



**Gikenyi B & 6 others v Attorney General (On behalf of Presidency) & 2
others; Muturi & 4 others (Interested Parties) (Petition E336 of 2024)
[2024] KEHC 9888 (KLR) (Constitutional and Human Rights) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9888 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E336 OF 2024

LN MUGAMBI, J

JULY 31, 2024

BETWEEN

**DR MAGARE-GIKENYI B 1ST PETITIONER
LINAH NYABATE KINGSLEY 2ND PETITIONER
PHILEMON ABUGA NYAKUNDI 3RD PETITIONER
PAULINE NDUATA KINYANJUI 4TH PETITIONER
SHALLUM KAKA NYAKUNDI 5TH PETITIONER
JAMLICK OTONDI ORINA 6TH PETITIONER
AGNES WANZUU WAMBUA 7TH PETITIONER**

AND

**HON ATTORNEY GENERAL (ON BEHALF OF PRESIDENCY) 1ST
RESPONDENT
PUBLIC SERVICE COMMISSION 2ND RESPONDENT
NATIONAL ASSEMBLY 3RD RESPONDENT**

AND

**HON JUSTIN BEDAN NJOKA MUTURI INTERESTED PARTY
LAW SOCIETY OF KENYA INTERESTED PARTY
KATIBA INSTITUTE INTERESTED PARTY
KITUO CHA SHERIA INTERESTED PARTY
REBECCA MIANO INTERESTED PARTY**



RULING

1. By notice of motion dated 19th July, 2024, filed under Certificate of Urgency and supported by the affidavit of Dr. Magare Gikenyi, J. Benjamin sworn an even date, the petitioner/applicant seeks the following orders:
 - (a) This Application be certified as extremely urgent and deserving to be heard ex parte in the first instance and service hereof be dispensed with as its object will be defeated unless it is so certified and heard expeditiously.
 - (b) The that expedited mention/hearing date be given in respect to hearing and determination of this application and petition
 - (c) Pending the hearing and determination of this application and Petition, The Honourable Court be pleased to review/set aside/modify the orders given by Hon.Justice Lawrence N. Mugambi On 15th July 2024 And/or Grant New Orders.
 - (d) Pursuant to (c) above, Pending the hearing and determination of this Application and Petition this honourable court is pleased to issue a conservatory order suspending the presidential press release dated July 11th 2024 and gazette notice no. 8440 Vol.CXXVI-NO102 dated 12th July 2024 which purported to remove Hon. Hon. Justin Bedan Njoka Muturi as attorney general of the Republic of Kenya
 - (e) That further pursuant to (c) & (d) above, Pending the hearing and determination of this Application and Petition suspend the presidential press statement and/or gazette notice dated 19th July 2024 and/or any other gazette notice and/or document of any other date to extent of purporting to appoint Mrs. Rebecca Miano and/or any other person appointed as nominee and/or appointee for office of the attorney general and further suspend the processing and/or appointment of Mrs. Rebecca Miano and/or any other person appointed as nominee and/or appointee for office of the attorney until the petition is heard and determined.
 - (f) That in the alternative to (d) & (e) Pending the hearing and determination of this Application and Petition suspend the presidential press statement and/or gazette notice dated 19th July 2024 and/or any other gazette notice and/or document of any other date to extent of purporting to appoint Mrs. Rebecca Miano and/or any other person appointed as nominee and/or appointee for office of the attorney general and further suspend the processing and/or appointment of Mrs. Rebecca Miano and/or any other person appointed as nominee and/or appointee for office of the attorney until the petition is heard and determined.
 - (g) Pending the hearing and determination of this Application, this Honourable Court be pleased to issue an conservatory order prohibiting the Respondents(both current and in the amended petition), either by themselves, anyone else acting at their behest, instructions or directions or any other person whosoever, from taking any action whatsoever pursuant to or in reliance on or in fulfillment of any duty or obligation or implementation of the presidential press release dated July 11th 2024 and gazette notice no. 8440 Vol.CXXVI-NO102 dated 12th July 2024 which purported to remove Hon. Hon. Justin Bedan Njoka Muturi as attorney general of the Republic of Kenya and the presidential press statement and/or gazette notice dated 19th July 2024 and/or any other gazette notice and/or document of any other date to extent of



purporting to appoint Mrs. Rebecca Miano and/or any other person appointed as nominee and/or appointee for office of the attorney general until the petition is heard and determined.

- (h) That the court is pleased to grant leave to the petitioners to amend the petition and/or allow the draft amended petition dated 19/7/2024.
 - (i) That any other order/modification of my prayers in which this honourable court may deem fit to grant for purposes of attaining Justice for all Kenyans.
 - (j) Costs be provided for and be borne by the office of the 1st respondent.
2. The application is supported by the grounds on the face of the application and the supporting affidavit of the petitioner/applicant sworn an even date.
 3. In brief, the petitioner/applicant stated that, on 11th July, 2024; the President of Republic of Kenya purported to unconstitutionally remove from office the 1st interested party in this petition, that is, the Hon. Attorney General Justin Bedan Muturi through a Presidential release dated 11th July, 2024 and subsequent gazette Notice Number Vol. CXXX – No. 102 of 12th July, 2024. The Petitioner contends that this action was in violation of Articles No. 10, 132, 156 of *the Constitution* and Section 12 of the Attorney General's *Act No. 49 of 2012*.
 4. That on 15th July, 2024, the Petitioners filed the instant petition simultaneously with an application for conservatory orders to uphold and protect *the Constitution* but the court issued only directions in which it fixed the hearing of the same on 30th September, 2024.
 5. In the intervening period, some new developments ensued as the President went further and nominated Mrs. Rebeccah Miano to the new nominee to be vetted for the office of Attorney General by the National Assembly thereby complicating the whole issue considering that if the new Attorney General nominee is to be approved by Parliament, it would resort in anarchy should the Court find that the removal was unconstitutional since the Country would be having two Attorney Generals.
 6. That in view of the new development, it was necessary that the court reviews/sets aside/or modify the directions of 15th July, 2024 in order to preserve the substratum of the petition and ensure orderly functioning within public agencies as well as uphold the adjudicatory authority of the Court in public interest as held in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR. That the latest development also necessitated the amendment of the petition for joinder of the new nominee Rebeccah Miano as the any orders made could affect her interests.
 7. The petitioner/applicant further stated that the absence of Attorney General could adversely expose the Government in cases filed against it for there is need for him to there so as to give directions.
 8. The petitioner pressed that unless the court moves to stop the unconstitutional and/or illegal removal by reviewing and/or setting aside the orders of 15th July, 2024 and granting conservatory orders to preserve the substratum of this petition, the principles of good governance, violation of constitutional rights and public interest will be prejudiced.
 9. To support the averments made, the petitioner/applicant annexed to the affidavit the following documents:
 - a. Copy of the court order of 15th July, 2024 (MG 5) that he wanted the Court to review
 - b. Copy of Presidential Press Statement and/or gazette Notice dated 19th July, 2024 purporting to appoint Mr. Rebeccah Miano for the office of Attorney General (MG 4).



- c. Copy of Presidential Gazette Notice no. 8440 Vol. CXXV1 – No. 102 dated 12th July, 2023 which removed Hon. Justin Bedan Njoka Muturi as Attorney General of the Republic.
10. Upon the application on 19th July, 2024 being filed, the Court considered the fresh grounds and was persuaded in the first instance and gave fresh directions that shortened the period for filing of responses and required the parties to attend court on 26th July, 2024 for brief oral hearing to address the emerging concerns described in the application.
11. On 26th July, 2024, the respondent and the interested parties had not complied with the fresh directions.
12. Mr. Bitu who appeared to the Respondent opposed the hearing of the application indicating that he had first seen the application that morning as he had all been aware that the court had given directions for hearing of application on the 30th September, 2024.
13. He equally informed this court he was aware that there was another matter – ELRC No. 108 of 2024 on the same subject that was coming before Justice Byram Ongaya of ELRC Court that very morning.
14. The petitioner/applicant protested that he had travelled from Nakuru for the hearing and disclosed that court that he had complied with directions as to service by effecting service on the same day the directions. That the instant application was only intended at preserving the substratum of the petition with a view to upholding the rule of law.
15. To which Mr. Bitu responded that the present application was for review of the previous directions was not in any way an application for conservatory orders. Mr. Bitu insisted that the orders that were binding are the ones issued on 15th July, 2024 and that was what the applicant was seeking to review, not seeking conservatory orders.
16. The court rejected the respondent’s attempt to postpone the hearing and allowed the Petitioner to highlight his written submissions and in brief, the oral highlight was a replica of what was contained in the grounds in support of the application which I have already adverted to.
17. Mr. Bitu basically reiterated his stand this was not an application for conservatory orders but one seeking review of previous directions.

Analysis and Determination

18. There are two issues, namely: -
- i. The scope of the present application before the Court
 - ii. Depending on outcome of (i) above, whether the application for conservatory orders is merited.
19. As to Mr. Bitu’s objection that the application only relates to this court considering the review of its directions made on 15th July 2024; it is necessary that I consider the grounds upon which the application is made and the orders sought.
20. However, I must first consider the legal basis that this Court act to review or revisit its earlier orders. Although *the Constitution* of Kenya, Protection of Rights and Fundamental Freedoms) practice and Procedure Rules, 2013; do not specifically provide for a specific procedure of review of its orders, Rule 3 which sets out the “Scope and Objectives” provides at Rule at 3(8) for the inherent jurisdiction of the Court in the following manner:



”Nothing in these rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the Court process.”

21. The phrase “as may be necessary to meet the ends of justice” gives the Court the discretionary power to make decisions based on facts or circumstances of a particular case to ensure that any mischief or injustice that can be prevented is prevented in any given situation as long as it acts judiciously.
22. For instant, in the present case, notwithstanding the previous directions, if the petitioner/applicant can demonstrate that there is a deserving need for the Court to review the previous directions due to a new circumstance that may put at risk the substance of the petition that was not before when the court was approached, nothing should stop the Court from varying such directions or making any new orders to meet the ends of justice.
23. As a result of the new circumstances disclosed by the Petitioner, the Court in the first instance was persuaded that that the Petitioner had persuasively made a case for amendment of the Petition and considering that responses had not been filed, allowed the same with immediate effect. It also allowed the inclusion of the 2nd Interested Party in that amended petition.
24. On whether the scope of the application is only limited to reviewing the previous directions as submitted by Mr. Bitu, that is not correct in view of above observations. Further, looking at the application, it is also clearly sets out other prayers and it includes a prayer for conservatory order. The argument that it is not seeking conservatory orders is thus untenable.
25. I will now consider the next issue, whether the prayer for conservatory order is merited in the circumstances of this case.
26. This prayer is based on provisions of Section 12 of the Attorney General’s Act as read together with Article 23 (2) and Article 22 of *the Constitution* and Rule 23(1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013; which provides:

“Despite any provision to the contrary, a Judge before whom a petition under Rule 4 is presented shall hear and determine an application for conservatory or interim orders.”
27. What is meant by the term “Conservatory Order” was explained in *Invesco Assurance Co. v M N (Minor suing through next friend and Mother 2016 eKLR* as follows:

“A conservatory order is a judicial remedy granted by court by way of undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for preservation of the subject matter.”
28. Through judicial precedents, Courts have established the principles to guide the Court in considering applications for conservatory orders. In *Centre for Right Education and Awareness (CREAW) and another Vs Speaker of the National Assembly* the court stated: -

“A party who moves to the court seeking conservatory orders must show to the satisfaction of the court that his/her rights are under threat of violation, are being violated or will be violated and that that the violation or threatened violation is likely to continue unless a conservatory order is granted. This is because the purpose of conservatory order is to prevent violation of rights and fundamental freedom and preserve subject matter pending the hearing and determination of a pending case or petition.”



29. Equally, the Supreme Court has held that Conservatory orders are meant to facilitate ordered functioning within Public agencies and uphold adjudicatory authority of the court in public interest. That was the holding of the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji* [2014] eKLR.
30. A conservatory order can thus issue to stop an arbitrary act which undermines the rule of law, constitutionalism and good governance as that is an order made in public interest.
31. Where therefore it is demonstrated that an act that is complained of threatens, violates or continue to violate any constitutional values or principle, the court can issue a conservatory order to forestall or stop the violation and preserve the status quo pending the hearing and determination of the petition.
32. There are fundamentally three main principles that courts rely on in considering an application for conservatory order: -
- i. That the petition raises a serious question for determination in terms of quality and intensity of the issue at hand.
 - ii. If the conservatory order is not granted, the petition will be rendered nugatory.
 - iii. Public interest is in favour of granting the orders sought.
33. I will now turn to the instant application to determine if the petitioner/applicant has fulfilled the above conditions.
34. On whether the Petitioner/Applicant has raised/demonstrated that there is a serious issue for determination; Section 12 of the Attorney General *Act No. 49 of 2012*; is relevant. It sets out the pre-conditions that have to be met before the Attorney general can be removed from office. Section 12 provides:
- Removal from office
- 12(1) The President may remove the Attorney General from office for:
- a. Serious violation of *the Constitution* or any other law.
 - b. Gross misconduct, whether in performance of their functions or otherwise.
 - c. Physical or mental incapacity to perform functions of office.
 - d. Incompetency or
 - e. Bankruptcy.
- 2) Notwithstanding the provisions of sub-section (1), the President may, upon election under *the constitution* appoint a person qualified as Attorney General in accordance with provisions of *the Constitution* and this Act.
35. Nevertheless, the same Act also has Section 11 which provides that the “Attorney General or Solicitor General may resign from office in writing addressed to the President.”
36. The dilemma that the petitioner faces in insisting that the President unconstitutionally removed the Attorney General is that even after naming and adding the immediate former Attorney General in this petition as; “the 1st interested party” nothing has been filed by the said immediate former Attorney General to give credence to the allegations put forward in the petition as to the circumstances to



pertaining to his removal. That casts doubts as to the claim on the manner or mode that the Attorney General may have left office.

37. Subsequent to this, it is public domain, and this court takes judicial notice that then Attorney General was subsequently nominated for a cabinet portfolio which leaves one wondering, can the facts put forward by the Petitioner be relied on as demonstrating the true state of affairs pertaining to the removal or are they bare speculations?
38. In my view, the Petitioner is inviting the court to make orders based facts that are not verifiable but are basically suspicion and speculation. Such far reaching orders cannot be made on mere assumptions.
39. I would, therefore, decline to consider the other two factors and equally find that the threshold for conservatory order has not been met based on the facts relied on in the circumstances.
40. The application is dismissed. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF JULY, 2024.

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L N MUGAMBI
JUDGE

