



## *Kutetea usawa wa jinsia na haki za waliobaguliwa na kupuuzwa*

# IMPLICATIONS OF THE SUPREME COURT RULING ON THE REALIZATION OF THE TWO THIRDS GENDER PRINCIPLE

### Background to the opinion

The Constitution of Kenya 2010 upholds the rights of women as being equal in law to men, and entitled to enjoy equal opportunities in the political, social and economic spheres.

Under Article 81 (b) which refers to the general principles of Kenya's electoral system) states 'the electoral system shall comply with the following principle - **(b) not more than two-thirds of the members of elective public bodies shall be of the same gender.**

Under Article 27 of the constitution the government is required to develop and pass policies and laws, including affirmative action programs and policies to address the past discrimination that women have faced. Additionally, the government is required to develop policies and laws to ensure that, **not more than two-thirds of elective or appointive bodies shall be of the same sex.**

### The Facts

On the 8th of October 2012 the Attorney General of Kenya filed a request for an Advisory Opinion as to whether the two-thirds gender principle is to be realized by the first general elections (under the new Constitution) i.e. in March 2013, or over a longer period of time. Essentially the Attorney General was asking if the two-thirds gender principle meant that Article 81(b) needed to be realized in the March 2013 general elections, and if so, if a Parliament with less than a third of women after March 2013 would be considered unconstitutional.

Stakeholders who applied to be parties to this case included: the National Gender and Equality Commission (NGEC), the Independent Electoral and Boundaries Commission (IEBC), the Commission on Administrative Justice (CAJ), the Commission on the Implementation of the Constitution, and civil society organizations such as the Centre for Rights, Education and Awareness (CREAW) (and others), Centre for Multi-party Democracy (CMD), FIDA-Kenya, and Katiba Institute. Advocate Charles Kanjama was allowed in as a friend of the court.

Under Article 163(7) the decision of the Supreme Court would be binding on all the lower courts but not to itself

### The Ruling:

On 11th December 2012, the Supreme Court by the Majority i.e. Chief Justice & President of the Supreme Court Dr. Willy Mutunga, Justices Philip Tunoi, Jackton Ojwang, Smokin Wanjala, and Njoki Ndung'u, delivered a decision on Article 81(b), that the two-thirds gender principle under Article 81 (b) is progressive. The ruling provided that the next National Assembly and Senate, will not be illegal if it has less than one-third of women.

The Supreme Court stated that Parliament is under an obligation to enact a law by 27th August 2015, to give effect to the two-thirds gender principle under Article 81(b).

However when it comes to county assemblies, the Supreme court stated that, these assemblies must have at least one third of women after the March 2013 elections (in line with Article 177(1)(b) of the Constitution).

The Chief Justice Willy Mutunga gave a dissenting opinion to the effect that the two-thirds gender principle should be realized in the upcoming March 2013 elections. He was of the opinion that the intention of the drafters was not to discriminate between women in county assemblies by allowing them representation and women at the National Assembly and the Senate by denying them such affirmative action for representation

### What the ruling means for women aspiring to elective positions and their supporters

- That the right of women under Article 38 (3), to be a candidate for the National Assembly and the Senate still stands; women must come out and contest for all positions available
- That women can and should still vie for all elective positions in the National Assembly and the Senate (beyond the special seats reserved for women under Articles 97 and 98 i.e. the 47 women's seats in the National Assembly and the 16 special seats in the Senate);
- That the realization of the two-thirds gender principle is not an immediate right for women. Rather, the Supreme court provided that a law must be passed by 27th August 2015, to give effect to Article 81(b) i.e. to ensuring that the

two-thirds gender principle in all elective bodies (i.e. the period of 5 years runs from the effective date of the Constitution of Kenya).

- The ruling provides that Article 81(b) cannot be enforced immediately. An individual therefore cannot go to court to challenge the legality or constitutionality of the next National Assembly and the Senate, on the basis of either elective body having less than one-third of women;
- However, any county assembly that will have less than one-third of women will be illegal and it will not be able to conduct business; women must therefore register as members of political parties to participate by either running or seeking nomination
- The ruling does not affect how political parties are to put in place their party lists for nominative positions as per Article 90 (2) (b). Political parties will still be required to submit party lists made up of equal numbers of men and women for the purposes of nominations.

### Way forward.

- It is clear that political parties are the only vehicles through which individuals can be elected or nominated and therefore have a clear role to play in the realization of the two-thirds gender principle.
- If women are to realize their rights to vie for elective positions in March 2013 elections, they need to register within parties.
- Women also need to take leadership and safeguard their rights.
- Women need to ensure that the political parties they belong to, support the realization of the two-thirds gender principle in concrete ways during the up-coming nomination and election processes.
- Women in Kenya need to aspire for all elective positions and not just the special seats that have been reserved for them in the National Assembly and the Senate; if they are to realize the two-thirds gender principle by 2013.
- There is no shortcut to realization of the 2/3 gender principle

**Unless women aspirants and voters alike own their political parties and demand accountability of their political party leaders, women will continue to be political spectators, and never be allowed to take part and benefit from the gains that the Constitution sought to give to women and other marginalized groups. WOMEN UNITE NOW OR FOREVER REMAIN DISCRIMINATED.**