, in counsel's view, they did not do with regard to **Article 97 (1) (c).** He urged us to arrive at the two different conclusions for the two different scenarios in the spirit of wholistic interpretation of the Constitution as we are enjoined by its **Article 259** which sets out the principles for the interpretation of the Constitution.

Mr. Bitta then proceeded to offer that the special interest that presidential candidates represent is that of "vision bearers" and "personifiers of political party confidence." He declared himself fortified by **Article 10** of the Constitution which lists good governance as one of the national values and principles of governance. He asserted that presidential candidates personified the value of good governance by virtue of being such leaders.

Mr. Bitta was not impressed by the appellant's submissions that the **ejusdem generis** rule should be applied to the construction of **Article 97(1) (c)** since, to him, there was no common

denominator between “youth, persons with disability and workers.” To him, the term ‘special interest’ was endless and dynamic and could be extended to include the challenged inclusion without offending the Constitution.

Learned Counsel pursued the theme of constitutional propriety in the inclusion of the Presidential candidates and their Deputies by asserting that **Article 91** of the Constitution already controls political parties and compels them to include persons with special needs who are not already catered for outside of **Article 97 (1) (c).** He was categorical that the hands of political parties could not be tied as to who to nominate to represent special interests, which, he was confident, were as defined by the parties themselves. To hold otherwise would be to undermine Parliament and political parties which are, by virtue of **Article 1 (2)** of the Constitution the vehicles for citizens’ exercise of political sovereignty, he rested.

On his part, Mr. Nyamodi, learned counsel for the 2nd respondent, argued that the Constitution contained certain provisions that were ambiguous and seemingly contradictory but that as a progressive charter for affirmative action, it has made certain deliberate distinctions and differentiations with regard to representation of special interests. He saw these as falling into three broad categories;

- Under **Article 97(1) (c)** – It is **interests** as opposed to the **persona of representation** that is intended
- Under Article 98(1)(b) (c) and (e) it is the **persona** of representation that is intended
- Article 177 (1) (b) – it is **gender balance** that is intended

Focusing specifically on Article **97(1) (c),** Mr. Nyamodi made the rather novel submission that in so far as it is interests that were to be represented by the members to be nominated thereunder, ***“it is possible for one to represent the youth without being young, women without being a woman, disabled without being disabled.”*** He therefore asserted that the fact of having contested the Presidency or Deputy Presidency ought not to disqualify one from nomination to represent the special interests.

He concluded that the whole challenge to **Section 34(9)** is premature as it is only after a person has been nominated or proposed for nomination that an enquiry ought to be embarked on to determine whether he is qualified to represent the special interest envisaged. He urged us to dismiss the appeal.

Having carefully considered the foregoing rival submissions, this is the view we take of the matter. We state at the outset that at issue is the question of the true meaning and intent of the legal framework for the nomination of Members of the National Assembly as currently formulated. We deal with this issue fully cognizant of the fact that the process of arriving at and composition of Nominated Members is now radically different from what it was under the former Constitution.

Under Section 33 (1) of that Constitution, Nominated Members of Parliament were provided for as follows and this after the amendments introduced under the 1997 IPPG deal to introduce political-party participation in the process;

**“S.33 (1) Subject to this section there shall be twelve nominated members of the National Assembly appointed by the President following a general election, to represent special interests.”**

It will be seen therefore that the absolute sway and unquestionable discretion that the President once had in the matter of nominated members of Parliament was swept out of the way with the coming

into place of a new constitutional order that attempts to inject equity, rationality, objectivity and inclusivity into the process consistent with the dictates of participatory democracy and an attempt, through affirmative measures, to redress the marginalization that had kept certain portions of the populace in the peripheries of the political process. Thus it is that among the national values and principles of governance under Article 10 of the Constitution we have;

**"(2)**

**(b) human dignity, equity, social justice,**

**inclusiveness, equality human rights, non-**

**discrimination and protection of the marginalized."**

It is to be noted that under sub-Article1 of the same Article, these values and principles;

**"bind all state organs, state officers, public officers and all persons whenever any of them**

a. **Applies or interprets this Constitution**

b. **Enacts, applies or interprets any law**

c. **Makes or implements public policy decisions."**

It seems clear that the listing of the phases of action the actors wherein are bound by the national values and principles enumerated in Article 10 bear the peculiar imprimatur of the three arms of government namely;

a. The Judiciary that must apply and interpret the Constitution

b. the Legislature that must enact legislation and

c. the Executive that must make and or implement public policy.

It is with that constitutional command in mind that we must consider whether, in enacting **Section 34 (9)** of the Elections Act, the National Assembly evinced the necessary fidelity to the Constitution. We also do not lose sight of the supremacy of the Constitution as self declared in **Article 2**;

1. **This Constitution is the supreme law of the Republic and binds all persons and all state organs at both levels of government.**

2. **No person may claim or exercise state authority except as authorized under this Constitution.**

3. **The validity or legality of this Constitution is not subject to challenge by or before any court or state organ**

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**

5. **The general rules of international law shall form part of the law of Kenya."**

To fully appreciate what is implicated by **Section 34 (9)** of the Elections Act that allows for the nomination of Presidential Candidates and their running mates, it is necessary to recall that the sub-section is but a small part of the larger architecture of the Section which begins thus;

**"S34(1) The election of members of the National Assembly Senate and county assemblies for party list seats specified under Articles 97(1) (c) and 98 (1) (b) (c) and (d) and Article 177 (a) (b) and (c) of the Constitution shall be on the basis of proportional representation and in accordance with Article 90 of the Constitution."**

The articles of the Constitution mentioned in the foregoing subsection relate to Political Party nominees in respect of the National Assembly **(Art 97 (1) (c));** The Senate **(Art 98 (1) (b) (c) and (d)** and the county assemblies **(Art**. **177 (i) (b) and (c))** and it would seem that in keeping with the dominant thinking of the political class as has been exhibited for decades, losers for the contests for seats in those legislative bodies had their interests catered for in the possibility of being nominated into the very bodies they sought to join competitively, and failed. In a word, nomination to the legislative bodies provided a soft landing.

As the Presidency is not made up of an assembly, however, it became clear that those who chose to contest the position of President and Deputy President risked the ignominious fate of political oblivion in the event of failing to win the contest as there is no room for nomination into the Presidency. It would seem that Parliament then proceeded to enact **Section 34 (9)** to provide a political lifeline for such contestants by making it possible for political parties to include them in the party lists. It would seem further, from a cursory reading of the sub-section, that it is at the discretion of the political parties to decide whether their losing Presidential pair should be nominated for the National Assembly, the Senate, a county assembly or all of the three.

It seems to us quite plain that in order to determine the legal propriety and therefore constitutionality

of **Section 34 (9)** of the Elections Act, it would be an error of law and a misdirection to fail to analyse not just **Article 97 (1) (c)** of the Constitution as did the learned judge, but also the other related articles set out in **Section 34 (1)** of the Elections Act.

Such an approach to the issue at hand leaves the person doing the analysis the poorer for the various provisions have a common theme and thread running through and connecting them and this is discernible only when seen together and not in isolation.

**Article 90** of the Constitution decrees that the party lists must comply with two discernable principles namely;

1. The requirement for **gender equity** in that the qualified candidates must be listed in order of priority but that order must alternate between men and women.

2. The requirement for the lists to reflect the **regional and ethnic diversity** of the people of Kenya. This is meant to ensure that no ethnic group or region of the country dominates the lists provided by the parties. The exception to this, naturally, is the **county assembly** which from the nature of things may be from an ethnic majority or from the one region in which the county is located. We would venture that on a proper reading of **Article 90 (2) (c**), the requirement for regional and ethnic diversity should apply so as to reflect the face or diversity not of the people of Kenya necessarily, but definitely of the county in question.

The gender and ethno-regional balance that is required to be reflected on the party lists that we have referred to above capture, to our mind, only two among several other interests that the Constitution sought to see addressed in the composition of the various legislative bodies. Through the open competitive process of elections at a general election the vast majority of the membership of those bodies is attained. In the case of National Assembly, **290** members of whatever gender, status or description are elected in that manner while the number is **47** for Senate and equal to the number of the respective wards for each county for the county assemblies.

In addition to those mixed members elected competitively, the Constitution has also determined, at **Article 97 (1) (b)** in the case of the National Assembly , a further **47** members **all of them** women, being one each elected competitively from the country's counties. For the Senate the number of seats reserved for women is stated as **sixteen** and they are to be nominated by political parties in accordance with their respective strengths in the Senate; **Article 98(1) (b).** For the county assemblies, the Constitution has clearly recognized the possibility of major divergence in the gender equation from county to county with the possibility that one gender (not necessarily the male) may dominate the assembly. With that in mind, the language employed in **Article 177 (1) (c**) is not that of women's representatives or women's seats but rather "special seat members" of such a number as to ensure that the memberships of the **majority gender** on the assembly does not exceed two-thirds.

After dealing with women in the foresaid progressive and affirmative manner, the Constitution next deals with additional categories of members of the legislative assemblies, the proper understanding of

which is critical to the determination of the constitutionality of **Section 34(9)** of the Elections Act. For reasons that will soon be apparent, it is convenient that we first begin with those other assemblies before coming to the National Assembly.

**Article 98(1)** of the Constitution, after dealing with the **47** elected members and the 16 women members, proceeds to provide as follows under membership of the Senate;

***"(c) two members, being one man and one woman, representing the Youth.***

d. ***Two members, being one man and one woman, representing persons with disabilities."***

The position then is that in the Senate, the Constitution commands the presence of a man and a women to represent **the youth** and a second man and second woman to **present persons with disabilities,** two distinct categories of Kenyans deemed worthy of special representation namely youth and persons with disabilities.

In a perfect example of conceptual harmony in the Constitution, **Article 177 (1) (c),** in dealing with these special extra seats provides as follows;

**"77(1) A county assembly consists of –**

c. **The number of members of marginalized groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; …"** (Our emphasis)

What clearly emerges is that the total number or members of the county assembly that shall occupy the special seats, under this particular category is left to the determination of Parliament. More important for our purposes, however, is the fact that the youth and persons with disabilities, the two groups of persons specifically catered for in Senate representation, are here given a fitting nomenclature and apt categorization as **marginalized groups.** Indeed, the two are just **some** of the groups that fall under that categorization. This is the constitutional categorization that Parliament is mandated to pass appropriate legislation for but, in doing so, it would provide for the number of representatives for youth and persons with disability **alongside other marginalized groups**. It is not expected, though going from what happened in this case may well be feared, that Parliament would purport to include in the said statutes any group of persons not properly classifiable as marginalized.

In the spirit of harmonization, and having considered the scheme of representation that runs through the Articles that deal with the Senate and those that deal with the county assemblies, we have no doubt that the next category of members of the National Assembly under **Article 97 (1)(c)** must logically be the marginalized groups.

Indeed, the constitutional text itself is clear that the next category of members is;

**"twelve members nominated by parliamentary political parties ... to represent special interests including the youth, persons with abilities and workers …"**

We agree that special interests is not defined in the Constitution but from what we have said regarding the corresponding provisions for the other legislative assemblies, they must bear the same meaning as marginalized groups. Moreover, this accords with our own understanding that the rationale for special seats is to open up political space for the entry and participation of persons, groups and categories of people who, due to various disadvantages and vulnerabilities, have historically been unable or incapable of generally and effectively finding their way through a strictly competitive methodology and have thus been relegated to the peripheries of the political playground.

The issue of special interests was considered at length by the High Court, sitting as a Constitutional Court in the **IL CHAMUS CASE: RANGAL LEMEGURAN ET AL Vs. ATTORNEY GENERAL ET AL** 2006 eKLR , a case that dealt mainly on the right of representation for minorities. By way of definition, the learned judges had this to say, and we respectfully concur;

**“Although the Constitution does not define special interests contemplated by Section 33(1) [of the former Constitution] they include those interests which have not been taken care of by the election process and which are vital to the effectiveness of the democratic elections in terms of adequate representation for all-in a democracy. In other words the special interests mean those interests which the normal electioneering process has failed to capture and represent.”**

So finding, the judges proceeded to hold that it is vital to the flourishing of democracy that minority groups do find representation in the legislative assembly and the instrumentality of nomination under the umbrella of special interests was meant to go towards achieving that end. Said the judges;

**“Thus a constituency which is otherwise well represented by a representative and has a distinguishable minority who cannot on their own make any difference to the outcome of the election has obviously a special interest in the minority. It is a democratic principle that the minorities should be fully embraced to enable them to become a majority. It is also a vital interest in terms of democracy to protect their rights so that they are never overwhelmed by the majority. The minorities empowerment to participate fully in the entire democratic process and the organs of a democratic society achieves even greater intergration in terms of vision, programs and goals whereas on the contrary denying them participation leads to isolation.”**

Acknowledging that the categories of special interests may be fluid, and which we believe explains why the Constitution makes no pretensions to exhaustiveness in this regard, the learned judges said, and we agree, as follows;

**“No doubt each age will have its fair share of minorities and special interest groups but in our time they include the blind, the deaf, the physically disabled and the youth in addition to the groups identified earlier.”**

Thus, on the basis of the **IL CHAMUS** decision, which, most unfortunately was not brought to the attention of the learned judge by any of the parties herein and was also not cited before us, there are some clear categories of people that qualify to be viewed as representing special interests, namely;

- ethnic minorities
- the youth
- the blind
- the deaf
- the physically disabled

We can on our part add that religious minorities, linguistic or cultural minorities and racial minorities fall seamlessly into the category of special interests while the Constitution has also in the wisdom of the framers and the people of Kenya made inclusion of “workers” as a special interest group.

From what we have said so far, it should be obvious that for a class of persons to qualify to be called a special interest worthy of special representation under our constitutional framework, they must be a class as can fairly be said to have suffered marginalization and disadvantage keeping them away from the centre of the political process. That, to us, is the logical, rational nexus that at once attracts and glues such a class into proper location in both **Section 34(9**) of the Elections Act and **Article 97(1) (c)** of the Constitution.

That being our view of the matter, we agree with the appellant that an interpretation of Article 97 (1) (c) of the Constitution invites the application of the ***ejusdem generis*** rule. The youth, persons with disabilities and workers clearly fall in the category of the marginalized, the disadvantaged and the vulnerable-those not sufficiently empowered to muscle their way, generally speaking, into the inner sanctums of political and state power. They are the natural underdogs in the rough and tumble of the political jungle more likely than not to be elbowed out of the centre and off the field unless special affirmative and protective measures be taken to aid them.

It is instructive that beyond the rather half-hearted submission made, tongue-in-cheek almost, that Presidential candidates were workers, no serious attempt was made by the respondents to show a rational or any connection between the expressly mentioned special interests in **Article 97 (1) (c)** and the Presidential and Deputy Presidential candidates that are meant to qualify for nomination by virtue of the impugned **Section 34(9)** of the Elections Act. For our part we see none.

Unable to properly fit the names of Presidential and Deputy Presidential candidates in the category of special interests commensurate with the youth, the disabled and the workers and other marginalized or vulnerable groups as the ***ejusden generis*** rule would demand, the respondents made a bold submission, which the learned judge accepted, that the special interests stated in **Section 34(9)** is to be defined by the political party making the nomination.

With all due respect, such an approach is plainly wrong. A history of the practice of nominations to Parliament shows that this well-intended methology for inclusion of those outside of the circle was perennially abused to bring into Parliament persons other than those intended to benefit from it. The **ILCHAMUS** court noted, for instance, that the applicants were able to demonstrate that in the history of nominations under **Section 33**, of the former Constitution it is only the blind who were, in one term of Parliament, so represented. We do not share the amount of faith that both the respondents and the learned judge placed in political parties to define for themselves what special interests should be. This is especially so when the Constitution itself is sufficiently clear on what these are.

In arriving at this conclusion, we have taken the approach that was expressed by Lord Bingham of Cornhill in **REYES Vs. THE QUEEN** [2002] 2 AC 235;

**“Decided cases around the world have given valuable guidance in the proper approach of the courts to the task of constitutional interpretation. It is unnecessary to cite these authorities because the principles are clear. As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution.”**

This we have done and our conclusion is that Presidential candidates and Deputy Presidential

candidates cannot possibly have been intended to be the representatives of the special interests specified in **Article 97(1)(c)** of the Constitution**.** In this regard, it matters not that they are the leaders, visionaries or vision bearers of their political parties. If they be what they are said to be, there really is no existential risk to their career or that of their parties to be feared from their absence from the benches and floors of the legislative assemblies.

As we have already stated earlier in this judgment, Parliament in enacting the legislation under review clearly had in mind considerations other than those spelt out in the Constitution and the Hansard Reports on their debates on the same are clear testimony to the fact. The question that then falls to be determined is whether, in the face of such constitutional failures on the part of Parliament, the Courts should adopt a passive and aloof attitude. We think not. We do not deign to intrude into, less still take over the legislative function of Parliament. Our role is as was expressed by the High Court in the case of **FEDERATION OF WOMEN LAWYERS KENYA (FIDA K) & 5 OTHERS Vs. ATTORNEY GENERAL & ANOR PETITION NO. 102 OF 2011,** [2011] eKLR;

**“In actual fact it is the court’s sole mandate to provide checks and balances for the executive and the court will not hesitate to interfere when called upon to interpret the Constitution and supervise the exercise of constitutional mandate. We find that to do otherwise would be dereliction of our constitutional mandate.”**

In delivering itself as aforesaid, the Court in **FIDA-K** was not propounding a strange species of jurisprudence, for courts of law have for ages been the interpreters of what is constitutionally valid and what is not. The constitutional interpretation jurisdiction that resides in the High Court, and which we must exercise when sitting on appeals from its determinations, is a critical and vital one. This is especially so when it comes to testing the constitutionality of legislative actions that touch on the special safeguards and protections that have progressively been adopted to protect persons and groups that are vulnerable or disadvantaged. In such instances, it is for the court to robustly and firmly affirm those protections that from their very nature may seem a counter-majoritarian irritation to those that have the weight or the numbers on their side.

Speaking on this counter-majoritarian theme, Justice Cheoskalson, the President of the South African Constitutional Court in **THE STATE Vs. T. MAKWANYANE ANOR 1995 (3) S.A. 391 (C.C)** succinctly expressed the court’s interpretational autonomy which often emerges as a counterweight to majoritarian or popular instincts;

**“Public opinion may have some relevance to the enquiry, but in itself it is no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be the decision there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty and a retreat from the new legal order established by the 1993 Constitution.”** (Emphasis ours)

What the 1993 constitution did for South Africa is what the 2010 Constitution did for Kenya, namely the uprooting of any enclaves and edifices of institutional or personal supremacy and the attendant absence or at best weak and ineffectual accountability mechanisms. Indeed, even before the Constitution came into force, Ringera J. (as he then was) had in **NJOYA & 6 OTHERS Vs. ATTORNEY GENERAL & 3 OTHERS (No. 3) [2008]2KLR** (E.P) 658 at 674, while discussing constitutional values and principles that undergird the Constitution, stated as follows;

**“I would rank constitutionalism as the most important. The concept of constitutionalism betokens limited Government under the Rule of law. Every organ of Government has limited powers, none is inferior or superior to the other, none is supreme, the Constitution is supreme and they all bow to it.”** (Emphasis ours)

We respectfully endorse the sentiments of Ringera J. and state that it cannot be open to any organ of state to act in any manner that violates the Constitution. The doctrine of parliamentary supremacy that once gave parliament near-unbridled right to legislate as it pleased is now of only historical significance in an epoch when the Constitution and the Constitution alone lays claim to supremacy and every act of every organ must be judged against its peremptory requirements. That task of judging whether an action passes constitutional muster is placed upon the superior courts.

We are convinced that the people of Kenya intended that marginalized groups be beneficiaries of a more inclusive constitutional order birthed by the Constitution they gave themselves in 2010. They put in place specific and well ordered provisions calculated to achieve that end. Moreover, they commanded Parliament, under **Article 100** to take legislative measures aimed at actualizing that object as follows;

**“Promotion of representation of marginalized groups.**

**100 Parliament shall enact legislation to promote the representation in Parliament of –**

a. **women**

b. **persons with disabilities**

c. **youth**

d. **ethnic and other minorities**

e. **marginalized communities.”**

This provision further confirms the conclusions we have arrived at from our analysis that “marginalized groups” and “special interests” can be used interchangeably. The fact that Parliament has not enacted the expected legislation and has up to 5 years since promulgation of the Constitution to do so by dint of the 5th Schedule, makes it even more needful that these special interests be jealously guarded in the intervening period.

It is abundantly clear to us that far from attaining the true object of protecting the rights of the marginalized as envisioned by the constitution, the inclusion of Presidential and Deputy Presidential candidates in **Article 34(9)** of the Elections Act does violence to all reason and logic by arbitrary and irrational superimposition of well-heeled individuals on a list of the disadvantaged and marginalized to the detriment of the protected classes or interests.

Having arrived at that conclusion we are satisfied that the learned judge misdirected himself in his interpretation and treatment of the question of “special interests” as captured in the five grounds of appeal filed and argued before us. The upshot is that this appeal succeeds and we declare **Section 34(9)** of the Elections Act to be invalid and void.

We make no order as to costs given the public interest nature of this litigation.

***Dated and delivered at Nairobi this 14th day of June 2013.***

**F. AZANGALALA**

**…….**

**JUDGE OF APPEAL**

**P.O. KIAGE**

**…….**

**JUDGE OF APPEAL**

**J. MOHAMMED**

**…….**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**