



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E425 OF 2020

HON. MIKE SONKO MBUVI GIDION KIOKO.....1ST PETITIONER

OKIYA OMTATAH OKOITI2ND PETITIONER

-VERSUS-

THE CLERK, NAIROBI CITY COUNTY ASSEMBLY.....1ST RESPONDENT

THE SPEAKER, NAIROBI CITY COUNTY ASSEMBLY.....2ND RESPONDENT

THE NAIROBI CITY COUNTY ASSEMBLY.....3RD RESPONDENT

THE CLERK OF THE SENATE4TH RESPONDENT

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

THE SENATE OF KENYA6TH RESPONDENT

HON. ATTORNEY GENERAL.....7TH RESPONDENT

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION...8TH RESPONDENT

THE ASSUMPTION OF THE OFFICE OF THE COUNTY, GOVERNOR COMMITTEE,

NAIROBI CITY COUNTY.....9TH RESPONDENT

THE A.G. GOVERNOR, NAIROBI CITY COUNTY.....10TH RESPONDENT

RULING

1. The 1st and 2nd petitioners herein filed two separate petitions namely; petition Nos. 425 of 2020 and E014 of 2021 respectively wherein their main challenge is the impeachment of the 1st petitioner as the Governor of Nairobi City County following the resolutions passed by the 6th Respondent on 17th December 2010. The Petitions were subsequently consolidated and through a ruling delivered on 25th February 2021, Makau J. certified petition No. 425 of 2020 as raising substantial questions of law and accordingly referred it to the Honourable Chief Justice for the empanelment of a Bench of uneven number of Judges to hear and determine the petition.

2. Through directions issued on 5th March 2021, P. Mwilu, Ag. Chief Justice directed this bench to hear and determine the petitions.

3. The matter was thereafter mentioned before this bench on 11th March 2021, when counsel for the respondents urged this court to refer it back to the Ag. Chief Justice for the constitution of a separate Article 165(4) bench thus precipitating arguments that have necessitated this ruling.

Parties' Submission.

4. **Mr. Nyamodi**, learned counsel for the 7th respondent submitted that a determination of this matter will impact on another matter pending before this bench being High Court Petition No. E005 Of 2021. He argued that a separate and fresh bench is necessary so as not to cloud the other petition.

5. **Mr. Nyamu**, learned counsel for the 1st petitioner, opposed **Mr. Nyamodi's** argument and submitted that no prejudice will be occasioned to any party if this bench handled the matter. He observed that returning the matter to the Chief Justice for the empanelment of a separate bench would cause unnecessary delay and added that there are instances where similar petitions have, in the past, been handled by the same bench.

6. **Mr. Kinyanjui**, learned counsel for the 1st petitioner joined issues with **Mr. Nyamu** and added that it is not unusual to have the same bench hearing different petitions over the same subject matter.

7. The 2nd petitioner, **Mr. Okiya Omtatah**, submitted that the issue raised by the 7th respondent is largely an issue of etiquette and not a jurisdictional issue.

8. **Mr. Osundwa, Mr. Kokebe, Mr. Ashioya and Mr. Okatch** for the 1st, 2nd 3rd and 10th respondents respectively supported **Mr. Nyamodi's** position and argued that the issue of delay does not arise in this matter as parties had agreed to freeze time. It was submitted that this petition should be heard by a different bench so that parties can have opinions from other judges. Counsel observed that etiquette demands that this court deals with the earlier petition and another bench addresses this petition so as not to cloud the issues or muddy the terrain.

9. It was submitted that the issues in this petition will have a direct bearing on Petition No. E005 of 2021 in which case, this court may be prejudiced or take the same position on both petitions.

10. It was further submitted that if this court handles both this matter and E005 of 2021, the bundles of documents filed by the parties may be so huge that fast-tracking both cases may be impossible thus causing an inevitable delay.

11. It was further submitted that both this matter and E005 of 2021 have germane issues that are intertwined such that it will only be fair and hygienic to separate the matters for proper administration of justice so that justice is not only done, but is also seen to have been done.

Analysis and Determination

12. We have carefully considered the rival and compelling arguments over the issue of whether or not this matter should be referred back to the Chief Justice for the empanelment of a separate and 'fresh' Article 165(4) bench for hearing and determination.

13. Our understanding of the respondents' argument for the reference of file back to the Chief Justice is that they are apprehensive that justice may not be seen to have been done if this bench hears this matter in view of the fact that it is also seized with another matter over the appointment of the Deputy Governor of Nairobi City County.

14. Our position is that this is not the first time that the same court is finding itself in the position where it has to hear and determine two or more petitions over what may appear to be the same or a related subject matter. Indeed, there are countless instances where the same court has had to determine several cases over the same subject matter without necessarily doing injustice in one case in favour of the other. Our position is that in such instances, each case must be determined on its own merit based on the facts and the applicable law.

15. We note that the respondents have not indicated that this court lacks the jurisdiction to hear and determine this matter or that it will be biased against any party in handling the dispute so as to justify the request for reference of the matter to the Chief Justice for the empanelment of a fresh bench. Needless to say, our interpretation of the respondents' oral application is that it is an indirect invitation to the members of this bench to recuse themselves from hearing this petition, *albeit*, without stating the grounds for such recusal.

16. We are of the humble view that in the circumstances of this case and considering that this court is yet to hear the substantive arguments on both petitions and has not issued any substantive orders in either of the petitions, which we observe, are still at the preliminary stages of directions, allowing the request to return the file to the Chief Justice will create an undesirable precedent where parties reject an empaneled bench based on mere apprehension. This is a practice that could breed or be interpreted to amount to forum-shopping.

17. We reiterate that that this court will hear and determine this petition as a separate, and distinct petition from Petition No. E005 of 2021.

18. For the above reasons, we do not find any merit in the application for the return of the file to the Chief Justice for the empanelment of a separate bench. We dismiss the application with no orders as to costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 18TH DAY OF MARCH 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID -19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

S. CHITEMBWE

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JUDGE

W. KORIR

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JUDGE

W. A. OKWANY

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JUDGE

In the presence of-

Mr. Adan, Mr. Mohammed and Ms. Sylvia Court Clerks.