Musyoka v Returning Officer, Independent Electoral and Boundaries Commission, Machakos County & 3 others (Constitutional Petition E004 of 2021) [2022] KEHC 160 (KLR) (11 February 2022) (Judgment)

Wilfred Manthi Musyoka v Returning Officer, Independent Electroral & Boundaries Commission, Machakos County & 4 others [2022] eKLR

Neutral citation: [2022] KEHC 160 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CONSTITUTIONAL PETITION E004 OF 2021

GV ODUNGA, J

FEBRUARY 11, 2022

IN IN THE MATTER OF CONSTITUTIONAL OF KENYA, 2010

ARTICLES 1,2,3,10,23,28,96,98(1)(A),99(1)B,101(4),165(3) (B) (D),232,258 & 259 OF THE CONSTITUTION OF KENYA,

2010

AND

IN THE MATTER OF ELECTION ACT, SECTION 22(1) (REPEALED)

AND

IN THE MATTER OF ELECTION LAWS (AMENDMENT) ACT, 2017 SECTION 8

AND

IN THE MATTER OF THE INTERPRETATION AND GENERAL PROVISIONS ACT, CAP.2 OF THE LAWS OF KENYA, SECTION 22

AND

IN THE MATTER OF NOMINATION OF AGNES KAVINDU MUTHAMA AS THE WIPER DEMOCRATIC CANDIDATE FOR

MACHAKOS SENATORIAL BY-ELECTIONS

BETWEEN

WILFRED MANTHI MUSYOKA ..... PETITIONER

AND

RETURNING OFFICER, INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION, MACHAKOS COUNTY ..... 1ST RESPONDENT

WIPER DEMOCRATIC MOVEMENT ..... 2ND RESPONDENT

AGNES KAVINDU MUTHAMA ..... 3RD RESPONDENT

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 4TH RESPONDENT

Section 22 of the Elections Act which required candidates vying for parliamentary seats to be holders of a degree from a university recognized in Kenya, did not apply to by-elections held following the 2017 General Elections.

Reported by Ribia John

Jurisdiction *– jurisdiction of the High Court – jurisdiction to entertain pre-election disputes - whether the High Court sitting as a judicial review court could entertain pre-election disputes - Constitution of Kenya, 2010, article 165(3) and (6).*

Statutes *- interpretation of statutes – interpretation of section 22(1A) of the Elections Act - what were the principles guiding construction and interpretation of statutes - whether section 22(1A) of the Elections Act required candidates vying for parliamentary seats to have a degree from a recognized university in Kenya - Elections Act (No. 24 of 2011) section 22(1A).*

Evidence Law *- burden of proof - shifting of the burden of proof during the trial process – shifting of the burden of proof in election disputes - what were the conditions necessary for the burden of proof to shift from the petitioner to the respondent in election petitions - Evidence Act (cap 80) section 107(1).*

Statutes *- suspension of statutes – where section 22(1A) of the Elections Act came into effect on January 4, 2013 but was subsequently suspended – what was the effect of suspending a statutory provision - Elections Act, (No. 24 of 2011), section 22(1A); Interpretation and General Provisions Act (cap 2) section 22.*

Brief facts

The petition revolved around the nomination of the 3rd respondent by the 2nd respondent to contest the senatorial by-election for Machakos County following the demise of the previous holder of that position. It was contended that on February 26, 2021, the 1st respondent cleared the 3rd respondent and issued her with a nomination certificate. The petition was initially filed by two petitioners but one of them withdrew from the proceedings.

According to the petitioner, he got information that the 3rd respondent did not complete primary school education and did not have secondary school education. The petitioner stated that he filed a complaint pursuant to section 74 of the Elections Act before the 4th respondent but their complaint was received under protest indicating that the matter had been overtaken by events.

The petitioner subsequently received a response from the 4th respondent stating that section 22(a) of the Elections Act had been suspended until after the general elections which were to be held after the 2017 general elections, the self-declaration form contained personal information protected under the Data Protection Act and the educational certificates were not a requirement during the election.

The petitioner contended that section 22 of the Elections Act (amended and substituted) prescribed a post-secondary school qualification as a minimum requirement for anyone seeking to contest for election as a member of parliament but an amendment vide section 8 of the Elections (Amendment) Act required any aspirant vying as a member of parliament to hold a degree from a recognized university in Kenya. The new provision of the law was suspended from operation until after the 2017 general elections.

The petitioners contended that section 22(1)(b) of the Elections Act was constitutional. The petitioner took the view that where there was a lacuna as to which provision was applicable in the intervening period, pursuant to section 22 of the Interpretation and General Provisions Act, the former provision continued in force until

the new provisions came into operation. The petitioners urged the court to find and hold that the post-secondary school qualification was applicable to the by-election. According to the petitioners, the court should then proceed to void the nomination of the 2nd respondent.

The respondents opposed the petition stating that based on section 22(1A) of the Election Act, the 3rd respondent was not required to possess a degree for her registration as a candidate. They, therefore, were of the view that they fully complied with the registration of the 3rd respondent. They submitted that the orders sought in the petition were not awardable for the reason that they had either been overtaken by events and/or the instant court was not properly moved to grant the orders sought. It was contended that the instant court lacked jurisdiction to grant the orders sought because it was not constituted as an Election Court. The respondents urged the court to dismiss the petition with costs for lack of merit.

Issues

i. Whether the High Court sitting as a judicial review court had jurisdiction to entertain pre-election disputes.
ii. What were the principles guiding construction and interpretation of statutes?
iii. Whether section 22(1) and (1A) of the Elections Act required candidates vying for parliamentary seats to have a degree from a recognized university in Kenya.
iv. What was the meaning and effect of suspension provisions of section 22(1A) of the Elections Act on by-elections held after the 2017 general elections but before the next general elections?
v. Whether a candidate was required to possess a degree certificate to vie for election as member of the Senate.
vi. Whether post-secondary academic qualifications were required for a person wishing to contest for a senatorial position.
vii. What were the conditions necessary for the burden of proof to shift from the petitioner to the respondent in election petitions?
viii. What was the rationale for requiring public officers intending to contest for elections to resign six (6) months before the elections?
ix. What was the effect of suspending a statute from coming into force?

Relevant provisions of the Law

Elections Act, No. 24 of 2011

Section 22 - Qualifications for nomination of candidates

(1) A person may be nominated as a candidate for an election under this Act only if that person—

(a) is qualified to be elected to that office under the Constitution and this Act; and

(b) holds—

(i) in the case of a Member of Parliament, a degree from a university recognized in Kenya; or

(ii) in the case of member of a county assembly, a degree from a university recognized in Kenya.

(1A)Notwithstanding subsection (1), this section shall come into force and shall apply to qualifications for candidates in the general elections to be held after the 2017 general elections.

(1B)The provisions of this section apply to qualifications to nomination for a party list member under section 34.

(2)Notwithstanding subsection (1)(b), a person may be nominated as a candidate for election as President, Deputy President, county Governor or deputy county Governor only if the person is a holder of a degree from a university recognised in Kenya.

(2A)For the purposes of the first elections under the Constitution, section 22 (1) (b) and section 24 (1) (b), save for the position of the President, the Deputy President the Governor and the Deputy Governor, shall not apply for the elections of the offices of Parliament and county assembly representatives.

Interpretation and General Provisions Act, (cap 2)

Section 22 - Repeal and substitution

Where a written law repeals wholly or partially a former written law and substitutes provisions for the written law repealed, the repealed written law shall remain in force until the substituted provisions come into operation.

Held

1. The jurisdiction of the High Court, sitting as a judicial review court, or in exercise of its supervisory jurisdiction under article 165 (3) and (6) of the Constitution was not lost in election matters simply because an election had taken place. Jurisdiction ought to always be retained in order to uphold and preserve the authority of the Constitution in the event of the occurrence of certain tragedies. The instant court was not deprived of the jurisdiction to entertain the instant petition merely because the challenge it raised was about the qualification for nomination of the 3rd respondent which was a pre-election dispute and by the mere fact that an election had already been concluded.
2. Section 22 of the Elections Act, before its amendment, prescribed a post-secondary school qualification as a minimum requirement for anyone seeking to contest for election as a Member of Parliament. That provision was amended *vide* section 8 of the Elections (Amendment) Act that required any aspirant vying as a Member of Parliament to hold a degree from a recognized university in Kenya. However, section 22(1A) of the Election Act provided that notwithstanding subsection (1), the section should have come into force and should have applied to qualifications for candidates in the general election to be held after the 2017 general election.
3. Words and phrases of technical legislation were used in their technical meaning if they had acquired one, and otherwise, in their ordinary meaning. The words and phrases were to be construed according to the rules of grammar. It was very desirable in all cases to adhere to the words of an Act of Parliament, giving to them that sense which was their natural import in the order in which they were placed. It was not permissible to depart where the language admitted no other meaning. Nor should there be any departure from them where the language under consideration was not susceptible to another meaning unless adequate grounds were found, either in the history or cause of the enactment or in the context or in the consequences which would result from the literal interpretation for concluding that that interpretation did not give the real intention of the legislature. If there was nothing to modify, nothing to alter, and nothing to qualify the language which the statute contained, it ought to be construed in the ordinary and natural meaning of the words and sentence.
4. The meaning and intention of a statute had to be collected from the plain and unambiguous expressions used rather than from any notions which could be entertained by the court as to what was just or expedient. However unjust, arbitrary or inconvenient the meaning conveyed could be, it ought to receive its full effect. When the meaning was plain, it was not the province of a court to scan its wisdom or its policy. Its duty was not to make the law reasonable but to expound it as it stood, according to the real sense of the words.
5. Construing section 22(1A) of the Elections Act in the ordinary and natural meaning of the words, Parliament intended to substitute the requirement of a post-secondary qualification as a criterion for eligibility to vie for parliamentary seats with that of holding a degree from a university recognized in Kenya. Having passed the amendment, Parliament proceeded to suspend its operation till the general election was held after the 2017 general election.
6. The election, the subject of the instant petition was not a general election. It was a by-election. There had to have been good reason why parliament exempted the application of the section to the 2017 general elections and expressly provided that it would only apply to the general election to be held after the 2017 general election as opposed to all elections to be held after the 2017 general elections. Had Parliament provided that the section would apply to elections held after the general elections of 2017, without qualifying that it would apply to general elections, the section would, no doubt, have applied to the 3rd respondent. It followed, therefore, that the requirement that those vying for parliamentary seats had to hold a degree from a university recognized in Kenya did not apply to the 3rd respondent when she vied for the position of Senator for Machakos County in the 2021 by-election.

7. Whereas the legal and evidential burden rested with the petitioner at the onset of the trial, depending on the manner he discharged it, the evidential burden kept shifting and its position at any time would be determined by ascertaining who would stand to lose if no further evidence were introduced. The legal burden of proof in an election petition rested with the petitioner; for he was the party desiring the court to take action on the allegations in the petition. The evidential burden initially rested upon the party bearing the legal burden, but as the weight of evidence given by either side during the trial varied, so would the evidential burden shift to the party who would fail without further evidence.
8. Where the petitioner had laid *prima facie* evidence against the respondent including the electoral body which as matter of law ought to be a respondent in an election petition, the law said that evidential burden had been created on the shoulders of the respondent who would fail if he did not adduce evidence in rebuttal. At the point where the respondent would fail without further evidence, the respondent should discharge the evidential burden by offering evidence in rebuttal. If the respondent offered no evidence in rebuttal, judgment could be entered against him or her on the basis of the preponderant evidence adduced by the petitioner.
9. The petitioner would not succeed because the respondent had not offered evidence in rebuttal but because the petitioner had proved his case to the required standard of proof, and the absence of evidence in rebuttal by the respondent only sanctified the confidence of the court to enter judgment in favour of the petitioner. Of essence was that the evidential burden was the obligation of the respondent once it had been properly created by the evidence tendered, and failure to discharge the evidential burden disadvantaged the respondent with the result that he failed and the petitioner succeeded. However, the evidentiary burden would not shift where the petitioner relied on hearsay evidence.
10. The legal burden of proof was on the petitioner to prove that the 3rd respondent had no post-secondary academic qualification. In setting out to prove that fact, the petitioner, apart from relying on what he called reliable sources, which could not be verified, relied on the affidavit sworn by another who averred that he was the 3rd respondent's nephew and that both in 2017 elections and during the by-elections, he was engaged by the 3rd respondent as her campaign manager. He swore that in that capacity, he came to know that the 3rd respondent did not complete primary school and therefore could not have obtained post-secondary school qualifications recognized in Kenya. The 3rd respondent did not swear any affidavit to controvert that very damning deposition. The burden shifted to the 3rd respondent since the deponent stated that due to his position, a position that included facilitating the 3rd respondent's clearance by several constitutional bodies, he was unable to vouch for the 3rd respondent's academic qualification, a fact that ought to have brought to his knowledge by virtue of his position as the 3rd respondent's campaign manager.
11. Under section 107(1) of the Evidence Act, whoever desired any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserted had to prove that those facts existed. Further, the legal maxim that *omnia praesumuntur legitime facta donec probetur in contrarium* meaning all things were presumed to have been legitimately done until the contrary was proved. In the instant case, the 3rd respondent failed to prove that she had a post-secondary academic qualification, a burden that had shifted to her.
12. The suspended amendment came into effect on January 4, 2013 but was subsequently suspended. Section 22 of Interpretation and General Provisions Act, Laws of Kenya, was inapplicable to those circumstances as the section applied to situations where a new legal provision had yet to come into effect and not to a situation where the provision had come into effect but was subsequently suspended. The law did not require the 3rd respondent to have post-secondary school academic qualifications.

Petition disallowed; parties to bear own costs

Citations

Cases

East Africa;

1. *Ngome, Alfred Muhadia & another v George W Sitati & 2 others* Civil Application No Nai 268 of 1999; — (Explained)
2. *Mutua, Alfred Nganga & 2 others v Wavinya Ndeti & another* [2018] eKLR — (Explained)
3. *Kitur, Bernard Kibor v Alfred Kiptoo Keter & another* [2018] eKLR — (Explained)
4. *Italframe Ltd v Mediterranean Shipping Co* [1986] KLR 54; [1986-1989] EA 174 — (Explained)
5. *Mwau, John Harun & 2 others v Independent Electoral and Boundaries Commission & 3 others* [2017] eKLR — (Explained)
6. *Mwau, John Harun v Independent Electoral & Boundaries Commission & Attorney General* [2019] eKLR — (Followed)
7. *Mahamud, Mohamed Abdi v Ahmed Abdullahi Mohamad & 3 others; Ahmed Ali Muktar (Interested Party)* [2019] eKLR — (Explained)
8. *Mwicigi, Moses & 14 others v Independence Electoral and Boundaries Commission & 5 others* [2016] eKLR — (Explained)
9. *National Rainbow Coalition Kenya (NARC) v Independent Electoral & Boundaries Commission & others* Civil Appeal No 328 of 2019 — (Explained)
10. *Odinga, Raila Amolo & another v Independent Electoral & Boundaries Commission & 2 others* [2013] eKLR — (Explained)
11. *Republic v Council of Legal Education & another ex parte Sabiha Kassamia & another* [2018] eKLR — (Explained)
12. *JK Patel v Spear Motors Ltd* Civil Appeal No 4 of 1991 [1993] VI KALR 85 — (Explained)
13. *Senyonga & 7 others v Shaikh Hussein Rajab Kakooza 6 others* [1992] V KALR 30 — (Explained)

Statutes

East Africa;

1. Constitution of Kenya, 2010 articles 84, 88 (4); 91; 165(3)(6) — (Interpreted)
2. Election Offences Act, 2016 (Act No 37 of 2016) In general - (Cited)
3. Elections Act, 2011 (Act No 24 of 2011) sections 8, 74, 22(a)(1)(b); 24 — (Interpreted)
4. Evidence Act (cap 80) sections 107(1); 112 — (Interpreted)
5. Interpretation and General Provisions Act (cap 2) section 22 — (Interpreted)
6. Leadership and Integrity Act, 2012 (Act No 19 of 2012) section 13 — (Interpreted)

Texts & Journals

Maxwell, PB., Et al (Eds) (1953) *Interpretation of Statutes* London Publishers 10th Edn

Advocates

1. Mr Onyango for Miss Ngetich for the 1st and 4th respondents
2. Mr Esibi for Ms Lumallas for the 2nd and 3rd respondents

JUDGMENT

1. **The Petition**

   This petition revolves around the nomination of 3rd respondent, Agnes Kavindu Muthama, by the 2nd respondent to contents for the senatorial by-election for Machakos County following the demise of the previous holder of that position, Dr Boniface Mutinda Kabaka. It is contended that on 26th February, 2021, the 1st respondent cleared the 3rd respondent and issued her with a nomination certificate.

2. Initially this petition was filed by two petitioners, Philippe Sadja and Wilfred Manthi Musyoka. Subsequently, the 1st Petition withdrew from the proceedings leaving only Wilfred Manthi Musyoka

to continue with the petition. According to the petitioner, he got information that the 3rd respondent may not have completed primary school education and does not have secondary school education. That information seems to have been obtained from one Anthony Wambua Nzau, who swore an affidavit in support of the petition on 12th March, 2021. According to the deponent, the 3rd respondent is his aunt and during the 2017 elections, the 3rd respondent who was contesting the position of the County Women representative engaged him as her campaign manager, a position that included facilitating her clearance by several constitutional bodies. As a result, he interacted with the 3rd respondent's documents. Similarly, in 2020 when the by-elections, the subject of this petition were announced, he was engaged by the 3rd respondent to perform the same duties. In the course of assisting the 3rd respondent in facilitating her clearance, he discovered that the 3rd respondent attended Kyaume Primary School but did not have a completion certificate and that she never attended secondary school. He annexed *inter alia* the self-declaration forms of the 3rd respondent which, according to him, were either indicated inapplicable or were left blank in spaces where the 3rd respondent was required to indicate her education qualifications.

3. According to the petitioner, a complaint pursuant to section 74 of the *Elections Act*, 2011 before the 4th respondent but their complaint was received under protest indicating that the matter had been overtaken by event. On the following day they received a response from the commission stating that:-

    a. That section 22(a) of the *Elections Act* had been suspended until after general elections to be held after the 2017 general elections.

    b. That the self-declaration form contains personal information protected under the Data Protection Act.

    c. That the education certificate were not a requirement during the election.

4. According to the petitioner, World Outreach International Bible College which awarded the 3rd respondent with a certificate is not recognized in Kenya as an accredited college institution of higher learning since no letter or certificate was produced to confirm the accreditation. The petitioner pleaded that the certificate does not pass as a post-secondary school qualification as the 3rd respondent did not attend any secondary school. He is therefore aggrieved by the 4th respondent's failure to consider section 22 of the *Interpretation and General Provisions Act*.

5. According to the petitioners, section 22 of the *Elections Act* (Amended and substituted) prescribed a post school qualification as a minimum requirement for anyone seeking to contest for election as a Member of Parliament but an amendment vide section 8 of the Elections (Amendment) Act required any aspirant vying as a Member of Parliament to hold a degree from a recognized university in Kenya. According to the petitioners the new provision of the law was suspended from operation until after the 2017 General Elections.

6. The petitioners made reference to the decision of the Court of Appeal in *John Harun Mwau v Indepedent Electoral & Boundaries Commission & Attorney General* [2019] eKLR where it affirmed Lenaola, J decision that section 22(1)(b) of the *Elections Act* was constitutional.

7. The petitioner took the view that where there is a lacuna as to which provision to apply in the intervening period, pursuant to section 22 of the *Interpretation and General Provisions Act*, the former provision continues in force until the new provisions come into operation.

8. According to the petitioners, the 3rd respondent violated Chapter Six of *the Constitution* and Section 13 of the *Leadership and Integrity Act* by uttering a false degree certificate while the 2nd respondent

violated article 84 and 91 of *the Constitution*, Independent Electoral and Boundaries Act, the Electoral Code of Conduct and section 22 of the *Elections Act* (Amended) by issuing a nomination certificate to an unqualified person. Further that the 1st respondent violated the provision of article 99(1) d of the *Constitution* and section 22 (amended and substituted) of the *Elections Act* by clearing the 3rd respondent without being presented with educational certificates.

9. The petitioners urge the court to find and hold that the post-secondary school qualification was applicable to the by–election. According to the petitioners, the court should then proceed to void the nomination of the 2nd respondent.

10. The petitioner submitted that prior to the amendment of section 22 of the *Elections Act*, 2011 in 2017, it was mandatory for one to contest as a Member of Parliament to possess or hold a minimum of a "post-secondary school qualification recognized in Kenya" but when the provision was amended by Parliament in 2017, one has to be a holder of a degree from a university recognized in Kenya. It was submitted that by inserting sub-section 1A in the amendment to section 22 of the Election Act, Parliament suspended the new provision until after the General Elections to be held after 2017. According to the petitioners, by the time the 1st and 4th respondents declared the 3rd respondent to vie for the Machakos senatorial by-election, Section 22(1)b of the *Elections Act* was still in force pursuant to the provisions of sections 22 of *Interpretation and General Provisions Act*. It is submitted that at the time the 3rd respondent was issued with the nomination certificate, the law in force required any candidate for Member of Parliament to possess a post-secondary school qualification pursuant to the provisions of section 22 (repealed) of the *Elections Act*, 2011.

11. Based on section 112 of the *Evidence Act* and the case of *Raila Odinga & 5 others v Independent Electoral & Boundaries Commission & 3 others SC Petition No 5 of 2013*[2013] eKLR, the petitioners submitted that while the evidential burden was shifted to the 3rd respondent to show that she indeed attended secondary school and possesses a valid post-secondary qualification, there is no evidence on record presented by any of the respondents in court to demonstrate that the 3rd respondent presented any secondary school qualifications to enable her acquire any post-secondary school qualifications. The petitioner submitted that it would have been expected from the 3rd respondent to swear an affidavit evidencing she attended secondary school to qualify her to attain a post-secondary college education.

12. According to the petitioner, the petitioners joint letter dated 9th March, 2021 to the 3rd respondent requesting information presented by the 2nd respondent during clearance was ignored and/or neglected to issue them with the documents hence a clear indication that the 3rd respondent did not possess the required educational requirements for her to run for the senatorial seat. It was submitted that the nomination certificate was issued unprocedurally, unconstitutionally, unlawfully hence void.

13. It was submitted that the 4th respondent did violate article 99(1) (d) of *the Constitution*, when they cleared the 3rd respondent who did not possess the relevant academic certificates and/or qualifications. Accordingly, it was submitted that the decision by the respondents was tainted with illegalities and procedural deficiencies thereby rendering the nomination and clearance of the 3rd respondent a candidate for quashing and revocation by this court. The petitioners urge court to issue an order of certiorari quashing the 1st respondent impugned decision and an order revoking the 3rd respondent's disputed nomination.

14. As regards jurisdiction of this court it was submitted that the petitioners had approached the commission seeking revocation of the clearance but the commission rejected their plea hence the genesis of this Petition. According to the petitioners, the Petition was lodged before the election hence not a reserve of the Election Court. It was further submitted that the jurisdiction of this court to hear

pre-election disputes was settled in Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 Others Ahmed Ali Mukhtar (Interested Party) (2019) eKLR where the court held that pre-election disputes are a reserve of the IEBC or this court acting in judicial review or exercising their supervisory jurisdiction.

15. According to the petitioners, the 1st and 4th respondents should bear the costs of the Petition since the infringement of *the Constitution* was brought to their attention but ignored the same.

16. The petitioner therefore sought the following orders:

    (1) A declaration that the provisions of section 22(1)(b) (deleted and amended) of the Election Act,2011 are still in force pursuant to the provisions of Section 22 of the *%202 Interpretation and General Provisions Act*.

    (2) A declaration that the 3rd respondent does not possess a valid post-secondary school as required under section 22(1)(b) of the *Elections Act*, 2011.

    (3) A declaration that the 3rd respondent did not meet the educational requirement to contest as a member of parliament as set out in article 99(1) of *the Constitution* and section 22(1)(b) (deleted) of the *Elections Act*,2011.

    (4) A declaration that the 1st and 4th respondent violated article 99(1) d of *the Constitution* by issuing a nomination certificate to the 3rd Respondent while she did not meet the educational requirement.

    (5) An order of *certiorari* to remove to the High Court and quash the decision of the 1st respondent that granted nomination certificate and clearance of the 3rd Respondent to contest the Machakos County Senatorial by-election.

    (6) An order revoking the nomination of the 3rd respondent to contest the Machakos County Senatorial by-election.

    (7) Any other order that this honourable court may deem fit and just to grant to ensure that the rule of law is upheld by the respondents in exercise of its legislative function

    (8) The cost of the Petition.

The 1st and 4th Respondents' Response

17. The Petition was opposed by the 1st and 4th respondents. According to them, on 26th January, 2021 the 1st Respondent cleared the 3rd respondent together with other 10 candidates to vie for the vacant Machakos County Senatorial seat after they presented all the requisite documents and clearances. In response to the petitioners request to revoke the 3rd respondent's nomination on grounds that the 3rd respondent did not possess the requisite educational qualification to enable her contest for the vacant position, the Commission cited section 22(1A) of the Election Act and contended that based on the said provision, the 3rd respondent was not required to possess a degree for her registration as a candidate. They therefore were of the view that they fully complied with the registration of the 3rd respondent.

18. As regards the orders by the petitioners, it was averred that the orders are not awardable for the reason that they have either been overtaken by events and/or this court was not properly moved to grant the orders sought. It was contended that this court lacks jurisdiction to grant the orders sought because it was not constituted as an Election Court and they urged the court to dismiss the Petition with costs for lack of merit.

19. On the respondent's part, it was submitted that this court lacks jurisdiction to entertain the Petition since the main effect of the reliefs sought would be to annul the election of the 3rd respondent as the Senator of Machakos County. According to the 1st and 4th respondent, this is not a duly constituted Election Court. It was submitted that as soon as the declaration of results by the 4th respondent was done on 18th March, 2021, IEBC's dispute resolution mechanism and subsequent pre-election appeal thereof, over the dispute becomes overtaken by events and that any subsequent dispute following the announcement of results by the 4th respondent is a post-election dispute and ought to be presented by way of an election petition before a duly constituted election court. Reference was made to section 74(1) of the *Elections Act*.

20. According to the respondents, the dispute is a dispute subsequent to the declaration of election results which ought to be in the hands of an Election Court.

21. In the said respondents' submissions, the reliefs sought by the petitioners discloses remedies that can only be granted by an Election Court. According to the respondents, if this court finds the relief sought are meritorious, it would simply mean a declaration annulling the 3rd Respondent's election, yet this court does not have jurisdiction to annul the 3rd respondent's election. Reliance was placed on the cases of Nairobi Civil Appeal No 328 of 2019-*National Rainbow Coalition Kenya (NARC) v Independent Electoral & Boundaries Commission & others* and *Moses Mwicigi & 14 others v Independence Electoral and Boundaries Commission & 5 others* [2016] eKLR.

22. According to the respondents, the reliefs sought have either been overtaken by events or ought to have been presented to this court in the form of an Election Petition. It is submitted that in *Moses Mwicigi case (supra)* the Supreme Court frowned upon the presentation of Election Petitions either as Constitutional Petitions or Judicial Review Applications. In *National Rainbow Coalition Kenya (supra)* the court held that where there is a prescribed procedure, it should be strictly followed.

23. The respondent asserted that whether legitimate or otherwise, the petitioner's grievances regarding the 3rd respondent's academic testimonials ought to have been presented in the frame of an election petition after the results of the elections were declared on 18th March, 2021. It was therefore the respondents submissions that the prayers sought in the Petition cannot be granted as they seek this court to invoke jurisdiction which it does not possess hence the Petition should be dismissed.

24. According to the said respondents, section 22(1A) of the Election Laws (Amendment) Act No 1 of 2017 is clear on the postponement of the implementation of the requirement of a post-secondary qualification as a criterion for eligibility for prospective contestants to the general elections to be held after 2017. The respondents urged the court to look at the Parliament's legislative intent when putting in place the provisions of section 22(1A). According to the respondents, there has been no allegations of unconstitutionality in respect of section 22(1A) of the *Elections Act*.

25. In the submissions of the said respondents, it would result to absurdity if this court interprets the provision of section 22(1A) of the *Elections Act* in a manner that clearly goes against the legislative intent. According to the respondents, if Parliament's intention would have been to have the post-secondary qualification be in place, then nothing would have been easier that for the same to be captured in the statute amendment law which introduced section 22(1A). Reliance was placed on the case of *Republic v Council of Legal Education & another Ex parte Sabiha Kassamia & another* [2018] eKLR where the court held that in interpreting a statute, the court should give life to the intention of law maker instead of stifling it.

26. The respondents urge the court to find and hold that Parliament intent was crystal clear that the provisions of section 22(1A) was intent on postponing the requirement for post-secondary academic

qualifications for contestants other than the Governors and Presidents to the General Elections of August 2022.

27. As to the applicability of the provision of section 22 of the *Interpretation and General Provisions Act*, it was submitted, first, that a reading of section 22 implies that there must be in existence a 'new' statute and this 'new' law must have repealed or is in the process of repealing an 'old one. Secondly, the operationalization of the 'new' statute substituting the 'old' one, ought not to have come into force. The said respondents' understanding of section 22 aforesaid is that pending the implementation/ operationalization of the new statute, the provision of the 'old' law would remain in force. In this case it was submitted that the petitioners have failed to demonstrate with requisite specificity the statute that is being replaced and the one coming into effect. According to the respondent, it is the provision applicable would be the provision in the second amendment of section 22 that took place on 4th January, 2013.

28. As regards the court decisions relied upon by the petitioners, it was submitted that the crux before those courts are not similar to the dispute before this court. In Civil Appeal No112 of 2014 - *John Harun Mwau case* , it was submitted that the gist of the Petition before the court was the constitutionality of section 24 of the *Elections Act* and specifically whether the requirements to impose education qualifications for one to be eligible for leadership was discriminatory and the issues in question before this court are not similar.

29. In conclusion, the said respondents urged the court to find that the 1st and 4th Respondents were not wrong in issuing the 3rd respondent with a nomination certificate; that the Petition is not a Constitutional Petition but rather an Election Petition challenging the election of the 3rd respondent; that the legislative intent of Parliament was clear that when enacting the amendment of the provision of section 22(1A) of the *Elections Act* and therefore section 22 of the *Interpretation and General Provisions Act* to be inapplicable to the current circumstances. The court was therefore urged to dismiss the Petition with costs to the 1st and 4th respondents as tax prayers money have been expended in defending the Petition.

The Response by the 2nd and 3rd Respondents

30. In response to the Petition, the 2nd and 3rd respondents filed a Motion dated 11th June, 2021 in which they sought to have the petition struck out. On 29th July, 2021, this court directed that the said application be heard together with the petition. The 2nd and 3rd respondents, apart from the said application, never filed any other response to the petition.

31. According to the said respondents, this court has no jurisdiction to determine the issues raised herein since the court does not have the jurisdiction to determine nomination disputes which is what is being raised herein as regards the 3rd respondent's academic qualifications.

32. It was further contended that the applicable law has already been established both vide statute law and case law and that tere is no such legal requirement prior to one running for elections as a Senator. It was contended that section 22 of the *Elections Act*, relied upon by the Petitioner was amended by section 8 of the Elections Laws (Amendment) Act No 1 of 2017 which provides that its provisions shall come into force and shall apply to qualifications for candidates in the general elections to be held after the 2017 general elections. It was contended that the said section is only applicable in the next general election in 2022 onwards.

33. It was averred that there is no evidence presented from the relevant institutions charged with recognizing degrees in Kenya that the 3rd respondent uttered a false degree certificate.

34. It was averred that the *Elections Act*, 2011 was preceded by the National Assembly and Presidential *Elections Act* and the Election Offences Act for the purposes of section 22 of the *Interpretation and General Provisions Act*.

35. In the said respondents' view, since the prayers sought have since been overtaken by events following the by-election, there is nothing left to be granted by this court.

Determination

36. I have considered the Petition, the affidavits in support and in opposition, the submissions and decisions relied upon. The issues that fall for determination in this petition are as follows:

    1. Whether this court has jurisdiction to entertain pre-election disputes.

    2. Whether the 3rd respondent was required to possess a degree certificate to vie for the Senatorial by-election for Machakos County

    3. Whether the 3rd respondent was possessed of post secondary academic qualifications

    4. Whether the law required the 3rd respondent to have post secondary school academic qualification.

    5. What orders ought the court to grant.

37. As regards the jurisdiction of this court, it is clear that what is being challenged in this petition is an action emanating from the nomination process. It is contended that the 3rd respondent ought not to have been nominated by the 4th respondent as she lacked the requisite academic qualifications to vie for the position of Senator. In challenging this court's jurisdiction, the respondents section 74(1) of the *Elections Act* which provides that:-

    Pursuant to article 88(4)(e) Constitution, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.

38. On his part, the petitioner contended that the jurisdiction of this court to hear pre-election disputes was settled in *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others Ahmed Ali Mukhtar (Interested Party)* (2019) eKLR where the court held that pre-election disputes are a reserve of the IEBC or this court acting in judicial review or exercising ITS supervisory jurisdiction. In that case, the Supreme expressed itself as hereunder:

    [68] So as to ensure that article 88(4)(e) of *the Constitution* is not rendered inoperable, while at the same time preserving the efficacy and functionality of an election court under article 105 of *the Constitution*, the Court developed the following principles:

        (i) (i) all pre-election disputes, including those relating to or arising from nominations, should be brought for resolution to the IEBC or PPDT, as the case may be, in the first instance;

        (ii) (ii) where a pre-election dispute has been conclusively resolved by the IEBC, PPDT, or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under article 165 (3) and (6) of *the Constitution*, such dispute shall not be a ground in a petition to the election court;

        (iii) (iii) where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to the High Court sitting as a judicial review court, or in

exercise of its supervisory jurisdiction under article 165 (3) and (6) of *the Constitution*; the High Court shall hear and determine the dispute before the elections, and in accordance with the Constitutional timelines;

(iv) (iv) where a person knew or ought to have known of the facts forming the basis of a pre-election dispute, and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the election court;

(v) (v) the action or inaction in (iv) above shall not prevent a person from presenting the dispute for resolution to the High Court, sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under article 165(3) and (6) of *the Constitution*, even after the determination of an election petition;

(vi) (vi) in determining the validity of an election under article 105 of *the Constitution*, or section 75 (1) of the *Elections Act*, an election Court may look into a pre-election dispute if it determines that such dispute goes to the root of the election, and that the petitioner was not aware, or could not have been aware of the facts forming the basis of that dispute before the election.

[69] We believe that the foregoing principles may pave the way in streamlining the electoral dispute-resolution processes, both at the pre-election and post-election stages.

[80] On the basis of the foregoing reasoning, we find and hold that both the Election Court and the Court of Appeal wrongly assumed jurisdiction, in determining what was clearly a pre-election dispute, regarding the academic qualifications of the petitioner. However, as our principle number (v) (above) stipulates, a petitioner's inaction does not prevent him from presenting the dispute for resolution before the High Court, sitting as a judicial review court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of *the Constitution*.

[81] This Principle as read with Principle (vi) means that at any time, the judicial process is never closed. It also preserves the authority of *the Constitution*, in the event of the occurrence of certain "tragedies", to which our attention was drawn. For example, what would happen if a person who is not a citizen of Kenya were to slip through the IEBC vetting process and become elected MP, Governor, or even President" Or what happens if a person who is not qualified as provided for by *the Constitution*, slips through the IEBC vetting process and gets elected" The answer lies in the two principles. In the one instance, where the tragedy was not known, the Election Court assumes jurisdiction. In the other instance, where the tragedy was known, the High Court takes over under Article 165 to preserve *the Constitution*. This interpretative framework is not only holistic and purposive, it is also forward looking. After all, whatever can slip through the IEBC vetting process, can also slip through the Election Court petition processes! At the end of the day, the constitutional pre-election dispute resolution mandate of the IEBC is respected, the efficacy of the Election Court is preserved, and above all, the authority of *the Constitution* is intact!"

39. What I understand the Supreme Court to be saying in that case is that the jurisdiction of the High Court, sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under article 165 (3) and (6) of *the Constitution* is not lost in election matters simply because an election has taken place. That jurisdiction must always be retained in order to uphold and preserve the authority of *the Constitution*, in the event of the occurrence of what the Supreme Court termed as "certain tragedies".

40. Based on the said decision I find that this court is not deprived of the jurisdiction to entertain this petition merely because the challenge is to the qualification for nomination of the 3rd respondent which is a pre-election dispute and by the mere fact that an election has already been concluded.

41. The next question for determination is whether the 3rd Respondent was required to possess a degree certificate to vie for the Senatorial by-election for Machakos County. It is true that section 22 of the *Elections Act* before its amendment prescribed a post secondary school qualification as a minimum requirement for anyone seeking to contest for election as a Member of Parliament. That provision was amended vide Section 8 of the Elections (Amendment) Act that required any aspirant vying as a Member of Parliament to hold a degree from a recognized university in Kenya. However, the section 22(1A) of the Election Act provided that:

Notwithstanding subsection (1), the section shall come into force and shall apply to qualifications for candidates in the general election to be held after the 2017 general election.

42. It is the interpretation of this provision that would determine whether or not section 22 of the *Elections Act*, prior to its suspension, applies to the 3rd respondent. In *Alfred Muhadia Ngome & another v George W Sitati & 2 Others* Civil Application No Nai 268 of 1999 it was held that:

> " The duty of the court in construing a statute is to ascertain and to implement the intention of the Parliament as expressed therein. Where Parliament has used non-technical legislation (sic) words which, in there ordinary meaning cover the situation before the court, the court will generally apply them literally provided that no injustice or absurdity results. In such case it is a reasonable presumption that Parliament or its draftsman has envisaged the actual forensic situation. But in many cases it will seem probable that Parliament or its draftsman have not envisaged the actual situation before the curt; and the duty of the court in such circumstances will be to surmise, as best as it can, what Parliament would have stipulated if it had done so...A number of rules, founded on common sense have been evolved to assist the courts in this task - e.g. Parliament will be presumed not to intend injustice or absurdity or anomaly; but the most useful approach was laid down as long ago as Hydon's Case that the court will ascertain what was the pre-existing "mischief", (that is to say, defect) which Parliament was endeavouring to remedy; this will often give a guide to what remedy Parliament has provided, and to its extent and its sanction. See *F v F* (1970) 1 All ER 200 at 204 and 205...It was submitted that the use of the word "shall" in both regulation 4(1) and 4 was intended to have a mandatory effect and reference was made *Franco v King & others* [1993-2009] East Africa General Reports Election 61, the Privy Council decision in *Nair v Tiek* [1967] 2 All ER 34, *Kibaki v Moi & others* [1993-2009] East Africa General Reports Election 98. Further reference was made to *Osogo v Shikanga* Election Petition No 5 of 1998, where the court while relying on the said Privy Council held as follows:
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> "In applying the construction of section 20(1) of the Act...where the language of an Act is clear and explicit, we must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the Parliament."

43. As was held by the Court of Appeal in *Italframe Ltd v Mediterranean Shipping Co* [1986] KLR 54; [1986-1989] EA 174:

> " It is not competent to any court to proceed upon an assumption that Parliament has made a mistake, there being a strong presumption that Parliament does not make mistakes. If blunders are found in legislation, they must be corrected by legislature, and it is not the

function of the Court to repair them. Thus while terms can be introduced into a statute to effect to its clear intention by remedying mere defects of language and to correct obvious misprints or misnomers no provision which is not in the statute can otherwise be implied to remedy an omission...It is one thing to introduce terms into an Act of Parliament in order to give effect to its clear intention by remedying mere defects of language. It is quite another thing to imply a provision which is not in the statute in order to remedy an omission, without any ground for thinking that you are carrying out what Parliament intended. It is not the function of the courts to repair the blunders that are to be found in legislation. They must be corrected by the legislature."

44. Maxwell on the *Interpretation of Statutes, 10th Edition* states that:

> "The first and most elementary rule of construction is that it is assumed that words and phrases of technical legislation are used in their technical meaning if they have acquired one, and otherwise, in their ordinary meaning; and secondly that the words and phrases are to be construed according to the rules of grammar. It is very desirable in all cases to adhere to the words of an Act of Parliament, giving to them that sense which is their natural import in the order in which they are placed. From these presumptions it is not allowable to depart where the language admits of no other meaning. Nor should there be any departure from them where the language under consideration is susceptible of another meaning, unless adequate grounds are found, either in the history or cause of the enactment or in the context or in the consequences which would result from the literal interpretation for concluding that that interpretation does not give the real intention of the legislature. If there is nothing to modify, nothing to alter, nothing to qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences...The underlying principle is that the meaning and intention of a statute must be collected from the plain and unambiguous expressions used therein rather than from any notions which may be entertained by the court as to what is just or expedient...However unjust, arbitrary or inconvenient the meaning conveyed may be, it must receive its full effect. When once the meaning is plain, it is not the province of a court to scan its wisdom or its policy. Its duty is not to make the law reasonable, but to expound it as it stands, according to the real sense of the words."

45. The petitioners have not urged this court to adopt an interpretation other than that which is expressed by Parliament when it enacted section 22(1A) of the Election Act. Construing the same in the ordinary and natural meaning of the words it is clear that Parliament intended to substitute the requirement of a post-secondary qualification as a criterion for eligibility to vie for parliamentary seats with that of holding of a degree from a university recognized in Kenya. Having passed the said amendment, Parliament proceeded to suspend its operation till the general election to be held after the 2017 general election. The election the subject of this petition was not a general election. It was a by-election. In my view there must have been good reason why Parliament exempted the application of the section to the 2017 general elections and expressly provided that it would only apply to the general election to be held after the 2017 general election as opposed to all elections to be held after the 2017 general elections. Had Parliament provided that the section would apply to elections held after the general elections of 2017, without qualifying that it would apply to general elections, the section would, no doubt, have applied to the 3rd respondent.

46. It follows that the requirement that those vying for Parliamentary seats must hold a degree from a university recognized in Kenya did not apply to the 3rd respondent when she vied for the position of Senator for Machakos County in the 2021 by-election.

47. The next question for determination is whether the 3rd Respondent was possessed of post secondary academic qualifications. To determine this issue, the court must interrogate instances of the burden of proof in election disputes. In *Raila Odinga & anor v IEBC & 2 Others* [2017] eKLR, the Supreme Court held that:

> "[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant throughout a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting" and "its position at any time is determined by answering the question as to who would lose if no further evidence were introduced."
>
> [133] It follows therefore that once the court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behoves the Respondent to adduce evidence to prove compliance with the law."

48. Whereas the legal and evidential burden rests with the Petitioner at the onset of the trial, depending on the manner he discharges it, the evidential burden keeps shifting and its position at any time would be determined by ascertaining who would stand to lose if no further evidence were introduced. The legal burden of proof in an election petition rests with the petitioner; for he is the party desiring the court to take action on the allegations in the petition. The evidential burden initially rests upon the party bearing the legal burden, but as the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence.

49. Therefore, where the petitioner has laid prima facie evidence against the Respondent including the electoral body which as matter of law must be a respondent in an election petition, the law says that evidential burden has been created on the shoulders of the respondent who would fail if he does not adduce evidence in rebuttal. It is, thus, not in doubt that at the point where the Respondent would fail without further evidence, the Respondent should discharge the evidential burden through offering evidence in rebuttal. If the respondent offers no evidence in rebuttal, judgment may be entered against him or her on the basis of the preponderant evidence adduced by the petitioner. The petitioner will not, however, succeed because the respondent has not offered evidence in rebuttal but because the petitioner has proved his case to the required standard of proof, and the absence of evidence in rebuttal by the respondent only sanctifies the confidence of the court to enter judgment in favour or the petitioner. Of the essence is that the evidential burden is the obligation of the respondent once it has been properly created by the evidence tendered, and failure to discharge the evidential burden disadvantages the Respondent with the result that he fails and the petitioner succeeds.

50. In *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others,* Nairobi Election Petition Appeal 2 of 2018, the Court of Appeal while upholding the finding of the trial court that the evidentiary burden shifted when the appellant failed to appear in court to be cross-examined on the contents of his affidavit, expressed itself as hereunder:

> " The cavalier attitude evinced by the appellant in the face of serious questions about his eligibility to vie for the seat of governor was compounded and rendered tragic by his choice to stay away from the proceedings and therefore not only fail to present his side of the story, but also keep himself from being cross-examined on his replying affidavit thereby robbing it of any probative value. The learned Judge in his analysis of the evidence and the appellant's failure to present himself in court expressed himself thus at paragraph 192:
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> 'I have taken note of the fact that although the 1st respondent had the opportunity to either deny or challenge all these facts, he did not do so in his replying affidavit. He also failed to appear in court and shed light on this issue. The petitioners' evidence therefore remained uncontroverted. The petitioners had therefore succeeded in shifting the evidentiary burden of proof to the 1st respondent. The moment they produced the graduation list and the alleged admission made before the Committee of the House of not having had a degree by 2014, the burden shifted to the 1st respondent to prove that the Bachelor's degree dated 1st March 2012, had been genuinely issued to him by Kampala University. This he failed to.'
>
> With respect ... the learned Judge's reasoning cannot be faulted. Nor can he be blamed for stating that what was placed before him by the Petitioners did establish a prima facie case about the invalidity of the degree dated 1st March 2012, which therefore shifted the evidential burden of proof to the appellant to discharge. The learned Judge remained faithful to the law on burden of proof in that the legal burden remained with the 1st and 2nd respondents but a basis had been established for the evidentiary burden to shift to the appellant. It therefore behoves the Petitioner to go beyond generalised claims and provide clear and cogent evidence for the onus of proof to shift."

51. In *John Harun Mwau & 2 Others v IEBC & 2 others*, Supreme Court Presidential Election Petitions 2 & 4 of 2017, the Supreme Court restated this requirement as follows:

> " As stated in both the *Raila* 2013 and 2017 decisions, the burden of proof, at all times, lies on a petitioner and generalized claims, without evidence that meets clear threshold, are of no value. The petitioner must supply evidence in support of their claims and this proof must be supplied to the required standard."

52. The Supreme Court in *Alfred Nganga Mutua & others v Wavinya Ndeti & Anor* Supreme Court Petition 11 of 2018, while addressing the question of whether the recruitment of public officers as agents of the appellant had been proved. It stated:

> "(45) As we have stated, this allegation amounted to commission of an election offence proof of which the law requires to be beyond reasonable doubt. With profound respect, the Court of Appeal erred in finding that the said Urbanus Wambua Musyoka was one and the same person as the Chief Officer of the Machakos County Government. Other than making that allegation in their petition and in the evidence of the 1st respondent in her supporting affidavit at Par. 85 (Volume 3) wherein she made reference to annexture WN 27, the respondents never provided any proof of the allegation that the said

> Urbanus Wambua Musyoka was one and the same person as the Chief Officer of the Machakos County Government. A mere allegation cannot be proof, leave alone proof to the required standard of beyond reasonable doubt. The respondents definitely needed to do more than that. In our respectful view therefore, the learned trial Judge was quite right in finding that the respondents had not discharged their burden of proof on that allegation to the required standard. We also find no anomaly in the trial Judge's suggestion that, to discharge their burden of proof on that allegation, the respondents should have invoked article 35 of *the Constitution* and obtained records from the Machakos County Government to verify that allegation. In the circumstances, we find that the Court of Appeal erred in basing its nullification of the 1st appellant's election partly on that ground."

53. However, the evidentiary burden will not shift where the Petitioner relies on hearsay evidence. In *Bernard Kibor Kitur v Alfred Keter & IEBC*, Supreme Court Petition 27 of 2018, the court ruled that having found that the evidence relied on by the trial court to determine that the petitioner had met the evidentiary burden and that it had shifted amounted to hearsay, the Court of Appeal was right to find that the Petitioner's evidentiary burden of proof did not shift to the Respondents.

54. In this case, the legal burden of proof was on the petitioner to prove that the 3rd respondent had no post secondary academic qualification. In setting out to prove this fact, the petitioner, apart from relying on what he called reliable sources, which could not be verified, relied on the affidavit sworn by one Anthony Wambua Nzau, who averred that he was the 3rd respondent's nephew and that both in 2017 elections and during the by-elections, he was engaged by the 3rd respondent as her campaign manager. He swore that in that capacity, he came to know that the 3rd respondent did not complete primary school and therefore could not have obtained post-secondary school qualification recognized in Kenya. The 3rd respondent did not swear any affidavit to controvert this very damning deposition.

55. As what the said deponent stated was a negative averment, it is my finding that the burden shifted to the 3rd respondent since the deponent stated that due to his position, a position that included facilitating the 3rd respondent's clearance by several constitutional bodies, he was unable to vouch for the 3rd respondent's academic qualification, a fact that ought to have come to his knowledge by virtue of his position as the 3rd respondent's campaign manager. I appreciate that under section 107(1) of the *Evidence Act*, cap 80 Laws of Kenya, "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." I also appreciate the legal maxim that omnia praesumuntur legitime facta donec probetur in contrarium (all things are presumed to have been legitimately done, until the contrary is proved). However, as was held by Seaton, JSC in the Uganda Case of *JK Patel v Spear Motors Ltd* SCCA No 4 of 1991 [1993] VI KALR 85:

> " The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant. The burden of proof in any particular case depends on circumstances in which the claim arises. In general the rule which applies is ei qui affirmat not ei qui negat incumbit probatio. It is an ancient rule founded on considerations of good sense and it should not be departed from without strong reasons...As applied to judicial proceedings the phrase "burden of proof" has two distinct and frequently confused meanings, (1) the burden of proof as a matter of law and pleading – the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond reasonable doubt; and (2) the burden of proof in the sense of adducing evidence.... The onus probandi

rests, before evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgement if no further evidence were adduced." See *Constantine Steamship Line Ltd v Imperial Smelting Corp* [1914] 2 All ER 165 (HL); *Trevor Price v Kelsall* [1975] EA 752 at 761; Phippson on Evidence 12th Ed Para 91; Phippson At Para 95."

56. Similarly, the Supreme Court of Uganda in *Sheikh Ali Senyonga & 7 Others v Shaikh Hussein Rajab Kakooza and 6 Others* SCCA NO 9 of 1990 [1992] V KALR 30 was of the view that the general rule that he who alleges must prove applies and since it was the appellants who were alleging that the fifth appellant was qualified, to hold that the negative must be proved by the respondents would be to impose an unnecessary burden on them.

57. In this case, the 3rd respondent failed to prove that she had a post secondary academic qualification, a burden which had shifted to her.

58. According to the petitioner by inserting sub-section 1A in the amendment to section 22 of the *Elections Act*, Parliament suspended the new provision until after the General Elections to be held after 2017 hence by the time the 1st and 4th respondents declared the 3rd respondent to vie for the Machakos senatorial by-election, section 22(1)b of the *Elections Act* was still in force pursuant to the provisions of section 22 of *Interpretation and General Provisions Act*. In other words, the petitioner contends that the effect of the suspension of the coming into effect of the amendment revived the substituted or deleted provision. Sections 22 of *Interpretation and General Provisions Act* provides as hereunder:

Where a written law repeals wholly or partially a former written law and substitutes provisions for the written law repealed, the repealed written law shall remain in force until the substituted provisions come into operation.

59. The respondents' argument is however that a reading of Section 22 implies that there must be in existence a 'new' statute and this 'new' law must have repealed or is in the process of repealing an 'old one. Secondly, the operationalization of the 'new' statute substituting the 'old' one, ought not to have come into force. The said respondents' understanding of section 22 aforesaid is that pending the implementation/operationalization of the new statute the provision of the 'old' law would remain in force. In this case it was submitted that the petitioners have failed to demonstrate with requisite specificity the statute that is being replaced and the one coming into effect. According to the Respondent, it is the provision applicable would be the provision in the second amendment of section 22 that took place on 4th January, 2013.

60. In this case, the suspended amendment came into effect on 4th January, 2013 but was subsequently suspended. Accordingly, I agree that section 22 of cap 2 is inapplicable to these circumstances as the said section applies to situations where a new legal provision has yet to come into effect and not to a situation where the provision had come into effect but was subsequently suspended. It follows that the issue whether the law required the 3rd Respondent to have post secondary school academic qualification must be answered in the negative.

61. Having dealt with the issues placed before me in this petition, the conclusion I must come to is that this petition lacks merit and is hereby dismissed but being a matter of public interest, there will be no order as to the costs.

62. It is so ordered.

JUDGEMENT DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 11TH DAY OF FEBRUARY 2022.

G.V ODUNGA

JUDGE

Delivered in the presence of:

Mr Onyango for Miss Ngetich for the 1st and 4th Respondents

Mr Esibi for Ms Lumallas for the 2nd and 3rd Respondents

CA Susan