



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 PARTY9TH INTERESTED PARTY
ISAAC CHEGE NJUGUNA.....10TH INTERESTED PARTY

BENCH RULING NO. 2

1. In the notice of motion dated 12th February, 2021 Anne Kananu Mwenda, the 1st Respondent/Cross Petitioner in the consolidated petitions seek orders as follows:

- 1. THAT this application be certified as urgent and the same be heard and service hereof be dispensed with in the first instance.***
- 2. THAT this Honourable Court's orders issued by Hon. Justice Weldon Korir on 10th February, 2021 be stayed pending inter-partes hearing of the application.***
- 3. THAT the Honourable Court does vacate and/or set aside its orders herein issued by Hon. Justice Weldon Korir on 10th February, 2021.***
- 4. Costs be in the cause.***

2. The application is supported by the grounds on its face and an affidavit on the date of the application.

3. On 10th February, 2021, Justice Weldon Korir (who is a member of this bench) certified the consolidated petitions as raising a substantial question of law under Article 165(4) of the Constitution and ordered that they be transmitted to the Acting Chief Justice for the empanelment of a bench of an odd number of judges not being less than three.

4. Anne Kananu Mwenda contends that the said decision be reviewed or set aside as it varied or set aside the orders of Mrima, J issued on 9th February, 2021 that the "Application dated 19th January, 2021 be heard and determined before any other Applications and/or petition since its outcome shall determine the directions that the other pending Applications will take." Further, that Mrima J had held that as a matter of urgency the petitions and applications herein be heard by one Judge as opposed to an empaneled bench as the constitutional timelines under Article 185(5) is cast in stone.

5. It is averred that the decision of Korir, J amounts to an enlargement of constitutional timelines and is violative of the decision of the

6. Further that the orders which the Applicant's application dated 19th January, 2021 seek to set aside are detrimental to her and her application needs to be heard without delay.

7. The Applicant concludes that unless the orders sought herein are granted, there shall be occasioned a constitutional absurdity of having the court suspend constitutional provisions based on a highly speculative affidavit of the 8th Petitioner, the Law Society of Kenya.

8. Although the 8th Respondent Law Society of Kenya, and the 9th Respondent, Kenya Human Rights Commission indicated that they were opposing the application through grounds of opposition dated 4th March, 2021, they do not make specific reference to this particular application in the said response.

9. We have read the ruling delivered on 9th February, 2021 and nowhere in that ruling do we find the statements attributed to the Judge. The orders issued in the ruling are found in paragraph 71 as follows:

(a) I hereby recuse myself from this matter as well as all the matters on the Governorship of Nairobi County.

(b) This matter shall be placed before the Presiding Judge of the Division for further orders and directions on 10.2.2021 given the urgency in the matter.

(c) Any party desirous of lodging an appeal against this ruling is hereby granted leave to appeal. Copies of the proceedings and the ruling to issue accordingly.

10. Be that as it may, we note that the Applicant prays for a review or setting aside of the order issued on 10th February, 2021 by Korir, J.

11. The power of the court to review its decree or order which is granted by section 80 of the Civil Procedure Act is fleshed out in Order 45 Rule 1 of the Civil Procedure Rules, 2010 as follows:

1. (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

12. In *National Bank of Kenya Limited v Ndungu Njau [1997] eKLR* the Court of Appeal stated that:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter”.

13. In *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR* the grounds for review of decree or order were summarized as follows:

“The main grounds for review are therefore; discovery of new and important matter or evidence; mistake or error apparent on the fact of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay.”

14. We have reviewed the application before us, and apart from the statement that Korir, J reviewed or set aside the orders of Mrima, J, which in our view is a ground for appeal, we do not find any ground established for the review or setting aside of the orders issued by Korir, J. on 10th February, 2021.

15. We therefore find the instant application to be without merit and we dismiss it. Since it was not defended, we make no order 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 17th April 2020.

S. CHITEMBWE

JUDGE

W. KORIR

JUDGE

W.A. OKWANY

JUDGE