



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 518 OF 2013

**IN THE MATTER OF ENFORCEMENT & INTERPRETATION OF THE
CONSTITUTION**

**AND IN THE MATTER OF THE INDEPENDENCE OF CONSTITUTIONAL
COMMISSIONS AND INDEPENDENT OFFICES**

BETWEEN

JUDICIAL SERVICE COMMISSION.....PETITIONER

VERSUS

SPEAKER OF THE NATIONAL ASSEMBLY.....1ST RESPONDENT

ATTORNEY GENERAL2ND RESPONDENT

RULING

1. This ruling is the subject of two applications. I wish to deal first with the Notice of Motion dated 31st October 2013 filed by **Bryan Yongo** seeking that he should be joined in this suit as an interested party. The grounds upon which the said application is made are that the applicant pursuant to Article 251(2) of the Constitution petitioned for the removal of **Ahmednassir Abdullahi**, a sitting member of the Judicial Service Commission and on 22nd October 2013, the applicant was advised to appear before the Justice and Legal Affairs Committee of the National Assembly to prosecute his petition which appearance he made on 24th October 2013 and submitted his petition. Based on the foregoing it is therefore the applicant's position that he is a party interested in these proceedings under Article 258 of the Constitution of Kenya as augmented by Articles 3 and 48 of the Constitution which grants a duty on every person natural or juristic to respect, uphold and defend the Constitution thereby bestowing locus standi on anyone to institute proceedings seeking judicial enforcement. According to the applicant, the order issued by this Honourable Court adversely affects his Petition hence the need for him to be joined in these proceedings as sought.

2. In support of his application, the applicant relied on **S P Gupta vs. President of India & Others AIR [1982] SC 149**. However the applicant did not furnish a copy of this decision to the Court. Further reliance was placed on **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others** Civil Appeal No. 290 of 2012 in which the Court of Appeal stated at page 16 as follows:

“Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the argument of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus standi to file the petition. Apart from this, we agree with the superior court below that the standard guide for locus standi must remain the command in Article 258 of the Constitution.”

3. In opposing the application **Mr Muite**, learned Senior Counsel for the Petitioner submitted that there is a misapprehension of Article 48 that the same did away with the previous requirement for locus standi which requirement was a source of injustice whereby the Courts were asked to throw out petitions unless the petitioner was able to show how and in what manner he was affected. According to learned Senior Counsel, Article 48 is applicable where a party is petitioning hence the consideration where a party seeks to be joined in a petition instituted by another party are clearly different. According to him the **Mumo Matemu Case** is an authority about a party petitioning and the Court of Appeal did not pronounce itself on considerations of a party wishing to be joined. In learned Counsel’s view, the Constitution requires expeditious disposal of disputes and therefore as a necessity where a party seeks to be joined in the proceedings, he has to show that he is coming to add value in the elucidation of Constitutional and legal issues which fall for determination. The applicant has to show that he is non-partisan and reliance was placed in the Supreme Court decision in **Raila Odinga and Others vs Independent Electoral and Boundaries Commission and 3 Others Nairobi Petition No. 5 of 2013 [2013] EKL.R.**, where the Court declined to allow the **Law Society of Kenya** and **Prof. Yash Pal Ghai** to participate in the said proceedings due to their partisan leanings. According to **Mr Muite**, the instant petition by the Judicial Service Commission seeks the interpretation of a number of Articles in the Constitution with a view of enhancing the letter and the spirit of the Constitution with regard to the doctrines of Separation of Powers and tenure of the holders of Constitutional

Petition 518 of 2013 | Kenya Law Reports 2015 Page 2 of 10.

Commission Offices. The petition, according to him, is between the Petitioner, the Speaker and the Attorney General and that the petition which gave rise to these proceedings was by **Riungu Nicholas Mugambi** and that this Court's orders were directed to deliberations of that Committee. Whereas perhaps if **Mugambi** was the applicant herein, the considerations might be different, a quick look at the applicant's petition demonstrates that the applicant has a quarrel with Commissioner **Ahmednassir Abdullahi** and not with the JSC and in the instant Petition by the Judicial Service Commission in the discharge of its mandate under Article 172 of the Constitution care should be taken by the Court not to clog and slow down the expeditious disposal of the dispute by freely allowing any one to be joined. Whereas Article 10 of the Constitution places an obligation to uphold the Constitution the corollary is not to be joined in a petition but for the person to petition. It was submitted that the Petitioner herein is anxious not to be dragged into side shows and since the applicant is not non-partisan, it is difficult to see how the applicant will add value to the weighty issues framed by the petitioner and to drag the Court into those issues will only slow down the determination of the petition hence the Court ought to reject the application.

4. *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2012*, defines an interested party as “a person or entity that has an identifiable stake or legal interest in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation”. From the foregoing it is clear that an interested party as opposed to an amicus curiae or a friend of the court may not be wholly indifferent to the outcome of the proceedings in question. He is a person with an identifiable stake or legal interest in the proceedings hence may not be said to be wholly non-partisan as he is likely to urge the Court to make a determination favourable to his stake in the proceedings. *Amicus curiae* on the other hand is defined as a “an expert on an issue which is the subject matter of proceedings but is not party to the case and serves to benefit the court with their expertise.” *Amicus curiae* is therefore a person who shows that he is possessed of some expertise relevant to the matters for determination before the Court. Such a person as is expected of experts is required to be non-partisan and his role is meant to enable the Court get a clear picture of the issues in dispute in order for the Court to arrive at an informed and just decision. Therefore the mere fact that the applicant herein may be partisan does not necessarily render him unsuitable to be joined in these proceedings as an interested party.

5. It is however a requirement that a person who intends to be joined to existing legal proceedings ought to show that he has “an identifiable stake or legal interest in the proceedings before the court.” The position of an interested party is different from a person invoking the provisions of Article 258 of the Constitution which provides as follows:

(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

6. It is clear that that Article deals with institution of proceedings. Article 3(1) of the Constitution on the other hand provides that “Every person has an obligation to respect, uphold and defend this Constitution” while Article 48 enjoins the State to “ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access”.

7. Whereas under the current Constitutional dispensation the Court ought not to lock out a person who prima facie shows that he has “an identifiable stake or legal interest in the proceedings before the court” in determining whether or not to join a person to pending proceedings the Court ought to take into account the provisions of Article 159(2)(b) of the Constitution that justice shall not be delayed.

8. In the present application the applicant’s basis for seeking to be joined to these proceedings is that the order which was issued by this Court on 30th October 2013 adversely affects his petition. On that day the this Court made an order “staying any further proceedings by the Departmental Committee of Justice and Legal Affairs of the National Assembly from taking any action with respect to the Petition filed by **Riungu Nicholas Mugambi** seeking the removal of six Commissioners of the Judicial Service Commission pending inter partes hearing on the 5th November 2013 or until further orders”. The applicant has not contended that his petition was the petition against which the said orders were directed and from the application filed by the applicant it seems that the petition the subject of the orders was not the same as the applicant’s petition. It is therefore incorrect by the applicant to contend that the orders which were issued herein adversely affected his petition. With due respect the applicant may have relied wholly on the media reports in making his application which application was made based on misapprehension of the true legal position. Accordingly, it is clear that the applicant’s ground for seeking to be joined to these proceedings does not disclose “an identifiable stake or legal interest in the proceedings before the court” as his petition is not the subject of these proceedings.

9. In the result I disallow the Notice of Motion dated 31st October 2013 but with no order as to costs as the applicant therein is not yet a party to these proceedings.

10. **Mr. Muite** on behalf of the petitioner submitted that as directed on 31st October 2013 the petitioner effected service of the petition, the Notice of Motion and Interim Conservatory orders in terms of prayer 2 thereof on the Clerk of the National Assembly and in the context of the defiance of the Court order the Court ought to grant prayers 4 and 5 of the Notice of Motion dated 30th October 2013. In the said Motion the following orders were sought by the petitioner:

1. **THAT this application be certified urgent and service thereof be dispensed with in the first instance.**

2. **THAT pending the hearing and determination of this application inter partes, a conservatory order be issued directed at the National Assembly by itself or the Departmental Committee of Justice and Legal Affairs staying any further proceedings under Article 251(3) of the Constitution by restraining the committee from hearing, deliberating, or in any way determining the Petition filed by Riungu Nicholas Mugambi seeking the removal of Six Commissioners of the Judicial Service Commission.**

3. **THAT pending the hearing and determination of the substantive Constitutional Petition a conservatory prohibitory and restraining order be issued directed at the National Assembly by itself or through the Departmental Committee of Justice and Legal Affairs saying any further proceedings under Article 251(3) of the Constitution by restraining the committee from hearing, deliberating, or in any way determining the Petition filed by Riungu Nicholas Mugambi seeking the removal of Six Commissioners of the Judicial Service Commission.**

4. **THAT pending the hearing and determination of the substantive Constitutional Petition a conservatory prohibitory and restraining order be issued restraining the National Assembly or the Departmental Committee of Justice and Legal Affairs from presenting or forwarding the Petition filed by Riungu Nicholas Mugambi seeking the removal of Six Commissioners of the Judicial Service Commission to the President.**

5. **THAT the costs of this application be provided for.**

11. As the Motion is not opposed and considering the issues raised by the petitioner I would have had no difficulty at all in granting the orders sought. As I stated when granting the ex parte orders, a Departmental Committee of the National Assembly when exercising quasi-judicial powers as opposed to legislative powers is subject to the supervisory jurisdiction of the High Court since under Article 165(6) of the Constitution, “The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court”. [Emphasis mine]. Whereas under Article 125 of the Constitution “Either House of Parliament, and any of its committees, has power to summon any person to appear before it for the purpose of giving evidence or providing information” and for that purpose and that purpose alone, “a House of Parliament and any of its committees has the same powers as the High Court—(a) to enforce the attendance of witnesses and examine them on oath, affirmation or otherwise; (b) to compel the production of documents; and (c) to issue a commission or request to examine witnesses abroad, that power cannot be interpreted to equate a House to the High Court in the exercise of judicial authority. Under Article 159(1) of the Constitution “Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.” A Departmental Committee of the National Petition 518 of 2013 | Kenya Law Reports 2015 Page 5 of 10.

Assembly, in my view is not a Court or Tribunal established under the Constitution. It cannot purport to grant orders which the Courts and tribunals set up under the Constitution are empowered to grant. If the position was different the doctrine of separation of powers would be rendered illusory.

12. When it comes to interpretation of the Constitution, Article 165(3)(b) and (d) confers upon the High Court jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened and the “jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191.

13. In the course of determining those questions the Court is empowered under Article 23(3) to “grant appropriate relief, including” a conservatory order. It is therefore clear that the Court is empowered under the said Article to grant any appropriate relief which is not limited to the relief particularized thereunder. This provision was the subject of interpretation in **Nancy Makokha Baraza vs Judicial Service Commission & 9 Others [2012] eKLR** where the Court expressed itself *inter alia* as follows:

“The New Constitution gives the court wide and unrestricted powers which are inclusive rather than exclusive and therefore allows the court to make appropriate orders and grant remedies as the situation demands and as the need arises.”

14. In that case the Court cited the decision in **Minister of Health and Others vs. Treatment Action Campaign and Others [2002] 5 LRC 216**, where it was stated at page 249 as follows:

“Section 38 of the Constitution contemplates that where it is established that a right in the Bill of Rights has been infringed a

court will grant ‘appropriate relief’. It has wide powers to do so and in addition to the declaration that it is obliged to make in terms of s 172(1)(a) a court may also ‘make any other order that is just and equitable’ (s 172(1)(b))...Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights...The courts have a particular responsibility in this regards and are obliged to ‘forge new tools’ and shape innovative remedies, if needs be, to achieve this goal...Nor would it necessarily be out of place for there to be an appropriate order on the relevant organs of state in South Africa to do whatever may be within their power to remedy the wrong here done to Mohamed by their actions, or to ameliorate at best the consequential prejudice caused to him. To stigmatise such an order as a breach of the separation of state power as between the Executive and the Judiciary is to negate a foundation value of the Republic of South Africa, namely supremacy of the Constitution and the rule of law. The Bill of Rights, which we find to have been infringed, is binding on all organs of state and it is our duty to ensure that appropriate relief is afforded to those who have suffered infringement of their constitutional rights”.

15. That the Court has the power to inquire into the Constitutionality of the actions of the Speaker and other officers of the National Assembly was answered in the affirmative by Lenaola, J in Njenga Mwangi & Another vs. The Truth, Justice and Reconciliation Commission & 4 Others Nairobi High Court Petition No. 286 of 2013 where the learned Judge expressed himself *inter alia* as follows:

“I am also in agreement, that under section 29 of the National Assembly (Powers and Privileges Act) (Cap 6), Courts cannot exercise jurisdiction in respect of acts of the Speaker and other officers of the National Assembly but I am certain that under Article 165(3)(d) of the Constitution, this Court can enquire into any unconstitutional actions on their part”.

16. It is clear that if there was any conflict between Cap 6 and Article 165(3)(d) of the Constitution the Constitutional provisions would take precedence.

17. Having said that, it has been submitted that the orders which were granted by this Court on 30th October 2013 were disobeyed. The natural consequences of disobedience of Court orders is to commence contempt of court proceedings in which case the Court will determine whether a contempt of court has in actual fact been committed and will thereafter mete out the appropriate punishment to the contemnor in accordance with the law. Article 10(1) of the Constitution binds all State organs, State officers, public officers and all persons when applying and interpreting the Constitution, enacting; or making or implementing any public policy decision. The said principles under Article 10(2) include the rule of law. Respect of Court orders however disagreeable one may find them is a cardinal tenet of the Rule of Law and where a person feels that a particular order is irregular the option is not to disobey it with impunity but to apply to have the same set aside. When the decision to obey particular Court orders are left to the whims of the parties public disorder and chaos are likely to reign supreme yet under the Preamble to our Constitution we do recognise the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.

18. I associate myself with the decision of my learned brother **Hon. Mr Justice Lenaola**, in **Kariuki & 2 Others vs. Minister For Gender, Sports, Culture & Social Services & 2 Others [2004] 1 KLR 588** where he expressed himself as follows:

“The instant matter is a cause of anxiety because of the increasing trend by Government Ministers to behave as if they are in competition with the courts as to who has more “muscle” in certain matters where their decisions have been questioned, in court! Courts unlike politically minded minister are neither guided by political expediency, popularity gimmicks, chest-thumping nor competitive streaks. Courts are guided and are beholden to law and to law only! Where Ministers therefore by their actions step outside the boundaries of law, courts have the constitutional mandate to bring them back to track and that is all that the courts do. Judicial review orders would otherwise have no meaning in our laws..... Court orders must be obeyed whether one agrees with them or not. If one does not agree with an order, then he ought to, move the court to discharge the same. To blatantly ignore it and expect that the court would turn its eye away, is to underestimate and belittle the purpose for which courts are set up..... If those who have knowledge of court orders and also have knowledge that the way to avoid those orders is to avoid personal service are sleeping well in the guise that by hiding behind the shield of muscle they can escape the long arm of the law, let this be a warning that they will not. The law is as applied by the courts studiously and unceasingly, will never sleep, and some day will catch up with those who flout the law and walk away unscathed.”

19. As was held by the Court of Appeal in **Dr. Christopher Ndarathi H Murungaru vs. Kenya Anti-Corruption Commission & Another Civil Application No. Nai. 43 of 2006 [2006] 1 KLR 77:**

“Since the Kenyan nation has chosen the path of democracy rather than dictatorship, the Courts must stick to the rule of law even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the Court’s decisions since occasionally those who have been mighty and powerful are the ones who would run and seek the protection of the Courts when circumstances have changed.....The courts must continue to give justice to all and sundry irrespective of their status or former status.”

20. Similarly, in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240,** it was held *inter alia*:

“When litigants come to the courts it is the core business of the courts and the courts’ role is to define the limits of their power. It is not for the Executive to tell them when to come to court! It is the constitutional separation and balance of power that separates democracies from dictatorships. The courts should never, ever, abandon their role in maintaining the balance.”

21. Therefore by ignoring Court orders the Respondents would be sending wrong signals not only to the people of Kenya from whom they derive their authority but also to the whole world that they do not believe in the rule of law. When Constitutional safeguards provided under Article 47 of the Constitution are destroyed by being whittled and judicial officers are put at the sufferance of the Executive or at the whims of the Legislature, the independence of the judiciary is the first victim. It must always be remembered that under Article 25 of the Constitution one of the rights and fundamental freedoms which cannot be limited is the right to a fair trial. Accordingly the Courts are empowered to investigate allegations of abuse of power and improper exercise of discretion as well as the right to fair hearing or trial which in essence are what the petitioner allege.

22. From the application prayer 3 of the Motion is in the essence seeking orders restraining the said Departmental Committee from hearing, deliberating or in any way determining the subject petition. If the order granted on 30th October 2013 was disobeyed it may well be that the report was tabled on the floor of the National Assembly with the result that the order as framed would serve no useful purpose as the Committee may well be *functus officio* with respect to the subject petition. However prayer 4 seeks to restrain the National Assembly or

the said Committee from presenting or forwarding the subject Petition to the president. That prayer though capable of being granted, under Article 251 of the Constitution the National Assembly is not the authority with powers to remove constitutional Office holders from the office.

23. In the circumstances and as the application is not opposed by the respondents who have despite service deemed it fit not to appear before this Court the conservatory order that commends itself to me and which I hereby issue is that the said six Commissioners of the Judicial Service Commission who are the subject of the petition filed by **Riungu Nicholas Mugambi**, shall not be suspended or removed from the office as such Commissioners based on the said petition pending the hearing and determination of this petition or until further orders of the Court.

24. The costs of this application shall be in the Petition.

25. Orders accordingly.

Ruling read, signed and delivered in court this 6th day of November 2013

G.V. ODUNGA

JUDGE

In the presence of Ms Mutua for Mr Issa for the Petitioner and Mr Yongo the intended Interested Party



While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](#) under a [Creative Commons Attribution-ShareAlike 3.0 Unported License](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions. Read our [Privacy Policy | Disclaimer](#)