IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KARANJA & OTIENO - ODEK, JJ.A.)

CIVIL APPEAL NO. 80 of 2014

BETWEEN

POLITICAL PARTIES FORUM COALITION.....1st APPELLANT

MUUNGANO PARTY.....2nd APELLANT

KENYA NATIONAL CONGRESS.....3rd APPELLANT

JULIUS MWANGI MURIUKI…….....……4th APPELLANT

AND

REGISTRAR OF POLITICAL PARTIES……...……1st RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION……2nd RESPONDENT

THE ATTORNEY GENERAL……..……3rd RESPONDENT

ORANGE DEMOCRATIC PARTY (ODM)……..……1st INTERESTED PARTY

UNITED REPUBLICAN PARTY (URP)……...……2nd INTERESTED PARTY

THE NATIONAL ALLIANCE (TNA)…….....……3rd INTERESTED PARTY

NARC KENYA……...……4th INTERESTED PARTY

DEMOCRATIC PARTY……..……5th INTERESTED PARTY

CENTRE FOR MULTI PARTY DEMOCRACY (CMD)…....6th INTERESTED PARTY

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Majanj, J.) dated 4th February 2014

in

Constitutional Petition No. 436 of 2013)

****

JUDGMENT OF THE COURT

1. To enhance multi-party pluralism with a view to foster competitive politics, the concept of funding political parties was mooted and engrained in Kenya's Constitution. To this end, ***Article 92 (f)*** of the Constitution provides that Parliament shall enact legislation to provide for the establishment and management of a Political Parties Fund. Pursuant to this enabling provision, Parliament enacted the **Political Parties Act No. 11 of 2011**. The objective of the Act is *inter alia* to provide for registration, regulation and funding of political parties.

2. ***Section 23*** of the **Political Parties Act** establishes the Political Parties Fund which is be administered by the Registrar of Political Parties. Under ***Section 24 (1) (a)*** of the Act, the Fund shall receive **not less than 0.3%** of the revenue collected by national government as may be provided by Parliament. To effectuate distribution of monies from the Fund to political parties, ***Section 25 (2) (a)*** of the Act establishes a threshold that a political party is eligible for funding if it garners five percent (5%) of the total votes cast at the preceding general election. A political party that fails to attain the 5% threshold shall not receive monies out of the Fund. ***Section 25*** provides as follows:

> **"25. (1) The Fund shall be distributed as follows—**
>
> a. **ninety five per cent of the Fund proportionately by reference to the total number of votes secured by each political party in the preceding general election; and**
>
> b. **five percent for the administration expenses of the Fund.**
>
> 2. **Notwithstanding subsection (1), a political party shall not be entitled to receive funding from the Fund if—**
>
> a. **the party does not secure at least five per cent of the total number of votes at the preceding general elections; or**
>
> **(b) more than two-thirds of its registered office bearers are of the same gender.**
>
> **(c) For purposes of subsection (1) (a) and (2) (a), the total number of votes secured by a political party shall be computed by adding the total number of votes obtained in the preceding general election by a political party in the election for the President, members of Parliament, county governors and members of county assemblies."**

3. The appellants in their petition filed before the trial court assert that the 5% threshold on funding a political party as set out by Parliament in ***Section 25 (2) (a)*** of the Act is unconstitutional, null and void and should be declared as such. It is contended that at the time of the preceding general elections conducted on 4th March 2013, there were 59 registered political parties out of which 36 parties participated in the general elections and only three political parties were able to realize the 5% threshold criteria for funding of political parties. The three political parties that met the threshold were ***The National Alliance*** (TNA) (29.8%), the ***Orange Democratic Movement*** (ODM) (26.1%) and the *United Republican Party* (URP) (9.4%); that the total percentage votes garnered by the three political parties amounted to 65.2% of all votes cast in the 2013 general elections. The appellants contend that it is apparent that 34.8% of voters who cast their votes are ineligible for political party funding. It is the appellants' assertion that due to the excessively high unconstitutional threshold enacted by Parliament in ***Section 25 (2)(a)*** of the Political Parties Act, fifty seven (57) political parties have been denied funding through the high 5% unconstitutional threshold.

4. At paragraph 30 of the Petition, the appellants assert that ***Section 25 (2) (a)*** of the **Political Parties Act** is inconsistent with the Constitution and violates their fundamental rights and freedoms; that the section establishes a discriminatory threshold for political party funding thus violating ***Article 27*** of the Constitution; it violates the constitutional requirement in ***Article 24*** on equal treatment of all persons; it contravenes ***Article 38*** which provides for the right of Kenyan citizens to participate in the activities of a political party of their choice; it violates ***Articles 32*** and ***33*** on freedom of opinion and expression and further violates ***Article 47*** on the right to fair administrative action.

5. The appellants assert that the respondents have further violated their rights by failing to give then an opportunity to form post-election political coalitions to reach the funding threshold thus denying political coalitions the right to access public funds.

6. In the petition before the trial court, the appellants sought *inter alia* the following reliefs:

> *"a) A declaration that the Political Parties Act is unconstitutional, null and void in Section 25 (2) (a) to the extent that it purports to establish a high and discriminatory threshold for political party funding.*
>
> b. *A declaration that Section 25 (2) (a) of the Political Parties Act is unconstitutional, null and void to the extent that it has been or is intended to be applied only to individual political parties and or only to pre-election coalitions, contrary to the constitutional and statutory recognition of political party coalitions.*
>
> c. *A declaration that the appellants as petitioners are entitled to fair access to the Political Parties Fund and to reasonable notice to scrutinize the full electoral results of the March 2013 General Elections.*
>
> d. *A declaration that the Registrar of Political Parties is obliged to ensure that the Political Parties Fund has adequate share of the projected revenue of the Government and not less than the statutory threshold of 0.3%."*

7. The 1st Respondent, the Registrar of Political Parties, in opposing the petition filed a replying affidavit deposed ***Ms Lucy Ndungu*** dated 24th September 2013. It is deposed that there is a presumption of constitutional validity of all legislations; that the appellants as petitioners were inviting the court to deal with policy issues and replace policy decisions by other arms of government with the court's own views; that if at all the appellants are aggrieved by the 5% threshold established and enacted by the legislature, it is upon them to lobby Parliament to replace the policy decision and factor what they consider to be a reasonable funding threshold; that there is no discrimination practiced upon the appellants as the Registrar computed the allocation of funds based on the criteria and threshold enacted by Parliament; that the appellant petitioners did not meet the funding threshold provided under ***Section 25 (2) (a)*** of the **Political Parties Act**.

8. The *Orange Democratic Movement* (ODM) in its affidavit opposing the petition deposed by ***Mr. Magerer Lagat*** averred that ***Section 25 (2) (a)*** of the **Political Parties Act** does not set an unreasonably high threshold since the threshold takes into account inclusiveness by ensuring that qualifying political parties exhibit a national character by obtaining votes across elective cadres and within the length and breadth of the country. However, during the hearing of the instant appeal, the ODM Party abandoned its opposition to the petition and made submissions in support of the appeal urging this Court to find that ***Section 25 (2) (a)*** of the **Political Parties Act** was unconstitutional. ODM urged us to allow the appeal.

9. The ***National Alliance*** (TNA) filed its written submissions urging dismissal of the appeal. TNA submitted that the appellants were inviting the Court to amend an Act of Parliament; that such amendments can only be effected by the legislature and not the judiciary; that it is upon the appellants to lobby Parliament to lower the 5% funding threshold.

10. The 3rd Interested, ***Party New Ford Kenya***, in its affidavit in support of the petition deposed by ***Col.***

Benjamin Mwema dated 4th December 2013 supported the submission that ***Section 25 (2) (a)*** of the **Political Parties Act** was discriminatory and dents and contradicts ***Article 4 (2***) of the Constitution that declares Kenya tobe a multi-party democratic state. The ***Party of Democratic Union*** (PDU), ***NARC Kenya*** and the ***Centre for Multi-Party Democracy*** (CMD) all expressed support for the instant appeal.

11. The trial court upon hearing the parties delivered judgment dismissing the petition and made the following findings:

> *"a) Section 25 (2) (a) of the Political Parties Act does not violate the Constitution.*

b. *In the absence of a real dispute, the trial court declined to make a finding as to whether Parliament had appropriated the amount necessary to comply with Section 24 (1) (a) of the Political Parties Act.*

c. *The trial court declined to order IEBC to release and publish the election results of 4th March 2013."*

12. Aggrieved by the judgment of the trial court, the appellants have lodged the instant appeal citing the following compressed grounds of appeal:

> *"a) The judge erred in law and fact in failing to find that Section 25 (2) (a) of the Political Parties Act had set an unreasonably high threshold of 5 % of the total votes casts.*

b. *The judge erred in failing to find that any threshold of funding of political parties is unconstitutional, null and void in so far as it infringes on the rights of all Kenyans to make their voices heard in public life and be included in political decision-making as guaranteed by Article 38 of the Constitution.*

c. *The trial court erred in law and fact in failing to appreciate that the threshold for access to public funding is an important dimension of the level playing field that will enable small political and fringe political parties to be serious contenders which can challenge incumbents effectively and promote political innovation.*

d. *The judge erred and failed to take into account the history and socio-economic context of the Political Parties Act.*

e. *The judge erred in law and fact when he failed to find that the appellants ought to have been treated as coalitions and given a reasonable notice period for purposes of entering into any additional post-election coalitions where necessary in order to access public funding.*

f. *The judge erred in law in failing to order the IEBC to disclose and publish the full electoral results for all six electoral contests held on 4th March 2013.*

g. *The judge erred in law in failing to order the Registrar of Political Parties to ensure that the budgetary allocation to the Political Parties Fund is a minimum of 0.3% of ordinary projected revenue."*

13. At the hearing of this appeal, Senior Counsel Mr. Paul Muite teaming up with learned counsel Mr. Charles Kajama appeared for the appellants. Learned counsel Mr. Kanjama further held brief for ***NARC Kenya*** and the ***Democratic Party*** in support of the appeal. Learned counsel Mr. Geoffrey Imende appeared for the 1st respondent; learned counsel Mr. Kimani Muhoro appeared for the 2nd respondent and the Senior Principal State Counsel Mr. Kepha Onyiso appeared for the 3rd respondent. Learned counsel Ms Mbiro holding brief for Mr. Makori appeared for the ***Orange Democratic Movement*** (ODM).

14. We have evaluated the rival written submissions by learned counsels, examined the record of appeal and considered the authorities cited. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions. It was put more appropriately in **Selle -vs- Associated Motor Boat Co. [1968] EA 123,** thus:

> **"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)."**

15. In our consideration and determination of this appeal, we remind ourselves that there are issues of fact and points of law that have been urged before us. This Court, as an appellate court, will rarely interfere with findings of fact by a trial court unless it can be demonstrated that the judge misdirected himself or acted on matters which he/she should not have acted upon or failed to take into consideration matters which he/she should have taken into consideration and in doing so arrived at a wrong conclusion. (See **Mbogo & another -v- Shah (1968) EA 93 at 96**).

16. The core issue in this appeal is the constitutionality of ***Section 25 (2) (a)*** of the **Political Parties Act**. It is well established that every statute enjoys a presumption of constitutionality and the court is entitled to presume that the legislature acted in a constitutional and fair manner unless the contrary is proved. (See **Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers -v- Kenya Revenue Authority & others High Court Petition No. 544 of 2013**). We are alive to the principle that there is a rebuttable presumption that any legislation is constitutional. (See **Ndyanabo -v-. Attorney General [2001] 2EA 485).**

17. The appellants submitted that the thrust of the appeal is whether ***Section 25 (2) (a)*** of the **Political Parties Act** is discriminatory and offends constitutional provisions; whether political coalitions are entitled to access the Political Parties Fund; whether the 2nd respondent failed to disclose and publish the full electoral results of the 4th March 2013 general elections and whether the respondents failed to ensure budgetary allocation of the minimum 0.3% of ordinary revenue. It was further submitted that political coalitions ought to be considered to be political parties for purposes of access to and distribution of funds from the Political Parties Fund.

18. It was submitted that this Court ought to ask itself whether the provisions of ***Section 25 (2) (a)*** of the **Political Parties Act** is discriminatory and disadvantageous to smaller political parties; that in so doing, the Court must be guided by the national value of equality and non-discrimination in ***Article 10*** of the Constitution; that the Political Parties Fund draws from the exchequer and it is unfair, unjust and discriminatory for tax payers to fund three political parties at the cost of suffocating the rest of the political parties and this amounts to discrimination; that the 5% threshold set by the Act is unreasonably high and it means that the three political parties who met the threshold will have an unfair advantage over smaller political parties; that the high 5% threshold is a threat to democracy. The appellant cited the Zimbabwean case of **United Democratic Movement -v- President of the Republic of South Africa & others 2000 (2) SA 674 (CC)** where it was expressed that "the question to ask is what is the practical effect of the funding system upon political parties in Zimbabwe….any public funding regime that systematically excludes all but one or two political parties strongly suggests that the threshold is too high." Guided by this dicta, the appellant submitted that the 5% threshold in ***Section 25 (2) (a)*** of the **Political Parties Act** is too high as it excludes all but three political parties in Kenya.

19. The appellants further submitted that being small political parties, they are a special interest group because they draw their support from segments of the population that comprise economic, social and

political minority groups; that their support base is made up of marginalized groups and alternative political opinions. The case of ***Il Chamus Case*****: Rangal Lemeguran & others -v- Attorney General & others (2006*) eKLR*** was cited in support of the submission that the appellants represent special interest groups. The appellants strenuously urged this Court to look at the history and socio-economic context of the **Political Parties Act** and the concept of political party funding and the practicability of ***Section 2 (2) (a)*** of the **Political Parties Act**.

20. The 1st respondent in opposing the instant appeal urged that the appellants were neither a special interest group nor a minority group nor a marginalized group; that there is no evidence to support the assertion that the appellants are a special interest group; that the only claim to distinction that the appellants can assert is that they failed to garner sufficient votes in the preceding general elections to enable them meet the 5% threshold; that the appellants as political parties performed poorly and do not represent any special interests.

21. The 3rd respondent in its submissions urged that all political parties are required to meet the threshold of 5% for political party funding and that all parties have equal chances of recruiting members to enable them achieve the 5% threshold during elections; that when Parliament enacted the 5% threshold, it was alive to the needs of the people of Kenya and the aim was to ensure that only those political parties that enjoy some level of support across the country are the ones that access the Political Parties Fund; that political parties that have a broad base support are able to attain the 5% threshold during elections. Counsel submitted that there is no evidence on record to demonstrate that the 5% threshold discriminates against the appellants since all political parties have equal chances to recruit members. The case of **Federation of Women Lawyers of Kenya & 8 Others -v- Attorney General & another (2011) eKLR** was cited to support the proposition that Parliament understands the needs of the people and legislations are not made in vacuum but responds to a given situation.

22. On the issue that both pre and post election political party coalitions should be entitled to access and get monies from the Political Parties Fund, the appellants submitted that ***Section 2*** of the Political Parties Act defines coalitions as an alliance of two or more political parties formed for the purpose of pursuing a common goal and is governed by a written agreement deposited with the Registrar of Political Parties. It was submitted that political party coalitions undertake the same function as a political party. Counsel submitted that under ***Section 10*** of the **Political Parties Act**, two or more political parties may form a coalition before or after an election and shall deposit the coalition agreement with the Registrar; that ***Article 108*** of the Constitution contemplates and recognizes political party coalitions since the Article provides that a coalition of parties can provide a leader of majority in Parliament.

23. The 1st respondent urged this Court to find that pre and post election political party coalitions are not entitled to funding; that the appellants case is misconceived as it urges this Court to circumvent the clear and unequivocal statutory provisions in order to accommodate individual desires of the appellants to benefit from the Political Parties Fund; that the purpose of placing funding thresholds is to encourage parties to undertake serious campaigns during the elections and inhibit the receipt of the funds by political parties that lack grassroots support. Counsel cited dicta from the Zimbabwe case of **United Parties -v- Minister of Justice Legal and Parliamentary Affairs &others (1998) 1LRC 614,** where it was stated that one of the aims of statutory thresholds on political funding is to inhibit proliferation of trifling political parties and to prevent such trifling parties from participating in the general elections simply to secure public moneys.

24. The 3rd respondent submitted that Parliament in enacting the **Political Parties Act** intended that only political parties should be the beneficiaries of the Fund; that if Parliament had intended coalitions of political parties to benefit from the Fund, it should have said so. The respondent urged this Court not to stretch the definition of political party to include coalitions simply for purposes of accessing Political Parties Fund. The respondent urged this Court to bear in mind the mischief rule in determining if all political parties that took part in the 4th March 2013 general election are entitled to access the Political Parties Fund. It was submitted that in enacting a threshold for eligibility of access the Fund, the legislature sought to cure the ills occasioned by one-man parties or brief case parties; that in the absence

of threshold provisions, mischievous persons would register political parties and ensure they participate in elections not for purposes of advancing democratic ideals but for financial gain; that individuals should not be permitted to access Political Parties Fund for financial gain.

25. In analyzing whether political party coalitions are eligible and entitled to funding, the trial court held that political coalitions are not entitled to funding. In rejecting the submission that coalitions are entitled to funding under the Act the trial court at paragraphs 55 and 56 of the judgment expressed:

> **"The entity that is recognized for that purpose is the political party which is registered and regulated in accordance with the Act. It is therefore not open for the court to re-write the Act to define a political party to include coalition where there is no ambiguity….If parliament intended that coalitions be eligible for public funding, it would easily and expressly stated as much. It is for this reason that the Registrar cannot be faulted for not inviting political party coalitions to demonstrate their eligibility for public funding. She is required to comply with the law as it is written."**

26. We have considered the diverse submission by counsel as to whether political party coalitions should be entitled to access the Political Parties Fund. Political party is described in ***Article 260*** of the Constitution as an association contemplated in ***Chapter 3 of Part Seven*** of the Constitution. Part 3 of Chapter Seven of the Constitution is titled Political Parties and it has two Articles namely ***Articles 91*** and ***92***. ***Article 91*** sets the basic requirements for political parties; ***Article 92*** is an enabling provision that mandates Parliament to enact legislation governing various aspects of political parties. Neither ***Article 9***1 nor ***92*** defines or describes the entity eligible for funding through the Political Parties Fund. The Articles provide a general constitutional framework and the details of the entity and the formula or threshold for accessing funding is to be determined by Parliament. ***Section 2*** of the

Political Parties Act defines a political party to be as defined in ***Article 260*** of the Constitution.

28. In our considered view, there is absence of a detailed definition of the term political party for purposes of accessing funds under the Political Parties Fund. The law is not clear whether or not a coalition of political parties is to be deemed to be a party for purposes of political party funding. We have considered whether it is opportune for this Court to declare that a coalition of political parties is eligible and entitled to political party funding. Upon such consideration, we have come to the determination that even if we were to find that political party coalitions are eligible for funding, the criteria, formula and threshold for distributing monies so received from the fund among the coalition members would be a quandary because such criterion for distribution has not been formulated. We remind ourselves that a court should neither act in vain nor make a vague order or make an order that would be difficult or impractical to implement. A court should also not issue orders that lead to dilemma or quandary or cause confusion and uncertainty. Accordingly, we concur with the trial court and find that the proper forum to determine whether a political coalition is eligible for funding under the **Political Parties Act** is Parliament. We recommend that in making such a determination, Parliament should lay the criteria; threshold and formula upon which political parties that are members of the political coalition can share and apportion the monies received. To this end, we find that the trial court did not err in finding that political party coalitions are not eligible for funding from the Political Parties Fund.A ground of appeal urged by the appellant is that the trial court erred in law in failing to find that the Registrar General was under an obligation to ensure that 0.3% of the Government revenue is allocated to Political Parties Fund. The 1st respondent submitted that the **Political Parties Act** expressly states that the sources of funds to the Political Parties Fund shall not be less than 0.3% of the revenue collected by the National Government as may be provided by Parliament; that under the **Appropriation Act 2013/14 Act No. 33 of 2013**, only Ksh.210 million was received by the 1st respondent and this sum was far less than 0.3% of the total revenue that stood at Ksh.815,609,952,297/=. It was submitted that the trial court erred and failed to appreciate that the sum of Ksh.210 million was way less than 0.3% of the budget.

29. The Attorney General (AG) in his submissions urged that under ***Article 156 (4)*** of the Constitution, the AG advises the national government and represents it in court; that the AG can only advise the relevant government agencies to ensure that the Fund has not less than 0.3% of the projected ordinary

revenue; that it is up to those agencies to ensure compliance.

30. The trial court in dealing with the submissions that the sum of Ksh 210 million received by the 1st respondent was less than 0.3% of the Government Revenue expressed that:

> **"….it is not necessary to deal with this issue for 2 reasons. First the evidence upon which to base the decision is insufficient. The depositions filed on the Petitioners behalf did not contain or refer to the Appropriations Act for the year 2013/14 nor did the parties submit on it. While I am entitled to take judicial notice of the state of legislation and the legislative process under Section 60 of the Evidence Act (Chapter 80), making a far reaching decision on whether the legislature has complied with the law in the absence of a material basis would not be in the interest of justice."**

31. We refer to ***Section 24 (1)*** of *the* ***Political Parties Act*** to determine whether the Registrar of Political Parties is under duty to ensure that 0.3% of the projected government revenue is to be allocated to the Political Party Fund. ***Section 24 (1)*** *of the* **Political Parties Act** stipulates as follows:

> **"24 (1) The sources of Funds are:**
>
> a. **such funds not being less than zero point three per cent of the revenue collected by the national government as may be provided by Parliament; and**
>
> b. **….."**

32. A literal reading of ***Section 24 (1)*** *of the* **Political Parties Act** clearly demonstrates that the funds allocated to the Political Parties Fund shall not be less than 0.3% of the revenue collected by the national government. The Section envisages that Parliament may allocate additional funds to the Political Parties Fund but a minimum floor ceiling of 0.3% has been enacted. ***Article 95 (4) (b)*** of the Constitution as read with ***Article 221*** thereof provides that the role of the National Assembly includes appropriation of funds for expenditure by the National Government and other national state organs. The money to be appropriated and allocated to the Political Parties Fund is done by Parliament. In our considered view, the 1st respondent has no constitutional or statutory duty to allocate and appropriate funds to the Political Parties Fund. If there is any failure to allocate the minimum funds as stipulated, the failure is not by the 1st respondent. The duty to allocate and appropriate funds is neither vested upon the 1st respondent nor upon the Attorney General. We find that the 1st respondent is not under obligation to ensure that 0.3% of the government revenue is allocated to the Political Parties Fund. We reiterate that the duty to allocate and appropriate funds is vested upon Parliament and Parliament is not a party to this suit to offer explanation why 0.3% of the government revenue was not allocated to the Political Parties Fund.

33. A key submission in this appeal is that the appellants are beseeching of this Court to find that the 5% threshold in ***Section 25 (2) (a)*** of the **Political Parties Act** is unreasonable as it encourages unconstitutional differential treatment of political parties. This Court was urged to appreciate that to avoid discriminatory treatment, all registered political parties should have access to political party funding and even a political party with 0.1% of the total votes should get 0.1% of the funding. Counsel urged us to apply the rationality test and determine that the 5% threshold in ***Section 25 (2) (a)*** of the **Political Parties Act** is unconstitutional. Central to the appellant's submission is ground 2 of appeal which states that the trial judge erred in law and fact in failing to find that any threshold on funding of political parties is unconstitutional, null and void.

34. We have considered the thrust of the appellant's submission which is premised on the contention that the 5% threshold enacted ***Section 25 (2) (a)*** of the **Political Parties Act** is high and discriminatory, promotes political party differentiation and is unconstitutional. The appellants urge us to determine if the 5% threshold is reasonable; we are further urged to pronounce that a political party is entitled to funding commensurate with the percentage of votes garnered in the preceding general elections. This is the basis of the appellants' submission that if a party garnered 0.1% of the total votes, it should get 0.1% of the funding.

35. The import and effect of the appellant's submission that any threshold on funding of political parties is unconstitutional is an invitation to this Court to declare that there should be no threshold of whatever nature in relation to political party funding. In **Mumo Matemu -v- Trusted Society of Human Rights Alliance & 5 others, Civil Appeal No. 290 of 2012**, this Court expressed that there must be executive, legislative and judicial deference to the repository of functions; that courts must show deference to the independence of the legislature. ***Article 92 (f)*** of the Constitution vests the power to enact legislation on funding of political parties upon Parliament. Both the reasonableness and rationality tests do not anticipate a court of law to substitute the opinion of those with mandate to make decision with its own opinion; a court cannot interfere with a decision simply because it disagrees with it. In the instant case, the 5% threshold that is the subject matter of contention was enacted by Parliament; establishing and setting of thresholds is a policy and legislative action and not a preserve of the courts. A court does not have legislative function; if we are to abolish thresholds as urged by the appellants, we would be making not only a policy issue but taking legislative action and substituting the views of those with the mandate to make policy and legislation with our own views. We would be coming up with our own criteria for political party funding and we would be delving into the realm of unpleaded issues and formulating a criteria that was neither pleaded nor canvassed by the parties.

36. To support submission on unconstitutionality of ***Section 25 (2) (a)*** of the **Political Parties Act**, Senior Counsel Mr. Paul Muite urged that in this appeal, the appellants are seeking the correct constitutional interpretation of ***Article 92 (f)*** of the Constitution; that when Parliament is directed to enact a legislation by the Constitution; such enactment must promote the spirit and letter of the Constitution; that in deciphering the spirit and letter of ***Article 92 (f),*** all relevant Articles of the Constitution must be considered. Counsel submitted that the most critical Article to be read with ***Article 92 (f)*** is ***Article 4 (2)*** of the Constitution that declares Kenya to be a multi-party democracy; that based on ***Article 4 (2),*** this Court should promote multi-party democracy and refrain from cementing ethnic mobilization of political parties; that to prevent ethnic mobilization of political parties, this Court should declare that any threshold on funding of political parties is unconstitutional. Counsel urged us to find that once a political party has fulfilled the onerous criteria for registration as a political party, it should automatically be eligible for funding.

37. We have considered the submission by the appellant that the issue in this appeal is about the correct interpretation of ***Article 92 (f)*** of the Constitution. A party is bound by its pleadings; likewise the court itself is also bound by pleadings as flied by the parties. Lord Denning in **Jones -v- National Coal Board [1957]2 QB55** expressed that in the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties and not to conduct an investigation or examination on behalf of society at large. In the Nigerian case of **Adetoun Oladeji (Nig) Ltd -v- Nigeria Breweries Plc S.C. 91/2002,** Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows:

> ***"….it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."***

38. In this case, the appellants are bound by their pleadings. As was stated by ***Lord Normond*** app 238 – 239 in **Esso Petroleum Co. Ltd -vs- South Port *Corporation* *(7) [1956] Ac 218*** which was cited with approval in **Puspa -vs- Fleet Transport Company [1960] Ea 1025*:*** and Court of Appeal in **Nyabicha -vs-Kenya Tea Development Authority & Others [2010]eKLR** that*:*

> **"The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them."**

39. We have examined the petition filed before the trial court to find out if the appellants prayed and sought orders for interpretation of ***Article 92 (f)*** **of the Constitution.** The appellants entire petition is not founded on Article 92 (f) of the Constitution but on constitutionality ***of Section 25 (2) (a)*** of the **Political Parties Act** measured against Articles ***27, 32,33, 25, 38,47*** and ***56*** of the Constitution; the correct interpretation of ***Article 92 (f)*** was neither pleaded nor canvassed before the trial court.

40. We have also analyzed the contents of the replying affidavits and further affidavits filed by the parties. Nowhere in the replying affidavits is the issue of the correct interpretation of ***Article 92 (f)*** of the Constitution urged or deposed as an issue for determination by the trial court. We have perused and analyzed the appellants written submissions filed before the trial court; the unconstitutionality urged by the appellants in its written submissions relate to the 5% threshold enacted in ***Section 25 (2) (a)*** of the **Political Parties Act**.

41. In our considered view, the appellants' submission before this Court that the appeal is about the correct interpretation of ***Article 92 (f)*** of the Constitution is not supported by the pleadings and is a new collateral attack to the judgment of the trial court. Often times it has been stated that a party cannot be allowed to raise a new issue and canvass the same before an appellate court. Nowhere in its judgment did the trial court interpret ***Article 92 (f) of the Constitution***. We are satisfied that the issue of the correct interpretation of ***Article 92 (f)*** of the Constitution was not an issue before the trial court and we make a finding that the appellant through its submissions before us has introduced an issue that was not in the pleadings filed by the parties.

42. ***Article 92 (f)*** of the Constitution is an enabling legislation; it stipulates that Parliament shall enact legislation to provide for the establishment and management of Political Parties Fund. Is there any dispute as to the power of Parliament to enact the enabling legislation envisaged in ***Article 92 (f)***? Is it the appellant's contention that Parliament has no power to enact the **Political Parties Act**? In our understanding, the appellants challenge is directed at ***Section 25 (2) (a)*** of the **Political Parties Act**. A plain and literal reading of ***Article 92 (f)*** reveals that there is nothing to interpret in the Article which is purely an enabling legislation. Unless the appellants assert that ***Section 25 (2) (a)*** of the **Political Parties Act** is *ultra-vires* ***Article 92 (f)*** which is the enabling constitutional Article, we see no merit in the contention that this appeal is about the correct interpretation of ***Article 92 (f)*** of the Constitution. There is no pleading that ***Section 25 (2) (a)*** of the **Political Parties Act** is *ultra vires* the enabling constitutional Article. The appellants have not demonstrated to us what is the contentious issue and dispute in ***Article 92 (f)*** that requires interpretation.

43. The appellants in their submissions before us urged us to find that Parliament should not pass **any legislation** on thresholds for funding of political parties. It was submitted that the correct approach under ***Article 92 (f)*** of the Constitution should be that once a political party is registered, it should be eligible and entitled to funding from the Political Parties Fund. The appellants' submission is that there should be no threshold to be fulfilled by any political party to be eligible for funding; that all that should be required is registration as a political party or at least participation in the preceding general election.

44. The 3rd respondent in response to the appellants' submissions invoked the concept of separation of powers. It was submitted that what the appellant is indirectly urging this Court to do is to abolish and reduce the threshold for accessing the Political Parties Fund; that this is not the function of courts but Parliament; that the appellants' prayer offends the doctrine of separation of powers. Counsel cited dicta from the case of **Trusted Society of Human Rights Alliance -v- Attorney General & others Nairobi Petition No. 243 of 2011 (2012) eKLR** where it was expressed:

> **"The Constitution consciously delegates the sovereign power under it to the three branches of government and expects that each will carry out those functions assigned to it without interference from the other two…This must mean that the courts must show deference to the independence of the legislature as an important institution in the maintenance of our constitutional democracy as well as accord the Executive sufficient latitude to implement legislative intent…"**

45. We are cognizant that one of the rationales behind public financing of political parties is that political parties play a crucial role in the public domain. Providing public financing for political parties is a mechanism to stimulate broader levels of diversity and bring different actors and groups into the political playing field, to strengthen democratic competition and to prevent corruption and any undue influence from private interests. Furthermore, despite being private entities, political parties operate in a context of limited income, particularly in Africa, where one important source of income, the membership dues, is

extremely limited. (See ***Regulating political party financing: Some insights from the praxis by Augustine Magolowondo, Elin Falguera, Zefanias Matsimbe by International IDEA Netherlands Institute for Multiparty Democracy).***

46. Comparative analysis of legislation from different countries reveals that there are three models, criteria or thresholds that can be adopted for allocations of public funding to political parties. These are: the *proportional model, equitable model* or a combination of the two. In the proportional model, the total amount provided is distributed to each political party in proportion to the number of votes or seats won (normally only) in the parliamentary elections; Tanzania is one of the countries that use this model. In the equitable model funds are distributed equally to the political parties, regardless of the electoral results; this is the case in Burundi. Other countries choose to use the two formulae concurrently, as is the case in Tunisia and Mozambique. Countries like Tanzania and Malawi use a threshold for political parties to access funds, while others provide funds for all political parties with legal existence. The most common approach is a threshold that incorporates the number of votes received in the previous parliamentary elections or seats won in a representative body. In countries like Mozambique campaign financing is distributed before the elections, using the number of candidates fielded, while in others funds are made available only after elections based on electoral results (the case of Burundi). (See ***Regulating political party financing: Some insights from the praxis by Augustine Magolowondo, Elin Falguera, Zefanias Matsimbe by International IDEA Netherlands Institute for Multiparty Democracy).*** The lesson from the comparative analysis is that each country as a matter of policy decides the threshold, model or criteria to adopt in funding political parties.

47. At the judicial level, in the Zimbabwe case of **United Parties -v- Minister of Justice Legal and Parliamentary Affairs &others (1998) 1LRC 614,** it was correctly stated that:

> "Regulation of public funding for elections has been identified with the following five goals: (a) to ensure equality of opportunity in a liberal democracy characterized by inequalities in the distribution of wealth; (b) to make enough money available for competitive campaigns to occur; (c) to allow new entrants, while not encouraging frivolous candidates or propping up decaying political organizations;
>
> (d) to reduce the possibility for undue influence and (e) to prevent corruption. The formula adopted to allocate State funding to political parties would determine whether these goals would be achieved or not. Certain formulae would do no more than entrench and re-enforce the regime of the major political parties and sideline their minor or new opponents."

48. Bearing in mind the persuasive dicta from Zimbabwe, we also are alive to the dicta in **Marbury -vs- Madison – 5 US. 137** where it was stated that:

49. **"The province of the court is solely, to decide on the rights of individuals and not to enquire how the executive or executive officers perform duties in which they have discretion."**

50. In **Peter Njoroge Mwangi & 2 others -v- The Attorney General & another, Nairobi Petition No. 73 of 2010**, it was aptly expressed that the legislature determines the legislative policy through the statute it enacts. In **Ndora Stephen - v- Minister for Education & 2 Others, Nairobi High Court Petition No. 464 of 2012,** it was observed that the formulation of policy and implementation thereof were within the province of executive. In **Speaker of the Senate & another -v- Hon. Attorney General & 3 others (2013) eKLR**, the Supreme Court expressed that:

> **"…courts ought not to indiscriminately take up all matters that come before them but must exercise caution to avoid interfering with operations of the other arms of government save for where they are constitutionally mandated…."**

a. In the instant appeal, the 1st respondent submitted that in enacting *Section 25 (2)(a)*of the **Political Parties Act**, Parliament was not blind to the fact that there existed numerous political

parties in Kenya which would apply for funding; that to address this, it was necessary to set a threshold in order to ensure that only the parties that are eligible and have complied with the provisions of ***Articles 91 (1)*** and ***(2)*** of the Constitution receive funding. Counsel cited the case of **Olum & another -v- Attorney General (2002) 2 EA 508,518** where it was expressed that to determine the constitutionality of a section of a statute or Act of Parliament, the court has to consider the purpose and effect of the impugned statute or section.

51. ***Article 92 (f)*** **of the Constitution** has given Parliament the constitutional mandate to enact legislation and regulate funding for political parties. Parliament in its wisdom enacted legislation with a five percent (5%) threshold for political party funding. In our considered view, the establishment, adoption and enactment of thresholds for political party funding is a policy and legislative function; it is only after the threshold has been established that challenge before the courts can be entertained. It is not the function of courts to set thresholds for funding of political parties; this is a constitutional preserve of Parliament. Accordingly, we decline the invitation by the appellant that we should pronounce that there should be no threshold for political party funding and that funding of political parties should be premised on the fact of registration as a political party. In this regard, ground 2 in the memo of appeal has no merit.

52. A pertinent ground of appeal is that the trial court erred in failing to find that the appellants as political parties were entitled to reasonable notice and an opportunity to form post-election coalitions with a view to accessing funds from the Political Parties Fund. ***The National Alliance*** (TNA) in its submissions urged that for purposes of disbursement of political parties fund, ***Section 25 (1) (a)*** as read with ***Section 25 (2) (a)*** of the **Political Parties Act** clearly state that such fund shall be distributed proportionately in reference to the total number of votes secured by each political party in the preceding elections. It was submitted that the key word is "each political party" and NOT "coalition of political parties".

53. In our considered view, the Political Parties Fund is aimed at funding political parties prior to the forthcoming general election; access to funding is based on a formula or threshold dependent on a political party's performance at the preceding general elections. The formula or threshold is backward looking with a forward looking objective. The submission by the appellants that they should be allowed to form post-election coalitions with a view to accessing funds from the Political Parties Fund goes against the tenet that the formulae or threshold for funding political parties is backward looking and is based on performance in the preceding general election. Allowing post-election coalitions with a view to accessing the Political Parties Fund is tantamount to circumventing and by-passing the threshold criteria enacted by Parliament. A court of law cannot interfere with the threshold enacted in the Political Parties Act if such interference is aimed at using a court order to circumvent the law; a court can only interfere if the effect of the threshold is to suffocate the rest of the political parties and reinforce the regime of major political parties. In the present case, we are being asked to declare that post-election coalitions of political parties should be allowed access to political party funding. In our considered view, sanctioning of post-election coalitions for the sole purpose of accessing funding for political parties would be using the court to circumvent the thresholds set by law. This we cannot do, permit or condone. Post-election coalitions for the sole purpose of accessing Political Parties Fund is impermissible.

54. Regarding the ground of appeal that the trial court erred in failing to find that the appellants were entitled to a reasonable notice and an opportunity to form post-election coalitions with a view to accessing funds from the Political Parties Fund, we make a finding that the appellants and all political parties are entitled to reasonable notice to make presentations on their eligibility for funding and fulfillment of the threshold criteria in ***Section 25*** of the **Political Parties Act**. Our finding in this regard is premised on the provisions of ***Article 47*** of the Constitution on fair administration action which entitles the appellants to expeditious, efficient, lawful, reasonable and fair administrative procedures.

55. A ground of appeal urged by the appellants is that the trial court erred in failing to find that the 2nd Respondent, the Independent Electoral and Boundaries Commission failed to disclose and publish the full electoral results for all six electoral contests held on 4th March 2013 General Elections. We have examined the 2nd respondents written submissions filed before the trial court on 7th January 2014 to appraise for ourselves of its response to the allegation that it failed to disclose and publish the full

electoral results. To our surprise, the 2nd respondent did not address the issue in its written submission. The 2nd respondent referred and relied upon the affidavit dated 26th September 2013 deposed by ***Mr. Moses Kipkogei*** where at paragraph 6 thereof it is deposed that the 2nd respondent believes that it has in no way whatsoever breached any of its obligations legal or otherwise in respect to the release of the election results of the 4th March 2013General Elections.

56. The trial court at paragraphs 68 to 71 of its judgment in considering whether the 2nd respondents had disclosed the full electoral results expressed that the appellants had a right to demand the electoral result under ***Article 35 (1)*** of the Constitution. Taking into account this right, the trial court made an order on 4th December 2013 directing the 2nd respondent, IEBC, to file an affidavit verifying the results of the 4th March 2013 General Elections. The IEBC is under a constitutional and statutory duty to declare and release electoral results. Electoral results can never be a secret that an interested party or member of the public can be denied access to. Accordingly, we are convinced that the trial court did not err in making an order directing IEBC to file an affidavit verifying the results of the 4th March 2013 General Elections.

AMENDMENT TO SECTION 25 OF THE POLITICAL PARTIES ACT BY THE POLITICAL PARTIES (AMENDEMENT) ACT 2016

57. The petition lodged by the appellants before the trial court is premised on ***Section 25 (2) (a)*** of the **Political Parties Act** as it was on 2nd September 2013 when the petition was filed. The relief sought by the appellants was a declaration that the then ***Section 25 (2) (a)*** of the **Political Parties Act** was unconstitutional, null and void. The basis of the prayer was that ***Section 25 (2) (a)*** as it then was set a very high threshold of 5% for funding of political parties and such high threshold was unconstitutional, discriminatory and violated equal treatment before the law.

58. Prior to the delivery of this judgment, Parliament has since amended ***Section 25***

2. ***(a)*** of the **Political Parties Act** and reduced the threshold from five percent to three percent. Additional amendments have been made with new provisions inserted into ***Section 25 (2)*** of the **Political Parties Act**. The Amendments are contained in **The Political Parties (Amendment Act, 2016).** These amendments were passed by the National Assembly on 21st April 2016 and the Senate on 28th April 2016, pursuant to ***Article 113 (3)*** of the Constitution. The commencement date to the **Political Parties Amendment Act No. 14 of 2016** is 3rd June 2016.

   The words underlined and in bold are the amendments and new insertions to ***Section 25*** of the **Political Parties Act** which now reads as follows:

   "25. (1) The Fund shall be distributed as follows—

a. ninety five per cent of the Fund proportionately by reference to the total number of votes secured by each political party in the preceding general election; and

b. five percent for the administration expenses of the Fund.

   (2) Notwithstanding subsection (1), a political party shall not be entitled to receive funding from the Fund if—

a. the party does not secure at least **three** per cent of the total number of votes at the preceding general elections; or

b. more than two-thirds of its registered office bearers are of the same gender.

c. **the party does not have at least-**

1. **twenty elected members of the National Assembly; and**

2. **three elected members of the Senate; and**

(iii) three elected members who are Governors and

4. **forty members of County Assemblies**

3. For purposes of subsection (1) (a) and (2) (a), the total number of votes secured by a political party shall be computed by adding the total number of votes obtained in the preceding general election by a political party in the election for the President, members of Parliament, county governors and members of county assemblies."

59. As of the date of this judgment, the then ***Section 25 (2) (a)*** upon which the petition and this appeal is founded has been amended. The threshold of 5 % that was core of the appellants' grievance has been reduced to 3%. It is trite that as a general principle, the rights and liabilities of parties to any judicial proceedings pending before court are determined in accordance with the law as it was at the time when the suit was instituted. Time and again, it has been expressed that a court should not act in vain. We note that the effective date of the amendments to ***Section 25 (2) (a)*** of the **Political Parties Act** is 3rd June 2016. Accordingly, we decline to grant the orders sought by the appellant to declare that then ***Section 25 (2) (a)*** of **Political Parties Act** is unconstitutional the same having been overtaken by events – *to wit* the amendment to ***Section 25 (2) (a)***. In our view, the section as it was with the 5% threshold for political party funding was the foundation of the appellants' petition and the substratum in this appeal. The 5 % threshold has been amended, if we were to declare ***Section 25 (2) (a)*** as unconstitutional, which ***Section 25 (2) (a)*** shall we be declaring as unconstitutional; the old amended Section with the 5% threshold or the new ***Section 25 (2) (a)*** with the new 3% threshold? Definitely not the new one because the petition and this appeal are not founded on the new amended ***Section 25 (2) (a)*** with the 3% threshold. If we are to declare the old ***Section 25 (2) (a)*** as being unconstitutional, the said old section has been amended and does not exist in law. We bear in mind that the appellant as petitioners did not challenge the constitutionality of ***Section 25 (1); 25 (2) (b)*** and ***25 (3)*** of the **Political Parties Act** and which Sections have not only been retained in the new ***Section 25*** but a ***new sub-section 2 (c)*** has been inserted. The new ***sub-section 25 (2) (c)*** has inserted new criteria and threshold that must be fulfilled to make a political party eligible for funding. These additional criteria were not the subject of pleadings filed by the parties and this Court cannot make a determination with regard to any of the amendments to ***Section 25*** of the **Political Parties Act**. Whereas we appreciate the submissions by the appellant, we are convinced that the deletion of the 5% in ***Section 25 (2) (a)*** and the overall amendments ***to Section 25*** of the **Political Parties Act** has taken away the breath of life in the appellants' petition and the instant appeal.

60. For the various reasons stated in the judgment, this appeal lacks merit and is hereby dismissed. Each party shall bear his/her/its own costs.

Dated and delivered at Nairobi this 1st day of July, 2016.

E.M. GITHINJI

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

…….……

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR