



**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.....6<sup>TH</sup> INTERESTED PARTY  
KRISTINA PRATT KENYATTA.....7<sup>TH</sup> INTERESTED PARTY  
JANE WERU.....8<sup>TH</sup> INTERESTED PARTY  
UNITED DEMOCRATIC  
MOVEMENT PARTY.....9<sup>TH</sup> INTERESTED PARTY  
ISAAC CHEGE NJUGUNA.....10<sup>TH</sup> INTERESTED PARTY

**BENCH RULING NO. 5**

1. This ruling is in relation to three related applications namely;

- a) Application by the 8<sup>th</sup> Petitioner (Law Society of Kenya) dated 18<sup>th</sup> January, 2021.
- b) Application by the 9<sup>th</sup> Petitioner (Kenya Human Rights Commission) dated 18<sup>th</sup> January, 2021.
- c) Application by the 1<sup>st</sup> respondent (Anne Kananu) dated 19<sup>th</sup> January, 2021.

2. The 8th Petitioner (The Law Society of Kenya) filed an application dated 18th January, 2021 seeking the following orders:

***“2. Pending the hearing and determination of this Application inter partes, a conservatory order be issued suspending the decision of the County Assembly made on 15<sup>th</sup> January, 2021 approving the nomination of Anne Kananu Mwenda as the Deputy Governor of Nairobi City County.***

***3. Pending the hearing and determination of this Application inter partes, a conservatory order be issued suspending the decision of the Respondents of 15<sup>th</sup> January, 2021 to swear into office Anne Kananu Mwenda as the Deputy Governor of Nairobi City County Government.***

***4. Pending the hearing and determination of this Application inter partes, a temporary injunction be issued restraining the Respondents, their agents and or servants from swearing in Anne Kananu Mwenda as the Governor of Nairobi City County Government.***

***Inter-partes***

***5. Pending the hearing and determination of this Petition, a conservatory order be issued suspending the decision of the County***

*Assembly made on 15th January, 2021 approving the nomination of Anne Kananu Mwenda as the Deputy Governor of Nairobi City County.*

**6. Pending the hearing and determination of this Petition, a conservatory order be issued suspending the decision of the Respondents of 15th January, 2021 to swear into office Anne Kananu Mwenda as the Deputy Governor of Nairobi City County Government.**

**7. Pending the hearing and determination of this Petition, a temporary injunction be issued restraining the Respondents, their agents and or servants the swearing in of Anne Kananu Mwenda as the Governor of Nairobi City County Government.**

**8. Costs for this Application be provided for.”**

3. The application by the 8<sup>th</sup> Petitioner resulted into the interim orders issued by Justice Mrima which stopped the swearing of the 1<sup>st</sup> respondent as the Governor of Nairobi City County. The 1<sup>st</sup> respondent responded to the application and at the same time filed her application seeking to have the interim orders vacated.

4. The application by the 8<sup>th</sup> Petitioner is a replica of the one by the 9<sup>th</sup> Petitioner. The two applications seek similar orders and the two petitions are equally similar.

5. The 1st Respondent filed her application dated 19th January, 2021 pursuant to the provisions of Article 1(1),(2), 3, 19, 22, 23, 258 of the Constitution of Kenya, 2010, Rules 2,4,5 and 6 of the Constitution of Kenya(Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice And Procedure Rules, 2012. The application seeks the following orders;

**i) THAT this Application be certified as urgent and same be heard and service hereof be dispensed with in the first instance.**

**ii) THAT this Honourable Court’s orders issued by Hon Justice A.C. Mrima on 18th January, 2021 on the Application herein dated 18th January, 2021, be stayed pending the inter-parties hearing of this Application.**

**iii) THAT the Honourable Court does vacate and/or set aside its orders herein issued by Hon Justice A. C. Mrima on 18th January, 2021.**

**iv) Costs be in the cause.**

6. The application is premised on the grounds on the face of the application and the supporting affidavit of Ann Kananu Mwenda, sworn on 19th January 2021. The 2nd Respondent through the Replying Affidavit of Paul Kados Kiguathi, Member of County Assembly for Mihango Ward and a Member of the Select Committee on Appointments, sworn on 21st January, 2021 supports the application.

7. It is the 1<sup>st</sup> respondent’s case that she is the rightful Deputy Governor of Nairobi City County after being appointed by the then Nairobi City County Governor, Hon Mike Mbuvi Sonko, vide a letter dated 6th January, 2020 to the Clerk of the Nairobi City County Assembly and sworn in on 15th January, 2021. That in line with the Public Appointments (County Assemblies Approval) Act, 2014, the Supreme Court of Kenya Advisory Reference No. 1 of 2015 and Rule 51 (4) (b) of the Election (General) Regulations, 2021, she was issued with a Certificate of Nomination on 10th February, 2020 by the Returning Officer for Nairobi City County as proof of her nomination for the position of Deputy Governor.

8. That subsequently on 15th January, 2020 Peter Odhiambo Agoro filed a Petition in the Anti-Corruption & Economic Crimes Division Petition No. 1 of 2020:Peter Odhiambo Agoro versus Anne Kananu Mwenda, Hon. Mike Mbuvi Sonko & County Assembly of Nairobi as an Interested Party and on 17th January, 2020 where Lady Justice Mumbi Ngugi issued an injunctive order restraining the 2<sup>nd</sup> respondent from voting on the nomination of Ann Kananu Mwenda as the Deputy Governor for Nairobi City County. That later on 7th January, 2021, the Petition was withdrawn unconditionally before Lady Justice H. I. Ong’udi giving way to the consideration and voting on the Nomination of the applicant for the position of Deputy Governor. That according to Section 9 of the Public Appointments (County Assemblies Approval) Act, 2014 a report was prepared after she appeared before the relevant committee and on 15th January, 2021 the report was tabled on the floor of the Nairobi City County Assembly and was unanimously voted for thus approving the nomination of the applicant herein.

9. It is the 1<sup>st</sup> respondent’s case that the orders of 18th January, 2021 were unjust, irregular and unenforceable as the injunction was based on a speculative process and secondly, none of the Respondents thereto were capable of swearing her in to the the said position. It is the Applicant’s argument that the Orders sought should have been against the Judiciary and the Assumption of Office of the Governor Committee as established under Section 5 of the Assumption of Office of the Governor Act, 2019 since they are bodies mandated by statutes and with capacity to swear in the 1<sup>st</sup> respondent. Further, the 1<sup>st</sup> respondent avers that the orders issued were unwarranted on the grounds that the application dated 18th January, 2021 did not disclose a *prima facie* case and it also did not the meet the principles laid down in the case of Gatirau Peter Munya V Dickson Mwenda Kithinji & 2 Others (2014) eKLR for granting Conservatory Orders in a Constitutional Process.

10. The 1<sup>st</sup> Respondent/applicant in her submissions in support of her application contend that the application by the Law Society of Kenya dated 18<sup>th</sup> January, 2021 raises the following issues:

**a) Whether the nomination of the 1<sup>st</sup> Respondent as Deputy Governor of Nairobi City County determined upon the impeachment of Hon.Mike Gideon Sonko, the Governor of Nairobi on 18<sup>th</sup> December, 2020.**

b) Whether the vetting and swearing in of the 1<sup>st</sup> Respondent undermines the provisions of Article 185 (5) of the Constitution of Kenya, 2010 and statutory appointment statutes.

c) Whether the petitioner/applicant has met the threshold of granting conservatory orders and injunction.

d) Whether the petitioner/applicant's application dated 18<sup>th</sup> January, 2021 has merit.

11. The 1<sup>st</sup> respondent submit that she was duly appointed as a Deputy Governor of Nairobi City County and a Certificate of Nomination was issued under Rule 51 (4) (b) of the Election (General) Regulations, 2012. Section 18 of the Election Act prohibits a political party or County Governor from changing the person nominated as a Deputy Governor candidate after the nomination has been received by the IEBC.

12. It is further submitted that the vetting and swearing in of the 1<sup>st</sup> Respondent as a Deputy Governor was done in compliance with the Constitution of Kenya, 2010. The residents of Nairobi City County have a right to be presented by their leaders and/or their nominees in strict compliance with the law and in particular as provided under Article 1(2) of the Constitution of Kenya.

13. The 1<sup>st</sup> respondent argues that the Order issued on 18th January was based on extraneous circumstances as there was no evidence placed before court on the likelihood of her being sworn in as the Governor of Nairobi City County and that the application did not reveal any prejudice that the Law Society of Kenya and/or the public would suffer if the Orders were not granted. The 1<sup>st</sup> respondent further argues that the impeachment of the 1<sup>st</sup> interested party from the Office of the Governor, Nairobi City County on 18th December, 2020 did not invalidate all the processes initiated by him but pending conclusion by the 2nd respondent.

14. It is the 1<sup>st</sup> respondent's contention that if the orders sought herein staying the Orders of 18th January, 2021 pending the hearing and determination of the present application are not granted, there subsists grave prejudice to all the residents of Nairobi for lack of governance and leadership, there shall be occasioned a constitutional absurdity of having the Honourable Court suspend constitutional provisions on grounds perpetuated by a highly speculative affidavit of the 1st Respondent and the continued violation of the Constitution and the Law.

15. In support of the application for stay, by the 1<sup>st</sup> respondent, the 2nd Respondent avers that the Orders issued, were not sought by the Petitioner in his application of 18th January, 2021. It is the 2nd Respondent's contention that indeed the Applicant was nominated to be vetted in a letter dated 6th January, 2020 for the office of the Deputy Governor by the Governor pursuant to Article 180 of the Constitution. It is the 2nd Respondent's contention that at the time of nomination, the applicable law was Article 182 of the Constitution as interpreted by the Supreme Court Advisory read together with the Interested Party's guidelines and as soon as the nomination was made, the Committee became exclusively seized of all matters pertaining to the nomination, vetting and approval of the 1<sup>st</sup> respondent to the exclusion of all other players.

16. It is the 2nd Respondent's case that before the Committee could convene a second meeting to hold approval hearings for the vetting of the Applicant herein, Peter Odhiambo Agoro secured injunctive orders on 17th February, 2020 vide Nairobi High Court, Anti-Corruption & Economic Crimes Division Petition No. 1 of 2020 stopping the vetting proceedings of the Applicant's nomination. The 2nd Respondent further contends that if it were not for the Injunctive Orders, then the vetting process would have been concluded and a decision on the suitability of the Applicant for the position of the Deputy Governor issued.

17. The 2nd Respondent has argued that the bail conditions which barred the Governor from accessing his office cannot impugn the legal propriety in the nomination of the Deputy County Governor because the bail terms did not bar him from carrying out his functions as the Governor, Nairobi City County. The 2nd Respondent has relied on the case of **Moses Kasaine Lenolkul v Republic [2019]eKLR** where the Court of Appeal held that imposition of bail terms barring the Governor from accessing County Offices while facing trial for corruption offences was not tantamount to removal from office. Similarly in the case of **Ferdinand Ndung'u Waititu Babayao v Republic [2019]eKLR** the Court of Appeal held that where neither the trial magistrate nor the learned Judge had not purported to remove or suspend the appellant from office of Governor in their judgment, section 62 (6) of ACECA had no application and therefore the appellant was still the Governor of Kiambu entitled to full pay.

18. It is the 2nd Respondent's argument that the actions and decisions made, performed and undertaken by the occupants of either the office of the Governor or the Office of the Deputy Governor in the discharge of their respective constitutional mandate survives any subsequent vacancy in either of the said offices. Reference has been made in the present case where the Governor has since been impeached.

19. The 2nd Respondent further argue that after the withdrawal of the Petition on 7th January, 2021 the Clerk of the Nairobi City County Assembly issued a Notice dated 8th January, 2021 inviting the Public to attend hearings of the vetting Committee of her nomination and on 11th January, 2021 after the Applicant delivered her testimonials, a Gazette Notice was published informing the public of the special sitting of the Nairobi City County Assembly. A subsequent Gazette Notice was issued informing the general public of the swearing in ceremony and assumption of office of the Applicant herein.

19. It is the 2nd Respondent's argument that it is an independent legislative arm of the County Government that does not take instructions or directions from any party and that its decisions and processes are protected from judicial interference under Section 10 of the County Assemblies Powers and Privileges Act, No. 6 of 2017.

21. On their part, the 8th and 9th Petitioners have submitted that an application seeking to set aside a Court Order issued ex-parte must prove non-disclosure of material facts by the party that obtained the *ex parte* orders. Reference has been made to the case of **The King vs The General Commissioners for the Purposes of the Income Tax for the District of Kensington [1917] 1 K.B. 486**, where the court laid down the legal principle that ex parte applicant must make a full and fair disclosure of all material facts. Warrington L.J had the following to say at page 509;

***“ It is perfectly well settled that a person who makes an ex parte application to the Court that is to say, in the absence of the person who will be affected by that which the Court is asked to do is under an obligation to the Court to make the fullest disclosure possible of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the said proceedings, and he will be deprived of any advantage he may have already obtained by means of an order which has thus wrongly been obtained.”***

22. The 8th and 9th Petitioners further cited the case of ***Uhuru Highway Development Limited vs Central Bank of Kenya & Others [1995]eKLR***, where the Court of Appeal of Kenya held that the principles of full disclosure of all material facts in ex parte applications apply in Kenya in the same way as England. The Court therefore proceeded to adopt the principles set out in ***Republic vs Kensington Income Tax Commissioner and Brink’s MAT Ltd vs Elcombe (Supra)*** in upholding the decision of the High Court whereby ex parte injunction was declined due to non-disclosure of material facts.

23. It is the 8th and 9th Petitioners further submissions that the entire averments in the instant application regarding the setting aside of the order stopping the ascension into office of the Governor by Anne Kananu Mwenda is a response to the Petitioner’s application dated 18th January, 2021. The 8th and 9th Petitioners disclosed all material facts in the Petition and no new material has been placed before Court to lay basis for any setting aside orders. The Applicant is not alleging material non-disclosure which is the ordinary ground for such an application.

#### ***Analysis and Determination:***

24. The Order granted by Justice Mrima on 18<sup>th</sup> January, 2021 reads as follows:

***“2. THAT this matter, and all other matters in anyway challenging the nomination of Anne Kananu Mwenda into office of Deputy Governor of Nairobi City County, are hereby certified to raise substantial issues of law.***

***6. THAT pending further orders of the multi bench and with a view to maintaining the prevailing status quao, a temporary injunction be and is hereby issued restraining the Respondents, their agents and or servants from swearing in ANNE KANANU MWENDA as the Governor of Nairobi City County Government, pending the hearing of the Application.”***

25. The 8<sup>th</sup> Petitioner (Law Society of Kenya) is seeking orders of certiorari to remove into this court and quash the decision of the County Assembly to approve the nomination of Anne Kananu as a Deputy Governor of Nairobi City County as well as an order of Certiorari to remove into this court and quash the decision of the respondents to swear Anne Kananu as a Deputy Governor of Nairobi County. The petition also seeks a permanent injunction restraining the swearing into office of Anne Kananu as the Governor of Nairobi City County and an order directed at the IEBC to conduct the elections of a Governor and Deputy Governor of Nairobi City County within Sixty (60) Days.

26. The Petitions are yet to be heard. There are other petitions challenging the appointment, vetting and swearing in of the applicant as the Deputy Governor of Nairobi County. If the Orders granted by Justice Mrima are vacated, there is the likelihood that the 1<sup>st</sup> respondent will be sworn into the office of the Governor of Nairobi City County even before the Petitions challenging her ascension into office of the Deputy Governor are heard. Such a scenario will render all the Petitions nugatory.

27. By the time the applications by the 8<sup>th</sup> and 9<sup>th</sup> Petitioners were made, the 1<sup>st</sup> respondent herein, Ann Kananu, had been sworn in on 15<sup>th</sup> January, 2021 as the Deputy Governor of Nairobi City County. The application by the 8<sup>th</sup> Petitioner was supported by the affidavit of the president of the Law Society of Kenya, **Mr. Nelson Havi**, sworn on even date. While the one by the 9<sup>th</sup> Petitioner is supported by the affidavit of **Mr. Davis Malombe** sworn on 18<sup>th</sup> January, 2021. Justice Mrima granted prayer four (4) of the applications and in effect restrained the respondents from swearing in the 1<sup>st</sup> respondent herein as the Governor of Nairobi.

28. The 1<sup>st</sup> respondent contends that the restraining orders are unenforceable for reason that none of the respondents thereto are capable of swearing her to the position of the Governor and this makes the order irregular. According to the 1<sup>st</sup> respondent, the orders ought to have been issued against the Judiciary and the Assumption of Office of the Governor Committee as established under Section 5 of the Assumption of the office of the Governor Act, 2019.

29. The *ex-parte* orders granted by Justice Mrima were directed at the Respondents in the two applications who included the applicant herself, their agents and/or servants. Even if the other respondents are not the specific people who were to swear in the 1<sup>st</sup> respondent as a governor, it is our considered view that it would have been in breach of the order if the 1<sup>st</sup> respondent would have presented herself for swearing in as a Governor before the Judge tasked to swear her at a ceremony organized by the Assumption into office of the Governor Committee. The 1<sup>st</sup> respondent is equally restrained by the Orders from being sworn into the Office of the Governor.

30. The other respondents in the application by the Law Society of Kenya are the Nairobi City County Assembly, The Speaker of the County Assembly, The Deputy Governor, Nairobi City County, The Attorney General and the Government Printer. The 1<sup>st</sup> Respondent would have been gazetted first before being sworn in. The ex-parte orders restrained the respondents from proceeding with the process that would have led into the swearing in of the 1<sup>st</sup> respondent as a Governor. The Assumption into office of the Governor Committee takes over the swearing process once the named respondents complete the initial administrative process. We do find that the orders of Justice Mrima are enforceable and were directed at the correct parties.

31. Before us are several applications challenging the 1<sup>st</sup> Respondent’s position as Deputy Governor and the process of her appointment to the office of the Deputy Governor for Nairobi City County. It is our opinion that the 1<sup>st</sup> respondent should await the determination of the consolidated petitions.

32. The meaning of this is that the *ex parte* orders granted by Justice Mrima on 18<sup>th</sup> January, 2021 restraining the respondents from swearing in the applicant, Anne Kananu, as the Governor of Nairobi City County shall remain in place pending the hearing and determination of the consolidated petitions.

33. The upshot is that the application by Anne Kananu dated 19<sup>th</sup> January, 2021 lacks merit and is hereby dismissed. The two applications by the 8<sup>th</sup> and 9<sup>th</sup> petitioners dated 18<sup>th</sup> January partly succeeds and are granted in terms of prayer four (4) pending the hearing and determination of the consolidated petitions. The interim orders granted by Justice Mrima on 18<sup>th</sup> January, 2021 are hereby confirmed pending the hearing and determination of the consolidated petition. Costs shall follow the outcome of the consolidated petitions.

**DATED, SIGNED and DELIVERED via Microsoft Teams at Nairobi this 18<sup>th</sup> 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 17<sup>th</sup> April 2020.**

**S. CHITEMBWE**

**JUDGE**

**W. KORIR**

**JUDGE**

**W.A. OKWANY**

**JUDGE**