



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

CONSTITUTIONAL PETITION NO. E005 OF 2021

AS CONSOLIDATED WITH PETITION NO. E433 OF 2020, E007 OF 2021, E009 OF 2021, E011 OF 2021, E012 OF 2021, E013 OF 2021, E015 OF 2021, 019 OF 2021 AND E021 OF 2021

IN THE MATTER CONCERNING ALLEGED VIOLATIONS OF ARTICLES 1(1), 1(3), 2(1), 2(3), 2(4), 3(1), 3(2), 6(2), 10, 38(2), 38(3)(B), 73, 74,81,94,165, 174,175, 179, 181, 182(4), 182(5), 182(6), 183, 185(1), 196, 258, 259(1), 259(3), AND 259(11) OF THE CONSTITUTION OF KENYA 2010: AND IN THE MATTER OF COUNTY GOVERNMENTS(AMENDMENT) ACT, 2020 AND IN THE MATTER OF THE COUNTY GOVERNMENT ACT, 2012 AND IN THE MATTER OF PUBLIC APPOINTMENNTS(COUNTY ASSEMBLIES APPROVAL)ACT, 2017 AND IN THE MATTER OF THE ASSUMPTION OF THE OFFICE OF GOVERNOR ACT, 2019

BETWEEN

- OKIYA OMTATAH OKOITI.....1ST PETITIONER**
- HABIB OMAR KONGO.....2ND PETITIONER**
- PATRICK MWANGI KIIRU.....3RD PETITIONER**
- JOSPHAT KARIUKI.....4TH PETITIONER**
- ANGELA MWIKALI.....5TH PETITIONER**
- MUIRURU WAWERU.....6TH PETITIONER**
- THIRDWAY ALLIANCE KENYA.....7TH PETITIONER**
- LAW SOCIETY OF KENYA.....8TH PETITIONER**
- KENYA HUMAN RIGHTS COMMISSION.....9TH PETITIONER**
- GEOFFREY MAKWORO.....10TH PETITIONER**

AND

- ANNE KANANU**
- MWENDA.....1ST RESPONDENT/CROSS-PETITIONER**
- NAIROBI CITY COUNTY ASSEMBLY.....2ND RESPONDENT**
- THE SPEAKER, NAIROBI CITY**
- COUNTY ASSEMBLY.....3RD RESPONDENT**
- THE CLERK, NAIROBI CITY**

COUNTY ASSEMBLY.....4TH RESPONDENT
THE ATTORNEY GENERAL.....5TH RESPONDENT
INDEPENDENT ELECTORAL
AND BOUNDARIES COMMISSION.....6TH RESPONDENT
THE GOVERNMENT PRINTER.....7TH RESPONDENT

AND

HON. MIKE MBUVI

SONKO KIOKO GIDION.....1ST INTERESTED PARTY

THE SENATE.....2ND INTERESTED PARTY

KATIBA INSTITUTE.....3RD INTERESTED PARTY

POLYCARP IGATHE.....4TH INTERESTED PARTY

JUBILEE PARTY.....5TH INTERESTED PARTY

NAIROBI CITY COUNTY EXECUTIVE.....6TH INTERESTED PARTY

KRISTINA PRATT KENYATTA7TH INTERESTED PARTY

JANE WERU.....8TH INTERESTED PARTY

UNITED DEMOCRATIC

MOVEMENT PARTY.....9TH INTERESTED PARTY

ISAAC CHEGE NJUGUNA.....10TH INTERESTED PARTY

BENCH RULING NO. 4

1. This ruling answers the Notice of Preliminary Objection dated 24th February, 2021 filed by the 4th Respondent, the Clerk of Nairobi City County Assembly. Through the notice he seeks the dismissal of the consolidated petitions *in limine* on the grounds:

(a) That this Court lacks jurisdiction to sit on appeal of its own decision delivered on 9th February, 2021 determining all the substantive matters in issue in the consolidated petitions.

(b) That the hearing and determination of the consolidated petitions is *res judicata* and offend the mandatory provisions of Section 7 of the Civil Procedure Act, Cap 21.

2. The Objector's case is that the matters raised, and in issue, in the consolidated petitions were directly and substantially in issue in the 1st and 2nd petitioners' applications dated 8th January, 2021 and 10th January, 2021 respectively, between the same parties, litigating under the same title, before a court of competent jurisdiction (Mrima, J) and the said issues have been heard and finally decided by this court in the ruling delivered on 9th February, 2021.

3. Further, that the substantive issues in the consolidated petitions are moot, having been determined by the court.

4. Turning specifically to the issues raised in the petitions, the Objector contends that on the issue of the stoppage of the statutory timelines for the by-election, the court held that this court's conservatory order stopping the election does not stop the time set under Article 182(5) of the Constitution and that the court had acted in the public interest and to prevent the looming constitutional process by allowing the 1st Respondent's vetting process by the 2nd Respondent and that the alleged withdrawal of the nomination of the 1st Respondent as a Deputy Governor was problematic and has no legal effect.

5. The court is therefore urged to find that all the issues raised in the petition have been determined and allow the preliminary objection.

6. The 8th Respondent (Law Society of Kenya) and the 9th Respondent (Kenya Human Rights Commission) opposed the Preliminary Objection through grounds of opposition dated 4th March, 2021.

7. According to the 8th and 9th respondents, Mrima, J did not substantively determine the issues before this court in his ruling of 9th February, 2021. Further, that the ruling is only persuasive in nature and does not bind this court in terms of the mandatory doctrine of precedence under Article 163(7) of the Constitution since it emanates from a court with similar jurisdiction as this court.

8. The 8th and 9th respondents identify the various issues raised in the consolidated petitions and in particular petitions E019 of 2021 and E021 of 2021 and submit that the issues are live and not moot.

9. We have looked at the issues identified in the Applicant's notice of preliminary objection and those identified in the 8th and 9th respondents' response to the notice of preliminary objection. All those issues can be consolidated into one issue namely whether the vetting, approval and appointment of the 1st Respondent/Cross-Petitioner, Anne Kananu Mwenda, as the Deputy Governor of Nairobi City County is constitutional.

10. We have perused the ruling of our brother Mrima, J delivered on 9th February, 2021 and nowhere do we find that issue answered. We therefore conclude that the issues raised in the consolidated petitions are yet to be determined and the doctrine of *res judicata* does not come into play and neither can the issues be said to be moot.

11. We only need to cite two authorities in order to demonstrate that the Objector has misapplied the doctrines of *res judicata* and mootness in the circumstances of this case. In ***Independent and Electoral and Boundaries Commission v Maina Kiai & 5 others [2017] eKLR*** the Court of Appeal outlined the principles of the doctrine of *res judicata* as follows:

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised”.

12. In applying the said elements of the doctrine, we only need to note that the decision that is being said to have rendered the issues in these consolidated petitions *res judicata* was actually a ruling on preliminary applications in these consolidated petitions and not a decision in a former suit between the parties. We have not seen any finding by Mrima, J on each and every one of the issues raised in the petitions.

13. As regard the claim that the doctrine of mootness renders the jurisdiction of this court otiose, we only need to revert to the recent decision of the ***Constitution Court of South Africa in AB and another v Pridwin Preparatory School and Others [2020] ZACC 12*** where it was held that:

“The general principle is that an application is moot when a court's ruling will have no direct practical effect. Courts exist to determine concrete legal disputes and their scarce resources should not be frittered away by entertaining abstract propositions of law, however engaging. Typically, this Court will not adjudicate an appeal if it no longer presents an existing or live controversy, and will refrain from giving advisory opinions on legal questions which are merely abstract, academic or hypothetical and have no immediate practical effect or result. This principle was recently reiterated in President of the Republic of South Africa. There, it was held that “courts should be loath to fulfil an advisory role, particularly for the benefit of those who have dependable advice abundantly available to them and in circumstances where no actual purpose would be served by that decision”.

14. A perusal of the pleadings and the proceedings that have taken place so far in these matters does not disclose that the issue of the constitutionality of the appointment of the 1st Respondent/Cross-Petitioner as the Deputy Governor of Nairobi City County has been determined. That issue is live and must be conclusively determined before one can say any fresh litigation on the issue is *res judicata* or moot.

15. It therefore follows that the 4th Respondent notice of preliminary objection dated 24th February, 2021 is without merit. The same is dismissed and costs shall abide the outcome of the consolidated petitions.

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 17th April 2020.

S. CHITEMBWE

JUDGE

W. KORIR

JUDGE

W.A. OKWANY

JUDGE