



The Courts and the Ballot: How Kenya's Electoral Jurisprudence Has Redefined the Right to Contest

Since the promulgation of the Constitution of Kenya, 2010, the courts have become increasingly influential in determining the boundaries of political participation. The Independent Electoral and Boundaries Commission (IEBC), established as a body corporate under Section 13 of the IEBC Act, 2011, has appeared in these cases on both sides bringing suits in furtherance of its mandate and responding to suits brought by citizens and institutions challenging its regulations.

Three clusters of rulings stand out for their practical impact on electoral participation: the nullification of academic degree requirements across all elective positions, the clarification of dual citizenship eligibility, and the challenge to ID-copy submission rules for independent candidates. Below is an analysis of each ruling, including the governing legal principles and their subsequent implications.

1. Academic Qualifications: The Degree Requirement Nullified Across All Elective Positions

The Elections Act, through Sections 22(1)(b)(i), 22(1)(b)(ii), and 22(2), mandated that candidates for MCA, MP, Governor, and President hold a degree from a university recognized in Kenya. The courts struck down each of these requirements in succession.

The High Court systematically struck down the academic degree requirement for MCAs, MPs, Governors, and the President across four landmark cases (*County Assembly Forum, Wambui, Buoga, and Nazlin Omar*), all grounded in the same constitutional logic: discrimination, restriction of political rights, irrationality given the 3.5% graduation rate, and lack of public participation.

2. Dual Citizenship: Eligible to Run, Not to Serve Yet - Contrasts the High Court's restrictive reading in *Mwawasi* (which barred dual citizens from contesting) with the Court of Appeal's reversal (which held that dual citizens can run and win, but must renounce the other

citizenship before assuming office), preserving the right to contest while enforcing loyalty upon accession.

The High Court in *Mwawasi* initially took a hard line: if you hold two passports, you cannot run for office. Full stop. The Court of Appeal later drew a more careful line between the right to stand for election and the right to take up the job after winning.

The difference matters. Running for office is part of the voters' constitutional right to choose who represents them. Taking office is different it carries obligations of loyalty to Kenya. Under the Court of Appeal's approach, a dual citizen can campaign, win, and be declared elected. But before stepping into office, they must first renounce their other citizenship.

In plain terms: getting on the ballot and getting into office are two different things.

The IEBC's successful appeal and the interim relief that followed also show something else that electoral rules are not fixed. A court ruling can change the landscape, and then an appeal can change it back, sometimes right before an election. The law is alive, and so are its consequences.

3. Independent Candidates and the ID Card Controversy - Covers the High Court's quashing of the ID-copy regulations in *Free Kenya Initiative*, the IEBC's appeal, the IEBC, exercising its right as a body corporate under Section 13 of the IEBC Act, 2011 to sue and be sued, moved to the Court of Appeal. In *IEBC v Free Kenya Initiative & 22 Others* (Nairobi Court of Appeal Civil Application No. E241 of 2022, now E585/2024), the Commission obtained a stay of execution of the High Court's judgment pending the hearing and determination of its appeal. The stay reinstated the ID-copy requirement. In the 2022 General Election, independent candidates were required to submit copies of their supporters' identification documents. The same requirement applies in subsequent elections for now. The appeal remains pending, and the final position of the law awaits the Court of Appeal's determination.