Orengo *v* Moi & 12 others (No 3)

High Court, at Nairobi May 30, 1994
O'Kubasu, Mbito & Mwera JJ

Election Petition No 8 of 1993

Elections-*qualification of presidential elections - presidential elections-term of office-where the petitioner challenged the election of a President on the main ground that he had already served the maximum period of two terms as prescribed under section 9(2) of the Constitution of Kenya-whether the amendments to the Constitution under Act No.6 of 1992 were to be applied retrospectively or prospectively-whether therefore the provisions of section 9(2) could have retrospective effect*
Statutes*-interpretation of statutes-retroactive versus prospective application of statutes-amendment of the Constitution limiting the office of president to two terms of five years each-whether the amendment was to apply retrospectively-whether the incumbent who had served for over 15 years was barred from holding the office-Constitution section 9*

The petitioner's main ground of claim was that the election of the 1st respondent as the President of the Republic of Kenya following the 1992 presidential election was prohibited by section 9(2) of the Constitution of Kenya. The section provided that a person shall not be elected to the office of President for more than two terms with each term lasting for five years. It was contended that the first respondent had already served 3 terms; 1979-1983;1983-1988; and 1988-1993. The petitioner asserted that section 9(2) of the Constitution was clear in its wording and it applied as it stood. The 1st respondent asked the court to say whether the effects of section 9(2) of the Constitution were retrospective or prospective. The petitioner further submitted that at the time it passed the amending Act, Parliament was aware that the 1st respondent had served for more than two terms prior to 1992, but nevertheless it had not incorporated any words saving the 1st respondent from the effects of the new section.

Held:

1. The court's duty was to interpret the law as it was gleaning the intention of Parliament from the words used in the statute being construed. The plain words of a statute being precise and ambiguous were to be given their ordinary and natural meaning.

2. Courts did not and could not construe the law to bring out what

Parliament ought to have legislated. The Courts were to construe the intention of Parliament as was clearly expressed in the statute in the question.

3. Act No 6 of 1992 amended the Constitution to such an extent that could be properly described as giving a "new look" to the election and holding of office of the President. From the language of the whole Act, the set up of sections and the reasonable and sensible flow therein it was clear to the court that Parliament made this law with focus on the future.

4. In reading, construing and applying section 9 of the Constitution, the court was of the view that the ordinary and natural meaning thereof was one attached to the words used therein, the context of the amending Act *vis-à-vis* the Constitution and the effect of the same: the global effect was one attaching to the future election of the office of the President.

5. From the plain language of the statutes, they were to be interpreted to operate prospectively. Only that statute could say otherwise. Accordingly it could not be imputed that a statute could as well have been intended to operate retrospectively.

6. A statute had to have words to the effect that it could operate retrospectively or such an effect could be gleaned from a necessary implication as conveyed by the words used.

7. Section 9(2) of the Constitution was not meant to operate retrospectively.

Petition dismissed.

Cases

1. *R v The Inhabitants of St Mary Whitechapel* (1848) 12QB 120; 116 ER 811
2. *L'Office Cherifien des Phospates v Yamashita* [1994] 2 WLR 39
3. *Yew Bon Tew v Kenderaan Bas Mara* [1982] 3 All ER 833
4. *R v Chandra Dharma* [1905] 2 KB 335
5. *West v Gwynne* [1911] 2 Ch D1
6. *Re A Solicitor's Clerk* [1957] 3 All ER 617
7. *Secretary of State for Social Security and another v Tunnicliffe* [1991] 2 All ER 712
8. *Barber v Pidgen* [1957] 1 KB 664; [1937] 1 All ER 115
9. *Chebaro v Chebaro* [1986] 2 All ER 897; [1987] 2 WLR 1090
10. *Somani's v Shirinkhanu* [1970] EA 580
11. *Municipality of Mombasa v Nyali Ltd* [1963] EA 371
12. *Patel v Republic* [1968] EA 97
13. *Moi v Matiba & 2 others* (2008) 1 KLR (EP) 715

Statutes

1. Constitution of Kenya, section 5, 7, 9, (2), 13, 32, 42, 46(6), 84, 123, 127
2. Conveyancing Act 1892 [UK] sections 3, 12(1)
3. Landlord and Tenant (Shops, Hotels & Catering Establishments) Act (cap 301) section 1(1)
4. Presidential and Parliamentary Elections Regulations (cap 7 Sub) regulation 40

Advocates

Mr Nowrojee for the Petitioner
Mr Inamdar for the 1st Respondent
Mr Gautama for the 2nd to 11th Respondents
Mr Kinyanjui & Mrs Onyango for the Attorney General

May 30, 1994, the following Judgment of the Court was delivered.

This petition was filed by one James Aggrey Orengo who is Member of Parliament for Ugenya Constituency and was a voter in the December, 1992 General Election. The petition was filed on 29th January, 1993 against one Daniel Toroitich Arap Moi (who was elected President of Kenya in this said election). The other respondents are the Electoral Commission of Kenya (2nd respondent) its Chairman (3rd respondent) and the rest are members of the Electoral Commission. There were twelve (12) respondents in all.

The crux of this petition lies in the following paragraphs:-

> "9. The result of the said Presidential Election was published in the Kenya Gazette of 4th January, 1993 by the Declaration of Persons Elected President dated the 4th January, 1993 Gazette Notice No 1 of 1993 made by the second respondent under the hand of its Chairman the third respondent by which the first respondent was declared elected as the President of Kenya.
>
> 10. Your petitioner states that the said election of the first respondent is prohibited by law and is contrary thereto.
>
> 11. The first respondent by the aforesaid purported election as President is and has become a person elected to hold office as President for more than two terms.
>
> 12. This is prohibited by s 9(2) Constitution of Kenya which enacts that
>
> > 'No person shall be elected to hold Office of President for more than two terms"

13. The first respondent has already been elected to hold office as President for the following terms:
1. 1979 – 1983
2. 1983 – 1988 and
3. 1988 – 1993

14. The first respondent's purported election by the aforesaid presidential election of the 29th December, 1992 and the aforesaid declaration thereof constitute on election of a person to wit the first respondent to hold office as President for more than two terms.

15. The same is as aforesaid prohibited by s 9(2) the Constitution of Kenya and the first respondent's purported election by the aforesaid presidential election of the 29th December, 1992 and the aforesaid declaration of his election as such President are accordingly invalid and are each null and of no effect.

16. By reason of all the foregoing the first respondent has not been validly elected as President"

Pararagraph 17, 18 and 19 of the petition were withdrawn.

The prayers that the petitioner is seeking from this Court are as follows:-

A. It be determined under section 10 Constitution of Kenya that the said Daniel Toroitich Arap Moi was not and has not been validly elected as President in the presidential election held on 29th December, 1992.

B. It be determined that the said Daniel Toroitich Arap Moi was not duly elected and that the said presidential election was void.

C. It be ordered that the respondents be condemned to pay your petitioner's cost of this petition and matters incidential thereto.

D. Such further other or consequential orders as this honourable Court deem just".

A short history relating to this petition is that there was Presidential and National Assembly Election held in Kenya in December, 1992. A total of eight candidates offered themselves to the electorate (as Members of Parliament in their respective Constituencies) and for Office of the President. One of those eight was the 1st respondent (the others being Hon Matiba, Hon Kibaki, the late Hon Odinga, Mr Ng'ang'a, Hon Anyona, Dr

Tsuma and Mr Mwau). After the election the 1st respondent was declared the winner of the presidential race. The petitioner challenges this in this petition. The challenge is based on the provision of the law in the Kenya Constitution (section 9(2)) to which much reference will be made later.

When the hearing of the petition opened before us Mr Nowrojee with his team argued the petitioner's case. Mr Inamdar was for the 1st respondent while Mr Gautama appeared for the rest of the respondents. Each of Mr Inamdar and Mr Gautama had a team of assistants. Mr Kinyanjui appeared for the Hon Attorney General's Chambers and was joined in the last stages of the hearing by Mrs Onyango.

As stated above this petition was based solely on the provision of section 9(2) of the Constitution of Kenya and thus only legal submissions were heard as there was no need for oral evidence being adduced. The submissions were long, learned and lucid. At times we heard what could as well pass for lectures in politics or classroom coaching - but all in the name of putting forth a point. Many cases were cited by either side and many a treatise was quoted and that is how it should be. But at the end of it all the main question for us to determine was whether or not the 1st respondent was validly elected President of Kenya on 29th December, 1992 or he was prohibited to be so elected by virtue of section 9 (2) of the Constitution. The whole of section 9 of the Constitution reads:-

> "S 9 (1) The President shall hold office for a term of five years beginning from the date on which he is sworn in as President.
>
> 2. No person shall be elected to hold office as President for more than two terms.
>
> 3. The President shall unless his office becomes vacant by reason of his death his resignation or his ceasing to hold office by virtue of section 10 or section 12 continue in office until the person elected as President at a subsequent presidential election assumes office.
>
> 4. The holding of the office of the President shall be incompatible with the holding of any office of profit or of an office in any professional or labour organization and with any professional activity or any other public employment.

This section 9 of the Constitution was ushered in by an amending Act No 6 of 1992. This Act was assented to on 28th August, 1992 and the same date was for its commencement. This section 9 has in its marginal notes

"Term of Office of President" and simply put it says that from the date a President is sworn in after election he/she will serve a term of five years, and that no person shall hold office as President for more than two terms (for a total of ten years served in a stretch?).

Prior to this amendment the original section 9 reads thus:-

> "S 9(1) The President shall unless his office becomes vacant by reason of his death his resignation or his ceasing to hold office by virtue of section 10 or section 12 of this Constitution, continue in office until the person elected as President at a presidential election held following a dissolution of Parliament assumes office.
> 2. During this tenure of office, the President shall not hold any office of profit other than that of President and that of Member of the National Assembly".

For this original section 9 it had in its marginal notes "Tenure of Office of President". Thus at a glance the two sections can be seen not only to refer to matters like "term of office" and "tenure of office" but also the lay-out of each is different. As each counsel stood up to argue his case it will be noted that these features formed serious points of contention but suffice it to say here that while the old section 9 tied the holding of Office of President to the dissolution of Parliament and subsequent presidential election the new section 9 sets out a specific period within which one holds office of President – a five year term from the period one is sworn in. It also limits the number of terms one has to serve as President to two. The old section 9 did not have such limitation. Pausing here for a while, it may be useful to set out a brief history relating to Kenya's political and Presidential elections.

Prior to the 1992 general election Kenya had been in law and in fact a one party political state (on two previous occasions it had been a multiparty state). The law was as it was until August, 1992 probably reflecting a one-party philosophy. Not much was placed on how long a President served in office. Hence the late President Kenyatta served as President of Kenya from 1964 until his death in August, 1978 – having been so elected in 1964, 1969 and 1974. Then President Moi took over in 1978 and was so elected in 1979, 1983 and 1988, and then in 1992 but it is this last election of 1992 that is being challenged by this petition. We believe what we have said so far is not in dispute.

We still proceed with undisputed facts of this petition. Prior to introduction

of Act No 6 of 1992 not much was placed on how long a President served in office and that is manifested in the records as we have already demonstrate above. Probably that is why being in office was merely referred to as "Tenure of Office". But the 1992 election had another angle to it. Multiparty politics had been reintroduced in Kenya. Parliament felt that there ought to be a difference in the holding of Office of President. It passed this Act No 6 of 1992 limiting the time one could stay in the office as President to two five – year terms only. The 1st respondent had held Office of President on three previous occasions before this new law came into force. Should he then be deemed to have held two terms of office as envisaged by the present section 9 (2) of the Constitution and therefore not validly in office now? That is the million dollar question and for a total of about twenty days we sat listening to submissions for and against this point. While Mr Nowrojee argued that by virtue of section 9(2) of the Constitution the 1st respondent had already served more that two terms in office before the December, 1992 election and therefore in – eligible for election to that office again, Mr Inamdar and Mr Gautama were of a contrary view. It was all in the interpretation and application of section 9 (2) of the Constitution.

We wish to set out the points that should be known by all to be applicable in this kind of arguments strictly limited to the interpretation of statute that Bills ushering in Acts of Parliament plus the speeches, debates and memoranda etc thereto do not avail as aids in interpreting those Acts, that a Constitution like any other statute or document for that matter, is governed by the same canons of interpretation: that a foreign country's Acts, Bills or speeches to Bills should not be applied to interpret Acts of another country.

One interesting aspect of this petition is that all sides were in agreement that in interpreting section 9 (2) of the Constitution what is to be applied is the golden rule in interpretation of statutes. This briefly put means – that when the words of a statute are plain and precise therefore unambiguous, the meaning to be put to them should be ordinary and natural. All sides were also in agreement that the words used in section 9 (2) of the Constitution are plain precise and unambiguous. That being the case one wonders why there should be a dispute when there is so much agreement between the disputing parties!

We now move to the areas of dispute. The first point is to consider whether when interpreting section 9 (2) of the Constitution its effect should be retrospective or prospective. These terms as they will appear in the body

of this judgment simply mean whether the effect of the legislation refers to the past or should be applied to the future events from the time given legislation is passed. For Mr Nowrojee if we understood him well he was of the view that neither of these two terms should apply. He asserted that section 9(2) of the Constitution was clear in its wording and it applied as it stood. As for the arguments on Mr Inamdar's side we were urged to say whether the effects of section 9(2) of the Constitution were (are) retrospective or prospective. In applying that state of affairs parties to this petition and events that took place before August, 1992 and what will take place in the future are or will be affected. Without much detail here it is our considered view that we should say whether the effect of section 9 (2) of the Constitution is prospective or retrospective. We say so because as far as we saw from cases cited by both sides, probably only a few of them did not touch on the retrospective / prospective aspects of the laws in issue. Indeed, the cases invariably talked of amending statutes similar to the one we are concerned with there. Besides, this petition does not constitute a case stated whereby we are only asked to declare and pronounce the state of the law. This petition concerns specific people, dates and events. It is no doubt that our determination here will have effect on these.

Accordingly, we have to state here and Mrs Onyango for the Hon Attorney-General rightly urged us to do so. Whether the effects of section 9(2) of the Constitution are retrospective or prospective (or both?) In doing this we will refer, *inter alia* to cases (not all or to full length) cited before us, and so we begin with the arguments on behalf of the petitioner and as countered by those advanced on behalf of the 1st respondent.

Let us quote again section 9 (2) of the Constitution which is the centre of contention in this petition.

> "S 9(2) No person shall be elected to hold office as President for more than two terms."

According to Mr Nowrojee, the words of this section are clear, precise and even commanding. They say what need not be argued about, namely that no person should be elected to hold Office of President for more that two terms. All Kenyans were notified of this prohibition on the holding of Office of President when Act No 6 of 1992 was published. It took effect as from 28th August, 1992 as we have already noted. It did not give exception to bring anybody including the 1st respondent. Mr Nowrojee went on to say that if Parliament desired to exclude the 1st respondent from the effects of this provision it should have done so by express words. Parliament at the time it passed the amending Act was aware that the 1st respondent

had served for more than two terms, prior to 28th August, 1992, yet it did not incorporate any words saving him (1st respondent) from the effects of this new section.

Mr Nowrojee repeated that we should give the precise clear and unambiguous words of section 9(2) a natural and ordinary meaning inspite of the consequences that may flow from our application of the law. He argued that the 1st respondent had no vested interest in the Office of the President which required protection. Indeed, Mr Nowrojee, went on equity should not be read in the interpretation of section 9(2) he urged us to interpreted and apply the intention of Parliament as set out in this legislation and have nothing of what we thought was the law or what Parliament ought to have passed. As section 9 (2) stood, it did not envisage when the two terms could run. It was not concerned with the future the past or the present state of things: what it said was that a bar was imposed on the holding of Office of President for more that two terms and that was the thing that Parliament desired to put a stop to Mr Nowrojee called the previous legal regime ie prior to the 1992 amendment when one could be elected President as often as he offered himself for the post, as a mischief that this amendment sought to remedy. To him such tenure of office amounted to concentration of power in the hands of one individual for so long that it could be subject to abuse. Accordingly that had to come to an end and Parliament did just that. This Court should therefore interpret the amending section in that light and apply to it without undue regard to any consequences like calling for other presidential elections, he concluded.

On this point Mr Inamdar to some extent did agree with Mr Nowrojee. He conceded that section 9 (2) came into force with effect from 28th August, 1992 affecting all Kenyans alike. He also agreed and we too agree that the court's duty is to interprete the law as it is gleaning the intention of Parliament from the words used in the statute being construed. That the plain words of a statute being precise and unambiguous should be given their ordinary and natural meaning. It is also an established principle of construction of statutes and documents that judicial officers do not pronounce their own views as representing the intention of Parliament nor do they put their own words in the statutes before them in the name of construing the intention of the law given. It is also known that Courts do not and should not construe the law to bring out what Parliament ought to have legislated. The courts should and we are no exception, construe the intention of Parliament as clearly expressed in the statute in question. Where a statute is ambiguous for any reason tending to some-not-so-clear a meaning, of course the Court will look to the purpose of that statute as

a whole and employ such other acceptable aids as are available to give meaning and effect to that law. This is so because it is presumed that Parliament passes law for the public good and benefit - not mischief. In this regard we were therefore not inclined to accept the argument put forth by Mr Nowrojee that a mischief obtained in the pre – August 1992 when one could be elected President again and again. A valid constitutional provision was in place and it cannot be said that it provided for anything other than the holding of a public office for public good.

Now turning to the part of his submission that did not accord with that of Mr Nowrojee, Mr Inamdar argued that section 9(2) of the Constitution came into force on the 28th August, 1992 with a clear mandate to operate prospectively. The words used in the amending section were in the future tense and so it was clear that the section was meant to operate from the commencement date onwards and not backwards. The dictionary meaning of the word "shall" used in section 9(2) was read to us from several sources. Several cases were cited where it was apparent that when the word "shall" is used in a statute without any other words or impression tending to the opposite, the legislation should be considered to be prospective in operation.

Mr Inamdar further submitted that the language in section 9(2) was different from that in the old section. It brought into force totally different regime of law. It used the word "term" for the first time in defining Office of the President. A specific period of five years was fixed as one "term" of office which ran from the time a person elected as President was sworn in. This meant a clean break from the past when a President held a "Tenure of Office" rather loosely tied to the life of Parliament. He argued that his client (1st respondent) had held a tenure of office in the past on more than two occasions but that would not be referred to as terms of office as it was submitted on behalf of the petitioner. Mr Inamdar urged us to see all these when interpreting section 9 (2) adding that indeed it had put in place some new disabilities ie limiting terms of office to two only. These did not exist before 28th August, 1992 and should not be put in the way of 1st respondent. Such a state of things could only work inequity and unfairness to his client whose right as a Kenyan to offer himself for election as President in 1992 could be prejudiced if the petitioner's submissions were accepted. Further it was submitted that the words of section 9 (2) were so plain and clear that there was no doubt that the provision was intended to operate prospectively. In this case there was no need for Parliament to put saving clauses in the amending Act to exclude or protect the 1st respondent from being affected by this new law. Mr Inamdar went on to argue that if this

new law was supposed or intended to operate restrospectively, Parliament had power under section 46(6) of the Constitution to say so. That it did not say that section 9 (2) was to operate retrospectively it should only be seen that Parliament intended it to operate prospectively.

Having considered these submissions let us know consider what we gather from the words of the section. Let us look a the whole Act No 6 of 1992 as it amended the provisions of the Constitution that concern us here. Let us see the following:-

The old section 5 said (in paraphrase) *inter alia* that a person shall be nominated for election of President if and shall not be qualified unless he was a citizen of Kenya, had attained the age of 35 years and was registered in some constituency as a voter in an election to the National Assembly. These were three requirements for one who wished to run for Office of the President. After valid nomination and if necessary on being properly elected one would go to State House as President. Invariably there were no hitches between 1963 – 1992 for Presidential candidates. Come 28th August, 1992 and something more is added for one elected as President to march to State House and this is in the new paragraph (f) in section 5 (2) of the Constitution.

It reads:-

> "(f) the candidate for President who is elected as a Member of the National Assembly and who receives a greater number of valid votes cast in the Presidential election than any other candidate for President and who in addition receives a minimum of twenty five percent of valid votes cast in at lease five of the eight provinces shall be declared to be elected as President."

The old section 5(3) (f) never contained this requirement of 25% vote in at least five out of the eight Provinces of Kenya. All one needed was to garner the greater number of valid votes cast in a Presidential election and that was all. There was a further amendment to this section 5 but it concerns situations where there is a run-off election for the Presidency. This too is a new feature where there is a tie in the Presidential election.

There was also an amendment to section 7 of the Constitution. Whereas the old section said that one assumed office as soon as he was declared to be elected President the amendment of August, 1992 added that the elected President shall form the Government of the political party which

nominated him as a candidate for President. That is yet a new phenomenon. Then other sections were amended that do not concern us here (sections 13, 32, 42, 46, 88, 84, 123 and 127).

The overall picture gathered from the foregoing is that Act No 6 of 1992 amended Constitution to such an extent that can be properly described as giving a "new look" to the election and holding of Office of the President. It was clearly a new state of affairs that took into account the relaunched era of multiparty politics in Kenya. The threshold of this era was the impending election in December, 1992 and everybody had to start in that new period on equal footing. We have noted from the amendments starting with section 5 that with effect from 28th August, 1992 whoever was elected President had also to muster 25% of the validly cast Presidential votes from at least five of the eight Provinces of Kenya. This had never been the case before and it could only attach to future and not past elections. We have also seen that a run-off election was provided for in case Presidential candidates tied at the polls. Again this was in anticipation of the multiparty elections coming soon after 28th August, 1992. A further amendment also provided from the winning candidate to form the Government of the political party that nominated him/her to run for the Presidency. Then, of course, there followed in the now so – much – repeated section 9, term of Office of President. Each term was given a specific run of five years. There had never been such a thing before. Then came the limitation – No person shall be elected to hold Office as President for more than two terms. From the language of the whole Act the set-up of sections and the reasonable and sensible flow thereat it is clear to us that Parliament made this law with focus on the future. We are not here concerned with the motive behind the limiting of being a President for not more than two terms. It is not our duty to speculate in this way nor should we be persuaded of any imagined (rightly or wrongly) motive of Parliament. Ours is to read and construe that Parliament did not desire to have one person being President for over a total of two terms. As we do not wish to speculate on the reasons for this, so do we not wish to speculate on whether these terms be consecutive or merely any two terms any time in one's life when one could be elected President. In sum, in reading construing and applying section 9 of the Constitution, we are of the view that the ordinary and natural meaning thereof is one attached to the words used therein, the context of the amending Act *vis-à-vis* the Constitution and the effect of the same: the global effect is one attaching to future election to the Office of the President. It is no matter that the 1st respondent had held tenure in the Office of the President on more than two occasions in the past. It is also no matter that by this our interpretation of the law the consequences

are that if the 1st respondent offers himself successfully for election after his first term of five years expire he will as one person be in that office for more than twenty years. If the law intended to cut down this then it should have stated so in plain words. It did not do so and we cannot be persuaded that section 9 (2) ought to be construed to mean that that indeed is what Parliament ought to have intended. Mr Nowrojee seems inclined in this direction but we do not agree.

If our conclusion above be inadequate in any aspect then what is our view about the authorities cited before us? About these authorities we should acknowledge that they must have been a result of concentrated research. They were presented with admirable eloquence and persuasive skill – a feature one can say should be practiced more often in our Courts. We will however refer to a few of the cited authorities and not necessarily in full length.

On behalf of the petitioner, Mr Nowrojee cited the case of *R v The Inhabitants of St Mary Whitechapel* (1848) 12 Q B 120. It concerned some widow who lived on a Church property. According to the poor laws, she was subject to be removed from there as soon as her husband died. The husband had died before the passing of an Act on 6th June, 1846. A notice to be removed had been served on her then but her removal came on 3rd September, 1846. This was challenged and arguments were heard about the effect of the Act that came into force on 6th June, 1846. Its relevant section read as follows:-

> "No woman residing in any parish with her husband at time of his death shall be removed nor shall any warrant be granted for her removal from such parish for twelve calendar months next after his death if she so long continue a widow."

In his judgment Lord Denman CJ said, *inter alia*:-

> "It was said that the operation of the statute was confined to persons who had become widows after the Act passed and that the presumption against a retrospective statute being intended supported this construction: but we have before shown that the statute is in its direct operation prospective, as it relates to future removals only and that it is not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing."

The Chief Justice then went on to say that the clause in question was of a general nature intended to prevent removals of the widows described therein after the passing of the Act. That the description of the widow did not refer to the time she became a widow. Accordingly, the widow was not subject to removal at the time she was removed.

Mr Nowrojee urged us to interpret section 9 (2) in the similar light. That it applied generally to all Kenyans at all times before and after its passing ie that no person shall hold Office of President for more than two terms.

Mr Inamdar did not agree. He told us that section 9 (2) unlike the provision in the *St Mary Whitechapel* case brought new aspects in the law. The section 9 (2) should not be construed in a similar manner. It can only be construed prospectively. Mr Inamdar submitted that the law in the *St Mary Whitechapel* had given relief and an advantage to the widow and thus it was proper that the law which was passed after she had become a widow was construed in her favour. To support this he cited the case *of L'Office Cherrifien Vs Yamashita* [1994] 2 WLR 39 where the *St Mary Whitechapel* case was referred to. Lord Mustill said with reference to the judgement of Lord Denman (*supra*).

> "Nevertheless the passage quoted is germane, because it reveals an assumption that a person newly qualifying for a relief may have that relief assessed in terms of events occurring before the relief became available"

[(NB The *Yamashita* case concerned amendment to the law relating to powers of arbitrators. We wish not to go in the details here)].

Considering the two view points above we are of the opinion that the law in *St Mary Whitechapel* case was construed the way it was on grounds including the advantage and relief the widow therein was accorded when the effect of the law was such that it related to events which occurred before its passing. In the case of section 9 (2) of the Constitution, applying it similarly, could work prejudice and unfairness to the 1st respondent. This section changed the law relating to election to the Office of President. New obligations and liabilities or disabilities were set down. It should not be construed with retrospective effect as it stands. That Parliament did not say that the law was to have retrospective effect by virtue of section 46 (6) of the Constitution only prospective effect should be given to the operation of section 9(2).

In consonance with such a conclusion we quote the following from *Yew*

Bon Tew vs Kenderaan Bas Mara [1982] 2 All ER 833 at p 836 per Lord Brightman:-

> "Apart from the provisions of the interpretation statutes there is a common law *prima facie* rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing law or creates a new obligation or imposes a new duty or attaches a new disability in regard to events already passed. There is however said to be an exception in case of a statute which is purely procedural because no person has a vested right in any particular course of procedure but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed."

Except for pointing out that section 9 (2) was not part of a procedural statute we have nothing more to add to the sound exposition of the principle of construction quoted above. Indeed a similar line was taken in the case of *R vs Chandra Dharma* [1905] IKB 335.

The other case which was referred to by both counsel for the petitioner and that of the 1st respondent is that of *West vs Gwynne* [1911] 2 Ch DI. Here the law regarding real property was in issue. Section 3 of the Conveyancing Act 1892 was an issue and the Court of Appeal was to determine whether the operation of that section was of a general application or it was confined to leases made after the commencement of the Act. The section read:-

> "S 3 In all leases containing a covenant, condition or agreement against assigning under-letting, or parting with possession or disposing of the land or property leased without licence or consent such covenant, condition or agreement shall unless the lease contains an express provision to the contrary be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent; but this proviso shall not preclude the right to require the payment of a reasonable sum in respect of any legal or other expense incurred in relation to such licence or consent."

In the Divisional Court Joyce J had remarked that this section 3 was quite

plain to everyone except to a lawyer. He had, however read the opening words "in all leases …" to mean the same thing as "… in every lease …" He had concluded that with such interpretation the law applied to all leases existing and in future as from the commencement of the Act of 1892, in the absence of an express provision to the contrary. The Divisional Court judge had observed that this statute was intended to prevent or put an end something which rightly or wrongly, was considered an injustice, namely the payment of fines by lessees.

In the Court of Appeal Cozens – Hardy MR did not have a contrary view. The language "… in all leases …" was perfectly general and nothing in section 3 confined it to the leases subsequent to the Act. This section was a general enactment based on grounds of public policy, namely the manner in which lessors were exacting fines from lessees. Therefore the Master of the Rolls declined to construe it in any other way as to render it in-operative. In any case he added:-

> "As a matter of principle an Act of Parliament is not without sufficient reason taken to be retrospective. There is so to speak a presumption that it speaks only to the future. But there is no like presumption that an Act is not intended to interfere with existing rights. Most Acts of Parliament infact interfere with existing rights. To construe this section, I have simply to read it, and, looking at the Act in which it is contained to say what is its fair meaning".

Thus from the plain reading of the section and the public interest involved the Court of Appeal interpreted section 3 to be of general application covering all the leases made before and after the commencement of the Act of 1892.

Another case which caused excitement on both sides of this petition was *Re A Solicitor's Clerk* [1957] 3 All ER 617. We do not wish to consider it here because of the doubts expressed in the Court of Appeal about the decision by the Queens Bench Division in that case (see judgment of Straughton LJ at p 724 in *Secretary of State for Social Security and Another vs Tunnicliffe* [1991] 2 All ER 712).

For the following cases, we do not wish to go in them in detail but only note in passing. There was *Barber Vs Pidgen* [1937] I KB 664 where the amending Act was read with retrospective effect because the Legislature intended to make a clean sweep of the old fiction that a woman ceased

to be an independent and separate personality on marriage. By that interpretation, a married woman was given back her full human status. Then we had *Chebaro vs Chebaro* [1987] 1 All ER 999. Here again without detail, past tenses were used in the amending legislation regarding where a marriage had been dissolved and that a wife would be entitled to a benefit if the statute was interpreted the way it was ie with retrospective effect.

The relevant section 12 (1) read:-

> Where (a) a marriage has been dissolved or annulled or the parties to a marriage have been legally separated by means of judicial or other proceedings in an overseas country and (b) the divorce annulment or legal separation is entitled to be recognized as valid in England and Wales either party to the marriage may apply to the Court in the manner prescribed by Rules of Court for an order for financial relief under his part of this Act.".

The Court of Appeal had no difficulty in noting that the use of the past tense "... has been dissolved …" clearly meant that marriages dissolved before the passing of the amending Act were contemplated by the Act. So much for the cases from other common law jurisdiction. Let us come back home.

In *Somani's v Shirinkhanu* [1970] EA 580 the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (cap 301) section 1(1) gave the Minister power to bring into effect the operation of the Act on different dates for different parts of the country. The Minister by notice purported to bring the Act into force retrospectively in respect of Mombasa. Section 1 of the Act read as follows:-

> "1(1) This Act may be cited as the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act 1965 and shall come into operation on such date as the Minister may by notice in the Gazette appoint.

Provided that the Minister may appoint different dates for different areas of Kenya and may by Notice in the Kenya Gazette exempt any area of Kenya from the operation of the Act (underlining supplied) :-

The Minister in a Gazette Notice of 27 September, 1966 acting under the power appointed *inter alia* the following dates
(a) 3 May, 1966 as the date on which the Act shall come or be deemed to

have come into operation in the Mombasa Municipality and
(b) 1 May 1966 as the date on which tenancies are required to have been subsisting for the purposes of sub s (2) of s1 of the Act in the Mombasa Municipality" (underlining supplied)

Without going into the facts in this case we move directly to the question the Court of Appeal had to answer: Whether the Minister had power to make retrospective appointments as to dates under section 1 (1) of the Act.

In the judgment of Lutta JA he said:-

> "The words "shall come into operation" which appear in s 1(1) of the Act indicate the prospective nature of the Act. That is those words show that the Act was intended to operate prospectively and these are appropriate to that object. However, the words "shall be deemed to have come into operation" which appear in the legal notice but which are not in s 1(1) of the Act suggest that the Act was intended to operate retrospectively."

Further the judgment went on:

> "The question then arises as to whether Parliament in s1(1) of the Act has sufficiently expressed that intention. If Parliament intended the Act to apply retrospectively, it would have expressly said so in the section or in any part of the Act, or the words "shall be deemed to have come into operation" or words to that effect would have been used therein. The absence of such words in s 1(1) or in any part of the Act seems to me to militate against a retrospective operation of the Act and against the general principle that a statute is not to be construed so as to have a retrospective operation unless its language is such as plainly to require that construction."

To stop here for a moment, and although there is a difference in the wording of this s 1(1) and s 9 (2) of the Constitution, the principle on the construction of the two is the same, that from the plain language of the statutes, they should be interpreted to operate prospectively. And that only that statute or statutes can say otherwise. Accordingly, it cannot be imputed that a statute could as well have been intended to operate retrospectively. A statute must have words to the effect that it should operate retrospectively or such an effect should be gleaned from a necessary implication as

conveyed by the words used.

Lutta JA then referred to *West v Gwynne* (*supra*) and continued that the words in s 1(1) of the Act.

> "… ought to be construed as being applicable to future dates only, if the rule that an Act of Parliament is generally to be construed as being prospective and intended to regulate the future conduct of persons is still a sound guide for purposes of construing an Act of Parliament. The only exception is of course where Parliament intends to affect past conduct or past state of circumstances, in which case it expressly so provides in the Act."

We are in total agreement with the above passage as regards section 9(2) of the Constitution now under review. We are of the view that if Parliament intended that section 9 (2) operate retrospective it should have said so under the provision it has under the same Constitution. That it did not say so is manifestly clear that it did not intend section 9(2) to operate backwards. Nor can we say that section 9(2) is of general application. The reading of the section itself and looking at the whole Act No 6 of 1992 does not admit to this. Indeed an earlier decision of the Court of Appeal on this principle of construction namely that the intention of Parliament is gathered from the Act as a whole is also found in *Municipality of Mombasa vs Nyali Ltd* [1963] EA 371. In that case it was said of the general rule that unless there is a clear indication either from the subject matter or from the wording of an Act of Parliament, an Act should not be given a retrospective construction. Lutta JA referred to this case.

We quote from the judgment of Luttaa JA in *extenso* because it touched on several aspects raised in submissions in this petition eg the question of rights of the Minister's legal notice which sought to make the Act retrospective in operation (this notice was declared *ultra vires*) the Court asked:-

> "What was the effect of the legal notice on the respondent's rights? The Respondent had …already accrued to her the right of action against the appellant …. By reason of the legal notice, the respondent was clearly prejudiced – her rights were adversely affected. In my view to hold the Act retrospective would be to deprive her of a right which she had actually acquired and …. Parliament's intention to apply the Act retrospectively

> and thus affect the respondents' substantive rights has not been manifested in the Act".

We need not add more to the foregoing except to say that section 9 (2) of the Constitution was not meant to operate retrospectively. Any further reading of local cases may get to *Patel v R* [1968] EA 97.

We have been referring to section 46 (6) of the Constitution when dealing with the rule that if Parliament intends to make legislation retrospective in effect, it should say so expressly in that legislation.

In Kenya, this is not only a rule of construction but it is specifically provided for in the Constitution. Section 46(6) of the Constitution provides:-

> "46 (6) A law made by Parliament shall not come into operation until it has been published in the Kenya Gazette, but Parliament may postpone the coming into operation of a law and subject to section 77 may make laws with retrospective effect."

Section 9(2) of the Constitution was brought on our statute books by virtue of Act No 6 of 1992. That Act was published and it was therein stated that it would commence operation on 28th August, 1992. Also in that Act Parliament did not say that section 9 (2) or indeed the whole Act could operate retrospectively. The Act itself did not appear in such a language as to be of general application ie to affect things that took place before its commencement or after. Accordingly, it was and we declare that Act No 6 of 1992 operates prospectively. It was a law passed altering the provisions relating to the election to the Office of President and thus intended to apply to a state of facts coming into existence after the Act.

Finally we turn to the 3rd respondent as Chairman of the 2nd respondent (Electoral Commission of Kenya) and the fact that the 1st respondent was declared validly nominated and later elected President. We did not see much legal merit in this ground (No 9) in the petition.

The declaration of one elected to Office of President is a statutory requirement (see regulation 40 of National Assembly and Presidential Election Act cap 7). The Electoral Commission is obliged by law to issue the certificate declaring a winning Presidential candidate. It has no room to dilly-dally on this. It has no business interpreting any statute and applying it with a view that such interpretation should bind a court of law. (see *Daniel Toroitich Arap Moi v Matiba* – Civil Appeal No 176 of 1993)

Thus the 2nd respondent's declaration in the Kenya Gazette that the 1st respondent had been elected President should not be seen to have meant one thing or the other regarding the construction and application of section 9(2) at all. We say no more.

Accordingly, we decline to determine that the 1st respondent was not validly elected as President in the Presidential Election of 29th December, 1992 and similarly we decline to determine that the 1st respondent's election was null and void.

The upshot of the foregoing is that this petition is dismissed with costs. We shall issue a due certificate in this regard.
Judgment accordingly.