Okoiti v Judicial Service Commission; Mwilu & another (Interested Parties) (Petition E408 of 2020) [2021] KEHC 12543 (KLR) (Constitutional and Human Rights) (12 January 2021) (Ruling)

Okiya Omtatah Okoiti v Judicial Service Commission; Philomena Mbete Mwilu & another (Interested Parties) [2021] eKLR

Neutral citation: [2021] KEHC 12543 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E408 OF 2020

AC MRIMA, J

JANUARY 12, 2021

BETWEEN

OKIYA OMTATAH OKOITI ..... PETITIONER

AND

THE JUDICIAL SERVICE COMMISSION ..... RESPONDENT

AND

HON LADY JUSTICE PHILOMENA MBETE MWILU ..... INTERESTED PARTY

THE HON ATTORNEY GENERAL ..... INTERESTED PARTY

RULING

Introduction and Background

1. The succession of the second Chief Justice of the Republic of Kenya post The Constitution of Kenya, 2010, has led to the institution of the proceedings subject of this ruling.

2. The Petitioner herein, Okiya Omtatah Okoiti, challenges the taking over of the current Deputy Chief Justice of the Republic of Kenya, Hon. Lady Justice Philomena Mbete Mwilu, the 1st Interested Party, as the Acting Chief Justice pending the recruitment of the next Chief Justice.

3. By a Petition dated 9th December, 2020, the Petitioner, in the main, prays for the following orders: -

1. A declaration that the Judicial Service Commission has violated the Constitution by delaying to hear and determine the four petitions seeking the removal of the Deputy Chief Justice Philomena Mbete Mwilu.

2. An order compelling the Judicial Service Commission to determine the four petitions seeking the removal of the Deputy Chief Justice Philomena Mbete Mwilu timeously before Chief Justice Maraga proceeds on terminal leave on 15th December, 2020.

3. An order barring the Judicial Service Commission from appointing DCJ Mwilu to act in the office of the Chief Justice upon the retirement of Chief Justice David Maraga unless and until the Judicial Service Commission clears her of the accusations levelled against her in the four petitions in issue seeking her removal.

4. An order compelling the Respondent to bear the costs of this suit.

5. Any other relief the court may deem just to grant.

4. Together with the Petition, the Petitioner filed an evenly dated Notice of Motion (hereinafter referred to as 'the First Motion') under a certificate of urgency. Later, the Petitioner filed another Notice of Motion. It is dated 14th December, 2020. I, will, hereinafter refer to that application as 'the Second Motion'). Both Motions shall be collectively referred to as 'the applications'.

5. Upon directions of this Court, the applications were to be heard by reliance to the Affidavit evidence and submissions. The Court issued timelines within which parties were to comply. The Petitioner and the 1st Interested Party duly complied.

6. The applications were finally heard on 6th January, 2021. This ruling is, hence, on the applications.

The Applications:

7. The First Motion sought the following orders: -

1. That, the honourable court be pleased to certify this application as extremely urgent and hear it ex-parte.

2. That, pending the inter-parties hearing and determination of this application and/or the petition herein the Honourable court be pleased to issue a temporary order of prohibition prohibiting the Judicial Service Commission and its agents from appointing the Deputy Chief Justice Philomena Mwilu to act in the office of the Chief Justice unless and until the JSC clears her of the allegations of corruption and abuse of office contained in the pending four petitions seeking her removal.

3. That, upon hearing this application, the Honourable court be pleased to certify that instant petition raises a substantial question of law and forthwith refer the petition to His Lordship the Chief Justice for the empanelment of a bench of three or five judges to hear and determine it pursuant to Article 165(4) of the Constitution of Kenya, 2010.

4. That consequent to the grant of the prayers above the Honourable court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.

5. That costs be in the cause.

8. The First Motion is supported by the Affidavit of the Petitioner sworn on 9th December, 2020.

9. The Second Motion sought the following orders: -

    1. That pending and following the inter-partes hearing and determination of this application/ petition, the Honourable Court be pleased to issue a temporary order suspending the letter REF: CJ/PERS of 11th December 2020 which the Hon. David Kenani Maraga, EGH, the outgoing Chief Justice of Kenya and President of the Supreme Court of Kenya wrote purporting to appoint the Deputy Chief Justice the Hon. Philomena Mbete Mwilu "to act as the Chief Justice of the Republic of Kenya and perform all duties and functions of Chief Justice from 12th December 2020... until a new Chief Justice is appointed in accordance with the Constitution of Kenya."

    2. That pending and following the inter-partes hearing and determination of this application/ petition, the Honourable Court be pleased to issue a temporary order of prohibition prohibiting the Deputy Chief Justice the Hon. Philomena Mbete Mwilu and any other person howsoever acting from acting or continuing to act as the Chief Justice of Kenya or giving effect in any way whatsoever to the Hon. David Kenani Maraga's letter REF: CJ/PERS of 11th December 2020.

    3. That following the inter-partes hearing of this Application an order be and is hereby issued, admitting the Affidavit and exhibits supporting this application to be part of the Record of the Petition herein.

    4. That upon hearing the petition, the Honourable Court be pleased to declare Subsections 5(4) and (5) of the Judicial Service Act, Revised Edition 2017 [2011], to be unconstitutional and, therefore, invalid, null and void.

    5. That upon hearing the petition, the Honourable Court be pleased to quash the Hon. David Kenani Maraga's letter REF: CJ/PERS of 11th December 2020.

    6. That consequent to the grant of the prayers above the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.

    7. That Costs of this application be borne by the Respondent.

10. The Second Motion is supported by the Affidavit of the Petitioner sworn on 14th December, 2020.

11. The Petitioner also swore a Supplementary Affidavit on 28th December, 2020. He, further, filed written submissions dated 30th December, 2020 and made reference to several relevant decisions.

The Responses:

12. The Respondent and the 2nd Interested Party did not file any responses to the applications. They also did not participate in the hearing. The 1st Interested Party vehemently opposed the applications.

13. The 1st Interested Party (whom I will alternatively herein refer to as 'the DCJ'), filed a Replying Affidavit sworn on 21st December, 2020. The DCJ also filed submissions and a List of Authorities.

Issues for determination and analysis:

14. I, hereby, discern the following areas of discussions from the reading of the Petition, the applications, the affidavits and the submissions:

    (i) The nature of conservatory orders;

(ii) The guiding principles in conservatory applications; and

(iii) The applicability of the principles to the applications.

15. I will deal with the above sequentially.

The nature of conservatory orders:

16. In Civil Application No. 5 of 2014 Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others (2014) eKLR, the Supreme Court discussed, at paragraph 86, the nature of conservatory orders as follows: -

> (86) "Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the Applicant's case for orders of stay.

16. The Court in Nairobi Civil Appeal 151 of 2011 Invesco Assurance Co. Ltd vs. MW (Minor suing thro' next friend and mother (HW) [2016] eKLR defined a conservatory order as follows: -

> 5. A conservatory order is a judicial remedy granted by the court by way of an 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 the preservation of the subject matter.

17. In Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR the Court had the following to say about the nature of conservatory orders: -

> Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.

18. Given the nature of conservatory orders, it is argued, that there is need for a Court to exercise caution when dealing with any request for such prayers. I agree with that proposition for the reason that matters which are the preserve of the main Petition ought not to be dealt with finality at the interlocutory stage.

19. The foregoing was fittingly captured by Ibrahim, J (as he then was) in Muslim for Human Rights (Milimani) & 2 Others vs Attorney General & 2 Others (2011) eKLR. The Learned Judge, correctly so, stated as follows: -

> The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-a vis the case of either parties. The principle is similar to that in temporary or interlocutory injunctive in civil matters. This is a cardinal principle and happily makes my functions and work here much

easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side.

20. The decisions in Centre for Rights Education and Awareness (CREAW) & 7 Others v. Attorney General (2011) eKLR, Platinum Distillers Limited vs. Kenya Revenue Authority (2019) eKLR and Kenya Association of Manufacturers & 2 Others vs. Cabinet Secretary – Ministry of Environment and Natural Resources & 3 Others (2017) eKLR also variously vouch the cautionary approach.

21. A Court, therefore, dealing with an application for conservatory orders must maintain the delicate balance of ensuring that it does not delve into issues which are in the realm of the main Petition. In this discourse, I will, therefore, restrain myself from dealing with such issues.

The guiding principles in conservatory applications:

22. The principles for consideration by a Court in exercising its discretion on whether to grant conservatory orders have been developed by Courts over time. They are now settled.

23. The locus classicus is the Supreme Court in Civil Application No. 5 of 2014 Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others (2014) eKLR where at paragraph 86 stated the Court stated as follows: -

> (86) ..... Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant courses.

24. In Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board and Others Nairobi High Court Constitutional Petition No.154 of 2016 (2016) eKLR after going through several decisions, the Court rightly so, summarized three main principles for consideration on whether to grant conservatory orders as follows: -

> (a) An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.
>
> (b) Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
>
> (c) The public interest must be considered before grant of a conservatory order.

25. There is also the need to ascertain whether the conservatory order sought will delay the early determination of the dispute. (See Nairobi High Court Constitutional Petition No. E243 of 2020 Kenya Tea Development Agency Holdings Limited & 55 Others vs. The Cabinet Secretary Ministry of Agriculture, Livestock, Fisheries & Co-operatives & 2 Others and Kenya Small Tea Holders Growers Association (Kestega) (Interested Party) (unreported).

The applicability of the principles to the application:

A prima-facie// case:

26. In its submissions, the Petitioner posits that his case is centered on the premise that the position of an Acting Chief Justice does not exist in law, and even if it did, then the DCJ is not suitable to occupy it.

27. The Petitioner is categorical that the Petition is not about the performance by the 1st Interested Party of her duties as a Judge of the Supreme Court; rather it is about her suitability to take on the administrative

functions of the Chief Justice of the Republic of Kenya and to be the face of the Judiciary in circumstances where she is under active investigations by the Judicial Service Commission (hereinafter referred to as 'the JSC') on allegations of abuse of office and corruption made by, among others, none other than the Director of Public Prosecutions and the Director of Criminal Investigations. That, as at now, there are four pending Petitions on the removal of the 1st Interested Party from office before the JSC. It is decried that the said Petitions have been pending for some time.

28. It is argued that the JSC, has by way of indolence and dereliction of duty, failed, refused and ignored to prosecute any of the four Petitions against the 1st Interested Party.

29. The Petitioner submits that the Constitution does not provide for nor anticipate the office of Acting Chief Justice; hence, Section 5(4) and (5) of the Judicial Service Act, which creates the position of Acting Chief Justice, is unconstitutional as Parliament has no capacity to create such offices in legislation. The Petitioner also argues that the Constitution does not provide for nor anticipate a vacancy in the office of the Chief Justice on the expiry of the term of office of a Chief Justice; hence, Section 5 (4) and (5) of the Judicial Service Act, remain unconstitutional.

30. Further arguments by the Petitioner include that the Deputy Chief Justice is by law limited to perform only the functions conferred by the Constitution and any other functions of the Chief Justice as the Chief Justice may assign. Section 5 (4) and (5) of the Judicial Service Act is faulted in creating the position of Acting Chief Justice as a "principal" office holder with all powers of the Chief Justice. There is no legal framework for the performance of limited functions by an Acting Chief Justice, resulting in the untenable situation where an Acting Chief Justice has all the powers and can perform all the functions of a substantive Chief Justice. A constitutional issue emerges because Article 166(1)(a) requires the Chief Justice to be appointed by the President on the recommendation of the JSC and with the advice and consent of the National Assembly. Since an Acting Chief Justice who takes office pursuant to Section 5 (4) and (5) of the Judicial Service Act — not pursuant to JSC recommendation, presidential nomination, and National Assembly confirmation as per Article 166(1)(a) — is a principal officer with all the powers of the office, then the section is unconstitutional to the extent that it allows this to occur.

31. The outgoing Chief Justice of the Republic of Kenya, His Lordship David Kenani Maraga, is also faulted to have acted ultra vires vide the second limb of his letter REF: CJ/PERS of 11th December 2020, which did not invoke any law vesting such powers on him, by purporting to appoint the 1st Interested Party, upon his exit from office on 13th January, 2021, to act as the Chief Justice of Kenya for a period not exceeding sixty days or until a new Chief Justice is appointed.

32. The Petitioner further argues, that: -

    i. If the appointment through the letter dated 11th December, 2020 is allowed to stand, then His Lordship David Kenani Maraga would technically and for all practical purposes have extended his tenure beyond midnight on 12th January, 2021.

    ii. The outgoing Chief Justice has no capacity in law to appoint an Acting Chief Justice.

    iii. The outgoing Chief Justice has no capacity in law to usher an Acting Chief Justice into office without the appointee taking an oath of office pursuant to Article 74 of the Constitution.

33. The Petitioner also argues that it is only the JSC which has the capacity to recommend to the President for a person to be appointed into the office of the Chief Justice, even in an acting capacity if the Constitution had allowed it. In the absence of a substantive Chief Justice to delegate duties and give direction, a Deputy Chief Justice cannot act on his/her own volition.

34. The Petitioner vehemently purports that the appointment of the DCJ to be an Acting Chief Justice upon the expiry of term in office by the current Chief Justice has no basis in law.

35. It is further argued that even if the Section 5(4) of the Judicial Service Act, 2011 was to apply, the Deputy Chief Justice can only act as the Chief Justice for a period not exceeding six months pending the appointment of a new Chief Justice in accordance with the Constitution, in the event of the removal, resignation or death of the Chief Justice. It does not apply when the incumbent Chief Justice vacates office in accordance with Article 167(1) and (2) of the Constitution.

36. The 1st Interested Party takes great exception in the manner the Petitioner has presented his case in the Petition and in the applications and submissions. It is contended that the issue of the constitutionality of Section 5 (4) and (5) of the Judicial Service Act, No. 1 of 2011 is not part of the current Petition before Court. As such, the issue as raised in the Second Motion and so amplified in the submissions, has no foundation in the Petition and cannot be a basis for granting any orders in the applications.

37. In a rejoinder, the Petitioner submits that the Court has jurisdiction to entertain any matters which is placed before it even if the same is not part of the parties' pleadings as long as the parties have fully addressed themselves to the same.

38. That, parties are bound by their pleadings is a settled principle in law. The Supreme Court of Kenya in its ruling on inter alia scrutiny of votes in an election Petition in Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in respect of the essence of pleadings: -

(52) Further, the Court went on and observed that: -

> ... In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....

39. The Court of Appeal in Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

> .... it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
>
> ... In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.

40. More recently, the issue was, once again, dealt with by the Supreme Court in Methodist Church in Kenya v Mohamed Fugicha & 3 others [2019] eKLR. The background of the matter is that a Petition was filed in the High Court against some Respondents on the issue as to whether female Muslim

students ought to be allowed to wear the religious hijab (head gear) in school. An interested party was enjoined. The interested party filed a cross-petition where it introduced the issue of discrimination against the Muslim female students in not being allowed to wear the hijab in school. The Petition and the Cross-Petition were fully heard before the High Court. On appeal, the Court of Appeal dealt with issue of discrimination at length. The matter eventually reached the Supreme Court vide Petition No. 16 of 2016.

41. The Supreme Court faulted both the High Court and the Court of Appeal in the manner they handled the cross-petition filed by an interested party. In striking out all the proceedings on the cross-petition and ordering that the matter be properly filed before the High Court for appropriate dealing, the Court reiterated the need for Courts to be guided by properly filed pleadings. The Court stated as follows: -

> (57) We agree that the issues set out in the cross-petition did not afford the opportunity for the Petitioner to respond to the same effectively. Firstly, because it introduced a different cause of action from that raised in the original Petition; and secondly, because it was not framed in a manner, for which there was a known laid out procedure for an exhaustive response. The fact, that the petitioner may have referred to the issues therein through oral arguments, could not, as wrongfully determined by both the High Court and the Court of Appeal, have amounted to formal pleadings in response to those issues. As such we find that both superior Courts violated the Petitioner's right to be heard, as provided for under Articles 25 and 50 of the Constitution.
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> (58) Furthermore and with due respect to the Appellate Court, we are persuaded that the cross-petition was improperly before the High Court, and ought not to have been introduced by an interested party, and in that light, it should not and could not have been entertained by the Court of Appeal; neither court having proper jurisdiction to do so.
>
> (59) In the same breadth, we recognize that the issue as contained in the impugned cross petition is an important national issue, that will provide a jurisprudential moment for this Court to pronounce itself upon in the future. However, to do so, it is imperative that the matter ought to reach us in the proper manner, so that when a party seeks redress from this court, they ought to have had the matter properly instituted, the issues canvassed and determined in the professionally competent chain of courts leading up to this Apex Court. In view of this, it is our recommendation that should any party wish to pursue this issue, they ought to consider instituting the matter formally at the High Court.

42. The legal position on pleadings is, hence, clearly settled by Courts, including the Apex Court.

43. Returning to the case at hand, it, therefore, follows that any issue which is not part of and/or has no foundation from the Petition dated 9th December, 2020 cannot be a basis for consideration on any matter in this cause.

44. I have carefully perused the Petition. The Petition is not amended. The Petitioner seeks the leave of the Court through the second motion to amend the Petition. I affirm that the issue of the constitutionality of Section 5(4) and (5) of the Judicial Service Act is not part of the Petition. It was introduced in the second Motion.

45. Guided by the above binding decisions, I hereby find and hold, that, unless and until the Petition is duly amended, this Court lacks the jurisdiction to in anyway deal with the issue of the constitutionality of Section 5(4) and (5) of the Judicial Service Act in the current proceedings.

46. With the aspect of the constitutionality of Section 5(4) and (5) of the Judicial Service Act not being part of the Petition, and by extension the matters before Court, most of the prayers in the second motion stand spent.

47. The first motion mainly seeks that the JSC be prohibited from appointing the 1st Interested Party as the Acting Chief Justice. The Petitioner, however, has not demonstrated the basis in law for the proposition that the JSC appoints the Acting Chief Justice. On the flipside, Section 5(4) and (5) of the Judicial Service Act, which is yet to be impugned, makes provision for an Acting Chief Justice. Neither the Constitution nor the Judicial Service Act or any law expressly provides for the appointment of the Acting Chief Justice by JSC.

48. The first motion is premised on the Petitioner's case that the 1st Interested Party cannot hold the office of the Acting Chief Justice in view of the pending Petitions on her removal from office. The Petitions are before the JSC. It is contended that the Petitions have adversely affected the integrity of the 1st Interested Party thereby making her unsuitable to hold the office of the Acting Chief Justice.

49. From the 1st Interested Party's response and submissions, it appears that there are several Court cases on the Petitions against the 1st Interested Party at the JSC. That is a factual issue.

50. Whereas, on one hand, the Petitioner fronts the position that the DCJ ought not to act as the Chief Justice since her integrity has been variously impugned and the Petitions for her removal pending, on the other hand, the DCJ contends that no adverse determination on her integrity or suitability to serve as the DCJ has ever been made hence there is no impediment in law against her acting as the Chief Justice.

51. The issue as to whether the 1st Interested Party ought to hold the office of the Acting Chief Justice is unsettled and highly contested. There are several Court cases pending as well as the Petitions before the JSC. With such a scenario, this Court must tread carefully in making any determination based on the unsettled issue.

52. Courts have been cautioned against making final findings on factual issues at interlocutory stages. The Court of Appeal in Civil Application Nai. 31 of 2016 Alfred N. Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 Others [2016] eKLR stated as follows: -

> 35. In the instant case, the trial judge made a finding that there was no threat of violation of the applicant's fundamental rights and freedoms. We remind ourselves that the trial judge made this finding in an interlocutory application. In our view, whether there is a threatened violation is a matter of fact to be ascertained in a full hearing of the Petition.

53. In the same vein, it is not only binding on this Court, but also logical that disputed factual issues be first ascertained in a full hearing before a Court makes any renditions based on those facts.

54. At the moment, given the pendency of the various Court cases and the Petitions before the JSC on whether the 1st Interested Party ought to be removed from office, this Court finds it rather difficult to comprehend how the Petitioner may aver to have established a case against the DCJ from acting as the Chief Justice. I say so because, to me, a similar issue was rightly settled by the High Court in a 5-Judge Bench in International Centre for Policy & Conflict & 5 others v Attorney General & 4 others [2013] eKLR. The Multi-Bench considered whether a person facing prosecution for serious international crimes at the International Criminal Court is disqualified from running for an elective office. The Court, again rightly so, stated as follows: -

> 154. It has neither been alleged, nor has any evidence been placed before us that the 3rd and 4th Respondents have been subjected to any trial by any local court or indeed the ICC that has led to imprisonment for more than 6 months. The confirmation of charges at the ICC may have formed the basis for commencement of the trial against the 3rd and 4th Respondents. The end

result however, cannot be presumed neither is there sufficient evidence that at the end of it all, a conviction may be arrived at.

155. We are alive to the serious nature of the charges the 3rd and 4th Respondents are facing at the ICC. However, we can only say that much. This is because under Article 50 of the Constitution, the 3rd and 4th Respondents are to be presumed innocent until the contrary is proved. The entrenchment of this Article is meant to ensure a fair trial in respect of every person before a court, tribunal or body. This right falls under the category of fundamental rights and freedoms that may not be limited as provided in Article 25 of the Constitution.

55. The foregoing is the position in this matter. In as much as the Petitioner may attempt to make a case out of the matters as they are, that case can only be dependent on the outcome of the Court cases and the Petitions before the JSC. The approach taken by the Petitioner is, hence, premature.

56. As demonstrated, the Petitioner's case is two-pronged. It is hinged on the issue of the constitutionality of Section 5(4) and (5) of the Judicial Service Act and, also, on the issue as to whether the 1st Interested Party ought to hold the office of the Acting Chief Justice in view of the pending petitions on her removal from office.

57. The foregoing discussion has answered the question as to whether the Petitioner has established a prima-facie in this matter. As said, this Court, at the moment, has no jurisdiction to entertain any arguments hinged on the constitutionality of Section 5(4) and (5) of the Judicial Service Act. Further, the issue of the inability of the DCJ to hold the office of the Acting Chief Justice is based on several pending Court cases and Petitions before the JSC. That position cannot yield a prima-facie case in the circumstances of this case.

58. In sum, it is the finding of this Court that based on the pleadings and material placed before Court, the Petitioner has not established any prima-facie case.

59. The upshot is that a consideration of the other principles will be largely academic. In the words of the Court of Appeal in Naftali Ruthi Kinyua case (supra) 'If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities, that is the end of any claim to interlocutory relief'.

60. For the record, the Petitioner abandoned the prayer for empanelment of a Multi-Judge bench in the first motion.

61. Having said so, I remain alive to the truism that the issue of the constitutionality of Section 5(4) and (5) of the Judicial Service Act is an important issue which will provide a jurisprudential moment for the High Court to pronounce itself. I, will, hence grant the Petitioner leave to amend the Petition.

62. In the end, the following orders hereby issue: -

(a) Save that leave is hereby granted to the Petitioner to file and serve an Amended Petition within 7 days and the Respondent and Interested Parties to file their respective responses thereto within 7 days of service, the Notices of Motion dated 9th December, 2020 and 14th December, 2020 respectively, be and are hereby, dismissed with no order as to costs.

(b) The Amended Petition, or the Petition if no amendment is made, shall be heard by way of reliance on the Affidavit evidence and written submissions.

(c) In view of (b) above, the Petitioner shall, upon receipt of the responses in compliance with (a) above or the expiry of 7 days after service of the Amended Petition, file and serve any supplementary responses, if need be, together with written submissions within 7 days.

(d) The Respondent and the Interested Parties shall file and serve their respective written submissions within 7 days of service.

(e) Highlighting of submissions on the 17th February, 2021.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF JANUARY, 2021.

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Okiya Omtatah Okoiti, the Petitioner.

Mr. Kanjama and Miss. Owano, Learned Counsels instructed by Messrs. Muma & Kanjama Advocates for the Respondent.

Mr. Nelson Havi, Learned Counsel instructed by Messrs. Havi & Company Advocates for the 1st Interested Party.

Dominic Waweru – Court Assistant.