



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO. 163 OF 2019

(FORMERLY MACHAKOS PETITION 7 OF 2019)

BETWEEN

OKIYA OMTATAH OKOITI.....1ST PETITIONER
NYAKINA WYCLIFF GISEBE2ND PETITIONER
CHARLES OMBOKO3RD PETITIONER
DAVID MUNYAO MWANZIA.....4TH PETITIONER
VINCENT MUILI MUINDI.....5TH PETITIONER

VERSUS

THE HON. ATTORNEY-GENERAL.....1ST RESPONDENT
KENYA LAW REFORM COMMISSION2ND RESPONDENT
THE NATIONAL ASSEMBLY.....3RD RESPONDENT
THE HON. JUSTIN BEDAN NJOKA MUTURI.....4TH RESPONDENT
THE HON. KENNETH MAKELO LUSAKA.....5TH RESPONDENT

CABINET SECRETARY, MINISTRY OF

INFORMATION COMMUNICATION AND TECHNOLOGY.....6TH RESPONDENT

AND

THE COUNCIL OF GOVERNORS1ST INTERESTED PARTY
THE KATIBA INSTITUTE2ND INTERESTED PARTY
THE LAW SOCIETY OF KENYA.....3RD INTERESTED PARTY
CHILD WELFARE SOCIETY OF KENYA.....4TH INTERESTED PARTY
COMMUNICATION AUTHORITY OF KENYA.....5TH INTERESTED PARTY

RULING NO. 3

The judgment in the instant petition was set for delivery today. However, two intervening factors, namely the enactment of the Data Protection Act, and the receipt of a letter dated 26th November 2019 from Mr. Mwendwa, the counsel for the 3rd Respondent, seeking directions from the court in light of the said enactment, made delivery not possible. In addition, as the Data Protection Act was enacted after reserving judgment, this Court is guided by the provisions of section 60 of the Evidence Act that obliges it to have judicial notice of all written laws. The Court therefore considered it prudent that parties be given opportunity to comment on the Data Protection Act, as it may be relevant to some of the issues raised in the Petition herein. Judgment was thus deferred, and the Court directed that a hearing be set for today to receive submissions from the parties on the Act, and to set a new judgment date.

This Court in this respect has power and discretion to give directions under Article 159 of the Constitution, which obliges this Court to provide substantive justice, and Rule 3 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which provides as follows:

“3. (1) These rules shall apply to all proceedings made under Article 22 of the Constitution.

(2) The overriding objective of these rules is to facilitate access to justice for all persons as required under Article 48 of the Constitution.

(3) These rules shall be interpreted in accordance with Article 259(1) of the Constitution and shall be applied with a view to advancing and realising the— (a) rights and fundamental freedoms enshrined in the Bill of Rights; and

(b) values and principles in the Constitution.

(4) The Court in exercise of its jurisdiction under these rules shall facilitate the just, expeditious, proportionate and affordable resolution of all cases.

(5) For the purpose of furthering the overriding objective, the Court shall handle all matters presented before it to achieve the—

(a) just determination of the proceedings;

(b) efficient use of the available and administrative resources;

(c) timely disposal of proceedings at a cost affordable by the respective parties; and

(d) use of appropriate technology.

(6) A party to proceedings commenced under these rules, or an advocate for such party is under a duty to assist the Court to further the overriding objective of these rules and in that regard to—

(a) participate in the processes of the Court; and

(b) comply with the directions and orders of the Court.

(7) The Court shall pursue access to justice for all persons including the—

(a) poor;

(b) illiterate;

(c) uninformed;

(d) unrepresented; and

(e) persons with disabilities

(8) Nothing in these rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

Mr. Omtatah, the 1st Petitioner herein, submitted that he was served with the directions of this Court late. Further, that making submissions on the Data Protection Act will amount to the reopening of this case, and will have repercussions on another Petition he has filed on the constitutionality of the Data Protection Act, namely Nairobi High Court Petition No. 474 of 2019. Mr. Ochiel for the 2nd Interested Party was categorical that the Data Protection Act has no relevance to the instant Petition, which entirely deals with the process issues of enactment of the Statute Law (Miscellaneous Amendments) Act No 18 of 2018. He left it to the Court to make a decision in the circumstances. The Respondents on their part asked the Court to take judicial notice of the Data Protection Act.

In the interests of justice, and in light of Mr. Omtatah’s submissions that he was notified of today’s hearing late, we were of the view that if

Mr. Omtatah so desires and indicates so to the Court, we would give him the opportunity to make submissions on the Data Protection Act before delivery of judgment. The said submissions on the said Act are for clarity purposes are the ones relevant and limited to issues the Petitioners have raised in Petition 163 of 2019 (the instant petition), on the amendments to the Registration of Persons Act. For the avoidance of doubt, the issue of the constitutionality of the Data Protection Act is not an issue before this Court, and cannot be addressed in the said submissions.

However, before the delivery of this ruling, Mr. Omtatah indicated that he would not be making any submissions on the Data Protection Act in this Petition, and would reserve his submissions on the Act for the hearing in Nairobi High Court Petition No. 474 of 2019.

Mr. Ochiel in his submissions also requested this Court to take judicial notice of a judicial authority by the Supreme Court of Kenya on public participation, that he filed in Court on 18th December 2019 in support of the petition herein. While Mr. Bitta for the 1st Respondent did not object to its admission, Mr. Regeru for the 2nd Respondent asked that the same be struck out as it is being filed after the hearing, and was incomplete on account of missing several pages. His sentiments were echoed by the counsel for the 3rd and 6th Respondents, and the counsel for the 5th Interested Party.

We have perused the said authority and note that the copy filed in Court is indeed incomplete, and we cannot therefore rely on it. This finding notwithstanding, we nevertheless note that we are bound by decisions of the Supreme Court of Kenya that are relevant and germane to the issues raised in this Petition, which may include the one brought to this Court's attention by Mr. Ochiel.

In the premises, judgment in this Petition is now reserved for **30th January 2020 at 3.00 pm.**

Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF DECEMBER 2019

P. NYAMWEYA

MUMBI NGUGI

W. KORIR

JUDGE

JUDGE

JUDGE