



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

PETITION NO. E002 OF 2021

IN THE MATTER OF ARTICLES 2,3,10, 165, 196 (1) (b) 257, 258, AND 159 (1) AND (3) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE CONSTITUTION AND COUNTY GOVERNMENT ACT, SPECIFICALLY ARTICLES 10,196 (1) (b) OF THE CONSTITUTION OF KENYA AND SECTION 87 (b) OF THE COUNTY GOVERNMENT ACT, 2012

BETWEEN

HON. AMEJA ZELEMOI.....1ST PETITIONER

HON. ERNEST KIBET TARUS.....2ND PETITIONER

HON. BETTY JEBET BIRCHOGO.....3RD PETITIONER

VINCENT C. KORIR.....4TH PETITIONER

CHRISTINE JEBICHII NDOIGO.....5TH PETITIONER

FINIS OBAL.....6TH PETITIONER

AND

COUNTY ASSEMBLY OF BARINGO.....1ST RESPONDENT

THE SPEAKER COUNTY ASSEMBLY OF BARINGO.....2ND RESPONDENT

THE CLERK OF THE NATIONAL ASSEMBLY.....3RD RESPONDENT

THE CLERK OF THE SENATE.....4TH RESPONDENT

THE SPEAKER OF THE SENATE.....5TH RESPONDENT

RULING

1. The petitioners filed their petition under Certificate of Urgency vide their Notice of Motion dated 15th February 2021 seeking the following orders.

1) *Spent.*

2) a conservatory order to restrain the 1st and 2nd Respondents from certifying, communicating, to the Speakers of the Parliament of the Republic of Kenya and to restrain Parliament from implementing the decision of the Baringo County Assembly dated 11/2/2020 that rejected The Constitution of Kenya (Amendment) Bill, 2020, pending the hearing and determination of this application *inter partes*.

3) a conservatory order to restrain the 1st and 2nd Respondents from certifying, communicating to the Speakers of Parliament of Kenya, and to restrain Parliament from acting on or implementing the decision of the 1st respondent dated 11/2/2021 that rejected The Constitution of Kenya (Amendment) Bill, 2020 pending the hearing and determination of the main petition.

4) a conservatory order to restrain the respondents either jointly or severally from acting on and/or implementing the decision of the 1st respondent dated 11/2/2020 that rejected The Constitution of Kenya (Amendment) Bill, 2020 pending the hearing and determination of the main petition.

5) a conservatory order to restrain the respondents either jointly or severally from acting on and/or implementing the decision of the 1st respondent dated 11/2/2020 that rejected The Constitution of Kenya (Amendment) Bill, 2020.

6) an order to compel the 1st and 2nd respondents to supply to the petitioners the respondents' copy of the Hansard of 9/2/2021 and further the minutes of the 1st respondent's House Business Committee meeting of 11/2/2021.

7) an order directing the respondents to pay the costs of this application.

2. During oral arguments on 24/02/2021 Mr. Ogola informed the court that the application raises 2 issues. The first one being that the Bill in the County Assembly was not subjected to public participation. Second, there was violence during the debate, which was not conducive to proper debating and voting. Furthermore, Mr. Ogola for the petitioners took a preliminary objection to the appearance of Ms. Betty Toroitich as counsel appearing for the 1st and 2nd respondents on the basis that the 1st and 2nd respondents had not entered appearance. According to Mr. Ogola, Ms. Betty Toroitich had no right of audience. I allowed her to address the court in the spirit of article 159 of the 2010 Constitution; since the issues raised by the application and the petition are weighty matters of public and constitutional importance.

3. Ms Betty Toroitich submitted that she is an in house advocate for the 1st and 2nd respondents. And that prayer Nos. 1 and 2 have been overtaken by events. The reason being that the certificate of rejection has already been served upon the Speakers of both the Senate and National Assembly. And for that reason she applied to be granted 14 days within which to instruct counsel to act for the 1st and 2nd respondents. Usage of in house counsel in matters of this nature should be discouraged; since non-in house counsel have the necessary objectivity and independence to act in such matters. At this preliminary stage, usage of in-house counsel is harmless. It is precisely for that reason that Ms. Betty Toroitich applied and was granted 14 days to engage counsel to prosecute on behalf of the 1st and 2nd Respondents.

4. Furthermore, Ms. Betty Toroitich opposed the application of the petitioners that they be granted interim conservatory orders pending the hearing determination of the application *inter partes* by a bench of 3 or 5 Judges, to be constituted by the acting Chief Justice. According to her those orders sought have been overtaken by events.

5. Mr. Ogola in reply submitted that the prayer sought did not end with the resolution and certification by the 1st and 2nd respondents. The prayers sought extend to the implementation by both the Senate and National Assembly. And that unless the interim conservatory orders are granted the petition and the application might be rendered nugatory.

6. Furthermore, Mr. Ogola submitted that all the respondents were served on 15/2/2021, which translates to 10 days and yet they have not filed any response either by way of grounds of opposition or replying affidavits to the petition.

7. Mr. Ogola finally urged the court to grant prayers No. 2 and 4 in order to preserve the rights of the citizen of Baringo county.

8. I have considered the rival submissions of both counsel. As a result, I find the following to be issues for determination.

1) Whether the petitioners have made out a case for the grant of interlocutory conservatory orders.

2) Who bears the costs of this application?

Issue 1

9. Ms Betty Toroitich, counsel for the 1st and 2nd respondents informed the court that she was not opposed to the court referring the petition to the acting Chief Justice to empanel a bench of 3 or 5 judges to hear and determine the petition. I find that it is not known how long it will take the acting Chief Justice (Hon. Lady Justice Philomena Mwilu) to empanel the said bench. The court also does not know the business calendar of Parliament (the Senate and National Assembly) in respect of deliberating on the certificate of rejection by the County of Baringo.

10. In the circumstances, I find myself in agreeing with Mr. Ogola that the rights of the citizens of Baringo County should be preserved in the interim period by the grant of interlocutory conservatory orders pending the hearing and determination of both the application and the petition. Unless this is done, the rights of the citizens of Baringo might be rendered nugatory.

11. In the premises, I hereby grant prayer Nos 2 and 4 of the notice of motion.

Issue 2.

12. The costs of this application will be costs in cause.

Reference to the acting Chief Justice

13. By consent of both counsel the petition is hereby referred to the acting Chief Justice to empanel a bench of three or five judges to hear and determine the application and the petition; since they raise weighty issues of constitutional law of public importance.

Ruling signed, dated and delivered through video conference at Kabarnet on this day of 24th February 2021.

J M BWONWONG'A

JUDGE

In the presence of:

Mr. Sitienei Court Assistant.

Mr. Ogola for the Petitioners Present.

Ms. Betty Toroitich for the 1st and 2nd Respondents present.