



REPUBLIC OF KENYA



**Mbiti v Mwilu & another; Attorney General & 4 others (Interested Parties)
(Petition E002 of 2021) [2021] KEHC 4871 (KLR) (29 July 2021) (Ruling)**

*Mwongela Isaiah Mbiti v Philomena Mbete Mwilu & another;
Attorney General & 4 others (Interested Parties) [2021] eKLR*

Neutral citation: [2021] KEHC 4871 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
PETITION E002 OF 2021
TW CHERERE, J
JULY 29, 2021**

BETWEEN

MWONGELA ISAAH MBITI PETITIONER

AND

HON. LADY JUSTICE PHILOMENA MBETE MWILU 1ST RESPONDENT

THE JUDICIAL SERVICE COMMISSION 2ND RESPONDENT

AND

THE HON. ATTORNEY GENERAL INTERESTED PARTY

DIRECTOR OF PUBLIC PROSECUTION INTERESTED PARTY

DIRECTOR OF CRIMINAL INVESTIGATIONS INTERESTED PARTY

KITUO CHA SHERIA INTERESTED PARTY

OKIYA OMTATAH OKOITI INTERESTED PARTY

RULING

1. The genesis of this Petition is Nairobi Chief Magistrate's ACC No. 38 of 2018 Republic v Philomena Mwilu & Anor instituted against the 1st Respondent and another. As we all know, a five judge bench of the High Court order in High Court Petition No. 295 of 2018 Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) quashing the 2nd and 3rd Interested Parties' decision to institute the criminal proceeding gave rise to Nairobi Court of Appeal Civil Appeal No. 298 of 2019 and Nairobi Court of Appeal Civil Appeal No. 314 of 2019 which are still pending.



2. Subsequent to the findings in High Court Petition No. 295 of 2018 (above), four Petitions were filed with the Judicial Service Commission (2nd Respondent) against the 1st Respondent on allegations of abuse of office and corruption by among others, the Director of Public Prosecutions (2nd Interested Party) and the Director of Criminal Investigations (3rd Interested Party).

Petitioner's case

3. On the basis of the four petitions against the 1st Respondent pending before the 2nd Respondent, Petitioner filed this Petition dated 26th January, 2021. Simultaneously with the Petition, Petitioner also filed a Notice of Motion of even date in which he contends that the 1st Respondent is unsuitable to continue discharging her constitutional and administrative duties on account allegations of abuse of office and corruption pending against her. Petitioner therefore sought orders that:
 1. That the Application and Petition be certified urgent and heard ex-parte in the first instance.
 2. That this Honourable Court be pleased to issue conservatory orders as against the 1st Respondent restraining her continued occupation of the office of the Deputy Chief Justice of the Republic of Kenya, Judge of the Supreme Court of Kenya, Member of the Judicial Service Commission and Ombudsman of the Judiciary pending the hearing and determination of this application
 3. That this Honourable Court be pleased to issue conservatory orders as against the 1st Respondent restraining her continued occupation of the office of the Deputy Chief Justice of the Republic of Kenya, Judge of the Supreme Court of Kenya, Member of the Judicial Service Commission and Ombudsman of the Judiciary pending the hearing and determination of this Petition
4. On 29th January, 2021, the court granted Conservatory Orders ex-parte, in the first instance, in terms of prayer 2 above.

1st Respondent's case

5. Aggrieved by the ex-parte Conservatory Order, 1st Respondent moved the court by a Notice of Motion dated 30th January, 2021 and on 01st February, 2021 obtained an order staying the enforcement of the Conservatory Order. The 1st Respondent also filed a notice of Preliminary Objection on the grounds that:
 1. The Conservatory Order is vitiated by material non-disclosure
 2. The Petition and the motion violate the doctrine of sub judice
 3. Court has no jurisdiction to hear the Petition and the motion
 4. Applicant has not established a case for grant of conservatory orders
6. It is the 1st Respondent's case that had the Petitioner been candid enough to make full disclosure to the court that her prosecution by the 2nd Interested Party had been stayed by an order dated 14th August, 2020 in High Court Petition No. E245 of 2020, the court would not have granted the ex-parte order in this case.
7. It is also the 1st Respondent's case that the Petition and the Motion are sub judice for the reason that the pendency of petitions before the 2nd Respondent which are the foundation on which the 5th Interested Party filed Nairobi High Court Petition No. E408 of 2020 seeking to bar the 1st Respondent from



acting as Chief Justice is directly and substantially the same ground underpinning the present Petition and Motion.

8. Finally, the 1st Respondent contends that by virtue of Article 168 of the Constitution, this court has no jurisdiction to issue the orders for her removal.
9. It is against this background that the 1st Respondent seeks orders that:
 1. The ex-parte orders issued on 29th January, 2021 be and are hereby set aside and/or discharged ex debito justitiae
 2. The entire petition dated 26th January, 2021, the Notice of Motion Application dated 26th January, 2021 and the supporting affidavit of Isaiah Mwongela Mbiti sworn on 26th January, 2021 be struck out
 3. This Petition and all the attendant proceedings be and are hereby transferred to the High Court in Nairobi for hearing and determination together with Nairobi High Court Petition No. E408 of 2020 Okiya Omutatah Okoiti V Judicial Service Commission, Hon. Lady Justice Philomena Mbete Mwilu (1st Interested Party) and Attorney General (2nd Interested Party).
 4. Costs of this application be in the cause

2nd Respondent's case

10. It is the 2nd Respondent's case that whereas it is constitutionally and statutorily empowered to determine complaints against judges, including the 1st Respondent, its efforts to consider the Petitions against the 1st Respondent had hit a snag due to among others the Conservatory Orders issued in High Court Petition No. E245 of 2020 suspending its administrative process against the 1st Respondent.
11. 2nd Respondent opposes the Petitioner's application and the 1st Respondent's prayer for transfer of this petition to be heard together with Nairobi High Court Petition No. E408 of 2020 and urges that the petitions be heard separately.

Case for 1st Interested Party, 2nd and 3rd Interested Parties and 5th Interested Party
12. The 1st, 2nd, 3rd and 5th Interested Parties support the Petitioner's application and oppose the transfer of this Petition to be heard together with Nairobi High Court Petition No. E408 of 2020 on the ground that the matters in issue in both Petitions are not directly and substantially the same. The 2nd and 3rd Interested Parties additionally dispute the 1st Respondent's contention that Petitioner is acting as their proxy.

4th Interested Party's case

13. The 4th Interested party opposed the Petitioner's application on the ground that by virtue of Article 168 of the Constitution, this court has no jurisdiction to grant the orders sought.

Issues for determination

14. I have considered both applications, the Preliminary Objection, the affidavits, and written submissions and oral submissions made by Mr. Maranya for the Petitioner, Senior Counsel Hon. Mr. Orengo, Ms. Soweto and Mr. Awele for the 1st Respondent, Mr. Kanjama for the 2nd Respondent, Ms. Kungú for the 1st Interested Party, Mr. Owiti for the 2nd and 3rd Interested Parties, Senior Counsel Dr. Khaminwa and Mr. Mulekyo for the 5th Interested Party and Mr. Omtatah, the 6th Interested Party, and I have discerned the following issues for determination



- a. Merits of the Preliminary Objection by the 1st Respondent
- b. Whether the Petitioner has made out a case for Conservatory Orders
- c. Whether this petitioner should be heard together with Nairobi High Court Petition No. E408 of 2020

Analysis and Determination

15. The sub judice rule is codified in Section 6 of the Civil Procedure Act, (cap 21) as follows:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same time, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

16. In *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties){2020}* eKLR, the Supreme Court of Kenya pronounced itself on the subject of sub judice and stated as follows: -

“(67) The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.” (Emphasis added).

17. The pleadings in this Petition disclose without a doubt that it is grounded on the Petitions concerning allegations of abuse of office and corruption pending before the 2nd Respondent and it is the basis on which the Petitioner contends that the 1st Respondent is unsuitable to continue discharging her constitutional and administrative duties.

18. It is also apparent that Nairobi High Court Petition No. E408 of 2020 is likewise premised on grounds among others that the Petitions for the removal of the 1st Respondent pending before the 2nd Respondent have adversely affected her integrity thereby making her unsuitable to hold the office of the Acting Chief Justice.



19. The applicability of the doctrine of sub judice were restated in Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR. At paragraph [26], Mativo J stated that:

“.....The test for applicability of the sub judice rule is whether on a final decision being reached in the previously instituted suit, such decision would operate as res-judicata in the subsequent suit”. (Emphasis added).
20. In as much as the Petitioner contends that this Petition does not seek the removal of the 1st Respondent under Article 168 of the Constitution, the issue in this petition of whether or not the 1st Respondent ought to continue discharging her constitutional and administrative duties pending the determination of unresolved Petitions for her removal are in my considered view directly and substantially the same in Nairobi High Court Petition No. E408 of 2020.
21. Having considered the sub judice rule as was best explained in Thiba Mini-Hydro Co. Ltd Vs Josphat Kariu Ndwega [2013] eKLR, I find that whereas the form in which both Petitions are framed is different, the substance in both Petitions disclose that there is no way that this court can allow or decline the prayers sought in this motion and Petition without delving into the issues in Nairobi High Court Petition No. E408 of 2020 pending before a three judge bench.
22. Concerning issuance of Conservatory Orders, the Supreme Court of Kenya emphasized in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR that:

(86) “..... Conservatory orders should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”
23. In considering whether the Petitioner has made out a case for a Conservatory Order, I am alive to the fact that the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success. (See Tom Odhiambo Ojienda v Kenya Revenue Authority & another [2018] eKLR).
24. As at time when Petitioner filed this Petition and the Notice of Motion Application dated 26th January, 2021, the court in Nairobi High Court Petition No. E408 of 2020 had already issued an order dated 12th day of January, 2021 declining to grant a Conservatory Order to bar the 1st Respondent from acting or continuing to act as Chief Justice for the reason that there were Petitions against her pending before the 2nd Respondent.
25. Petitioner has been faulted for non-disclosure of existence of, and status of the various cases and Petitions related to the 1st Respondent’s conduct pending in various courts and before the 2nd Respondent.
26. Whereas it is factual that Petitioner is not a party to any of the pending cases and Petitions, it is apparent that this Petition and Motion are grounded upon facts, documents and information that Petitioner could only have obtained from the parties to the pending cases and Petitions.
27. Petitioner’s contention that the 2nd Respondent had failed to force the 1st Respondent to step aside pending the hearing and determination of the Petition leaves no doubt in the mind of court that the Petitioner was aware that the Petitions were still pending.



28. And even assuming that the Petitioner did not have knowledge concerning the existence of High Court Petition No. E408 of 2020, the Petitioner cannot treat as unworthy of serious consideration the claim of non-disclosure made against him merely on the ground that he is not a party to any of the pending cases and Petitions for the reason that such information would have been available to him had he made all such inquiries as were reasonable and proper in the circumstances,
29. It is trite that a party that approaches a court for an equitable remedy, especially one appearing ex-parte as did the Petitioner, is expected to act with utmost good faith in the presentation to the court of all material evidence even if such evidence is not to their advantage.
30. Whether a fact is material depends on the importance of that fact to the issue to be decided. (See Brink's MAT Ltd vs. Elcombe [1988] 3 ALL ER CA 188). As clearly stated hereinabove, the existence of High Court Petition No. E408 of 2020 and the order declining the Conservatory Order in that Petition are substantially material to this Petition that had it been disclosed, the court might never have granted the ex-parte Conservatory Order in the first instance.
31. Apart from establishing a prima facie case, the applicant must also demonstrate that unless the conservatory orders are granted, he or she stands to suffer real danger or prejudice.
32. What amounts to real danger was discussed by Mwongo, J in Martin Nyaga Wambora vs. Speaker of The County of Assembly of Embu & 3 Others [2014] eKLR, where he expressed himself as follows: -

“To those erudite words I would only highlight the importance of demonstration of “real danger”. The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court’s attention.” (Emphasis added).
33. Neither in the Petition nor in the motion does the Petitioner plead or demonstrate the danger, real or otherwise that is likely to be suffered if the orders sought are not granted. The 1st Respondent has continued to discharge her constitutional and administrative duties as Deputy Chief Justice of the Republic of Kenya, Judge of the Supreme Court of Kenya, Member of the Judicial Service Commission and Ombudsman of the Judiciary. In my considered view, public interest and the proportionate magnitudes of the orders sought do not stand in favour of allowing the motion. To the contrary, I find that the interests of justice would best be served if the parties are afforded an opportunity to ventilate their respective cases at the hearing of the Petition on merit.
34. From what is stated hereinabove, I find that the grant of the Conservatory Order at the interlocutory stage, in the absence of evidence that the Petitioner was likely to suffer real danger or prejudice, ventured into the making of a definite and conclusive finding thereby having the impact of prejudicing the hearing of the main Petition without affording the 1st Respondent an opportunity to be heard.
35. From the foregoing analysis, I find that the Petition and Motion present an unfortunate scenario of not only having parallel proceedings on the same issues, but also a great risk of coordinate courts granting conflicting orders.
36. In the end, I have come to the conclusion that there cannot be any justification in having this Petition and Motion, and High Court Petition No. E408 of 2020 being heard parallel to each other.
37. As discussed from the foregoing analysis, I find that the Preliminary Objection by the 1st Respondent has merit. I also find that the Petitioner has not made out a case for Conservatory Orders. I additionally find that the overriding objectives of facilitating the just, expeditious, proportionate and affordable



resolution of this Petition would best be served if it is heard together with Nairobi High Court Petition No. E408 of 2020.

38. It is therefore hereby ordered:

1. The Notice of Motion dated 26th January, 2021 is unmerited and it is hereby disallowed.
2. Petitioner has not made out a case for confirmation of the Conservatory Orders granted on 29th January, 2021 and the same are hereby discharged
3. This Petition is transferred to Nairobi Constitutional and Human Rights Division to be heard together with Petition No. E408 of 2020.

DATED AT MERU THIS 29TH DAY OF JULY, 2021

T. W. CHERERE

JUDGE

Court Assistant - Morris Kinoti

For Petitioner - Mr. Maranya instructed by M.D.Maranya & Co. Advocates

For 1st Respondent - Mr. Orenge (SC), Mr. Awele, Prof. Sihanya, Mr. Kilonzo, Mr. Havi and Ms. Soweto instructed by Soweto & Co. Advocates

For 2nd Respondent - Ms. Owano hb for Mr. Kanjama instructed by Mumma & Kanjama Advocates

For 1st Interested Party - Ms. Kungú instructed by Hon. Attorney General

For 2nd Interested Party

For 3rd Interested Party - N/A for Director of Public Prosecutions

For 4th Interested Party - Mr. Mulekyo instructed by Khaminwa & Khaminwa Advocates

5th Interested Party - Mr. Omutatah acting in person

