



**General & 2 others v Katiba Institute & another; Unit (Interested Party)
(Constitutional Petition 26 of 2019) [2022] KEHC 3333 (KLR) (22 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 3333 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CONSTITUTIONAL PETITION 26 OF 2019**

**JM NGUGI, J
JUNE 22, 2022**

BETWEEN

**ATTORNEY GENERAL 1ST APPLICANT
NATIONAL GOVERNMENT 2ND APPLICANT
OF POLICE 3RD APPLICANT**

AND

**KATIBA INSTITUTE 1ST RESPONDENT
COUNCIL OF GOVERNORS 2ND RESPONDENT**

AND

INDEPENDENT MEDICO-LEGAL UNIT INTERESTED PARTY

RULING

1. The main Petition in this matter relates to the implementation of sections of the *National Police Service Act*, 2011 (hereinafter “the Act”). The subject sections concern the establishment and operationalisation of County Policing Authorities in each County. In its Petition dated November 14, 2019, the Petitioner sought the following prayers:
 - a. A declaration that the Respondents’ failure, neglect, or refusal to operationalize the County Policing Authorities established under section 41 of the *National Police Service Act* is unconstitutional and in violation of articles 2(1), 3(1), 6(2), 6(3), 10(2), 47(1), 73(1), 232(1), 238(2), 239(5) and 244 of the *Constitution*.
 - b. A declaration be issued to the effect that the respondent’s failure to constitute County Policing Authorities is contrary to the principle of public participation and cooperative governance between the two levels of government found in articles 6(2) and 10(2) of the *Constitution*.



- c. An Order of *Mandamus* do issue compelling and directing the 2nd to 3rd Respondents to immediately operationalize the County Policing Authorities, through issuance of guidelines, policies, financing of and appointments to the Authorities.
 - d. That the 2nd to 3rd respondents be directed to file an affidavit in this Honourable Court within 3 months of this court's decision indicating the status of their compliance with order (c) above.
 - e. That the respondents bear the petitioner's costs or in the alternative each party bears their own costs.
 - f. Any other relief that this Honourable court may deem just and fair to order.
2. Directions on the hearing of the Petition were given on January 18, 2021 after which the Applicants filed the Application now before me. The same is dated June 18, 2021 and seeks the following orders:
 1. That this Honourable Court be pleased to stay proceedings herein pending legislative process of the proposed amendments to the [National Police Service Act](#) by the National Assembly.
 2. That the costs of this application be in cause.
 3. It is supported by the grounds on the face of it as restated in the affidavit of Wilson Njega, EBS, the 2nd applicant's Secretary- Internal Security. He deposes that the 1st applicant has inaugurated a bill in Parliament to amend several sections of the Act and that one of the salient proposed amendments is deleting sections 41, 42, 43, 44 and 97 of the Act. It is his deposition that the amendments are hinged on the ground that the sections providing for the establishment and operations of the County Policing Authority shall be headed by County Governors is contrary to article 254(2)(b) of the [Constitution](#), which provides that the Inspector General of the National Police Service shall exercise independent command over the service, as well as Paragraph 7 of the Fourth Schedule of the [Constitution](#) which delegates the Police Service to the National Government. According to him, the proposed amendments seek to align the Act with the [Constitution](#).
 4. He contends that the activities proposed to be carried out by County Policing Authorities can be carried out under the Community Policing Committees which start from the police station to the highest level of command.
 5. It is also his contention that the amendment if approved, would abolish the County Policing Authority as established under section 41 of the Act in its entirety and that execution would be impractical if the Court was to grant the orders sought by the petitioner. To him, the determination and conclusion of the present Petition is clouded in uncertainty due to the introduction of the National Police Service Bill seeking to amend various sections of the Act and that this court should not issue orders in vain.
 6. In a nutshell, the applicants' case is that since this Petition is hinged on section 41 of the Act, any actual or proposed changes would defeat the purpose of the Petition should they be effected.
 7. The Application was opposed through the petitioner's Grounds of Opposition dated July 15, 2021. Summed up, the petitioner's Grounds of Opposition are as they appear in the first seven grounds as follows:
 1. That the applicants have not satisfied the legal requirements for the issue of stay of proceedings of Petition No. 26/2019.
 2. That the orders prayed for cannot issue as the application is incompetent, misconceived, bad in law and incurably defective, having been brought under the wrong sections of the law,



unavailable within or unsupportable based on Order 2 Rule 15 and Order 50 Rule 1 of the Civil Procedure Rules, 2010.

3. That the stay of proceedings is a serious, grave and a fundamental interference of the Petitioner's right to be heard and the applicant has not demonstrated what loss or prejudice it will suffer if the petition is heard and determined.
 4. That the application is a gross abuse of the Court process having been brought very late in the day and a delay tactic by the Office of the Attorney General.
 5. That the Applicant's fears are futuristic and not probable thus they cannot supplant the law upon which the Petition is premised, in any event Section 41 of the National Police Act enjoys the presumption of Constitutionality.
 6. That there is no Bill tabled in Parliament seeking to amend the law upon which the petition is grounded.
 7. That stay of proceedings will disturb the just and expeditious disposal of this petition.
8. The interested party also opposed the application vide its 'Grounds of Objection' dated June 23, 2021 which are:
1. That the said application is an admission or concession to the application dated November 14, 2019.
 2. That the proposed legal amendment by parliament has no time limit and the applicants would get a blank cheque to take all their sweet time. This court ought to pronounce itself on timelines for amendment if any by granting the petition.
9. The application was canvassed by way of written submissions. The applicants' submissions are dated October 27, 2021. The applicants submit that they have met the legal threshold for the grant of an order of stay of proceedings. They concede that a grant of stay of proceedings is discretionary and that in exercising its discretion, the court ought to evaluate the matter before it and the circumstances, then make a just, fair, and considerate determination. To the Applicants, this discretionary power is not to be exercised capriciously or whimsically but rather in a manner that would not prejudice any party. They rely on the case of Stanley Kangethe Kinyanjui v Tony Ketter & 5 others [2013] eKLR
10. The applicants urge that this court be guided by the principles laid down in Housing Finance Company of Kenya v Sharok Kher Mohammed Ali Hirji & another [2015] eKLR and Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi [2014] eKLR i.e. whether the applicant has established a prima facie or arguable case, whether the application was filed expeditiously and whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.
11. On the first principle, the applicants submit that they have established a *prima facie* case as set out in Mrao Ltd. v First American Bank of Kenya Ltd & 2 others [2003] eKLR, by virtue of the 1st applicant having instituted a bill in Parliament seeking to amend the Act
12. On the second principle, they contend that the courts ought to consider unreasonable delay depending on the circumstances of the case, as stated in Jaber Mohsen Ali & another v Priscillah Boit & another [2014] eKLR. The circumstances of the instant case, the Applicants argue are that they have made several efforts to amend the Act since 2019 and as such, they cannot be said to have unreasonably delayed.



13. On the third principle, the Applicants submit that the Application has become germane because of the acceptance of the Amendment Bill by the Legislature and in because of the need to save judicial time. They rely on *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others* [2009] eKLR and contend that it would be in the interest of justice to halt proceedings until the fate of the bill is determined by Parliament.
14. On whether this court should pronounce itself on the timelines for debate and passage of the Act by the National Assembly, the Applicants submit that this would amount to the court meddling with the business of another arm of government. They argue that this would breach the independence of the Parliament and the doctrine of separation of powers. They submit that *the Constitution* recognizes the independence of Parliament by allowing it to establish its own rules and procedures under article 124.
15. The applicants reiterate that the court should not interfere with the Legislature when it is discharging its mandate. They rely on *In the Matter of the Speaker of the Senate & another* [2013]: and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*. It is therefore their submission that no institution can interfere with the procedures of Parliament where it has accepted a bill for debate.
16. Accordingly, the applicants submit that this court should exercise its discretion and grant a stay of proceedings. They rely on *David Morton Silverstein v Atsango Chesoni* [2002] 1 KLR and *Global Tours & Travels Limited*, Nairobi High Court Winding Up Cause No 43 of 2000 (UR)
17. The petitioner's submissions are dated January 15, 2022. The petitioner relies on *Kenya Wildlife Service v James Mutembei* [2019] eKLR and *Halsbury's Law of England* 4th Edition Vol 37 at Page 330 and 332 for the proposition that stay of proceedings is an extraordinary remedy whose test is high and stringent.
18. The petitioner contends that the application for stay of proceedings is not meritorious because it is based on speculation of possible amendments by Parliament as there is neither evidence to verify introduction of the bill in Parliament nor proceeding before any Parliamentary Committee.
19. The petitioner contends further that the application is untimely because the Applicants have repressed information forming the basis of the Petition and have not explained the extraordinary delay. It is the Petitioner's submission that the Petition is ripe for determination and that the Petitioner having exhausted significant time and resources to pursue their constitutional rights, the applicants should not be allowed to dust off the claim as it would only delay the proceedings.
20. It is the petitioner's submission that the stay of proceedings will not lead to a just and expeditious disposal of this Petition. The Petitioner contends that the Petition raises serious constitutional questions and that the Applicants are asking the Court to relinquish its responsibility and undermine the Petitioner's constitutional Right to a fair hearing in favour of waiting for an indefinite and protracted political and legislative process with an uncertain outcome. The petitioner thus prays that the application be dismissed, and the Petition be determined.
21. The single issue for determination is whether the applicants have established sufficient grounds for a grant of stay of proceedings.
22. It is not clear why the Application has been brought under Order 2 Rule 15 and Order 50 Rule 1 which provide for striking out of pleadings and computation of time respectively. Nevertheless, it is the duty of this Court to determine the Application before it on its merits.
23. In arguing their case for stay of proceedings, the applicants have enumerated three principles, which in my view, would be applicable for a stay of proceedings and/ or execution pending appeal. In this



case, the grounds upon which the stay of proceedings is sought can only be classified as an external event. Accordingly, all the applicants need to demonstrate is that granting a stay will not only be in the interest of justice, but also not prejudicial to the petitioner's case.

24. The Applicants argue that if the proceedings herein continue, the execution of the orders granted would be impractical in case Parliament repeals the sections that are the subject of this Petition. Save for attaching a list of clauses that they allege are proposed amendments to the Act, the applicants have not placed any material before the court as proof of having presented those proposals to the National Assembly or whether the same has been accepted by the National Assembly. As the Petitioner points out, no definitive evidence has been presented before this Court that any bill to amend the National Police Service Act actually exists. No copy of the bill has been provided and no evidence has been presented that the bill has been forwarded to Parliament for consideration and approval.
25. That the applicant has not presented definitive evidence that the bill exists or that it has been presented to the National Assembly for consideration and approval really disposes of this matter: it forestalls the possibility that the Applicant can raise an arguable case for staying the proceedings ostensibly to await consideration by the National Assembly.
26. Even if such evidence of existence of the bill was provided to the Court, the facts here would hardly justify staying proceedings.
27. Halsbury's Laws of England, 4th Edition, Vol 37 at p 330 says the following about stay of proceedings:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings, beyond reasonable doubt, ought not to be allowed to continue....This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases...It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of this case.”

28. In short, a stay of proceedings is a radical remedy which is only granted in very exceptional circumstances. In the words of Ringera J in *Global Tours & Travels Limited* (Nairobi HC Winding Up Cause No 43 of 2000):

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice.....the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously” (emphasis added)

29. In the present case, the sparse evidence placed before the court suggests that the decision to seek the amendments to the statute is not a new development; but that it had been mulled and acted upon



even when the Petition herein was filed. That it took more than two years for the applicant to bring the present Application – and after directions on the Petition have been given and submissions filed -- confirms that it is an afterthought and an attempt to prevent the court from reaching a decision on the merits. It disentitles the Applicant from the exceptional discretionary relief of stay of proceedings. The situation is exacerbated by the fact that the applicant is asking the court to stay the proceedings indefinitely and await a legislative process whose timelines are unknown and unknowable. Such a situation would, without a doubt, severely prejudice the petitioner's rights to have its case decided as expeditiously as is practicable. Finally, it has now come to pass that the 12th Parliament which was ostensibly considering the bill (if it existed) has been adjourned sine die. With that adjournment is the functional demise of all pending bills.

30. The upshot is that the Application dated June 18, 2021 has no merits whatsoever. It must be dismissed and I hereby do so.
31. The costs will be in the cause.
32. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 22ND DAY OF JUNE 2022.

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JOEL NGUGI

JUDGE

