**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**MISC. APPLICATION NO. 240 OF 2016**

**IN THE MATTER OF JUDICIAL REVIEW APPLICATION BROUGHT PURSUANT TO ARTICLES 22, 23, 165 (3) (B) & 258 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF THE ENFORCEMENT OF THE SUPREMACY OF THE CONSTITUTION AS PER ARTICLE 2 (1AND 4) OF THE OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE ENFORCEMENT OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 37**

**REPUBLIC…………………………………………...………APPLICANT**

**VERSUS**

**NAIROBI CITY COUNTY POLICE COMMANDER.....1ST RESPONDENT**

**NAIROBI CITY COUNTY GOVERNMENT…………......2ND RESPONDENT**

**CABINET SECRETARY FOR INTERIOR AND CO-ORDINATION OF**

**NATIONAL GOVERNMENT……………..............…..3RD RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE....….........…4TH RESPONDENT**

**EX PARTE: COALITION FOR REFORMS AND DEMOCRACY**

**RULING**

**Introduction**

1. In the recent past this Country has witnessed unfortunate incidents where Kenyans have lost properties, limbs and lives. These unfortunate incidents have regrettably revolved around the coming general elections. The main protagonists in this saga are Coalition of Reforms and Democracy (CORD) a coalition of mainly opposition parties on one hand and Jubilee Coalition, a coalition of ruling parties. Of

course there are other players in the same saga.

2. In the aftermath of the elections of 2007/2008, this country witnessed and experienced an unprecedented wave of violence that pushed the country to the brink of civil war. It took the effort of our neighbours to bring us back sanity. Thereafter, we all agreed ‘never again” to go the same route. However it looks like that was simply wishful thinking. We have once again gone full circle and are almost replaying the 2007/2008 scenes.

3. In a democracy like ours it must be appreciated that people will always differ in terms of ideologies. However such differences should not be the source of our disintegration as a Nation but the manner in which we resolve the same ought to be evidence of our strength. The fact that we are able to express our disagreements openly ought to be our source of pride as a nation.

4. We ought to be guided by the notion that this country is bigger than all of us and just as we found it here, the same way we shall leave it here. Our aspiration should be that when, and not if, our time to leave comes we shall leave it a better place than we found it. In my view, our differences, and these shall always be there, ought to be resolved in the spirit of “come now let us reason together”. ”. In fact in my respectful view life would not only be boring and intolerable if all of us shared the same view-points on all issues. We can only hope that good sense will prevail amongst all the protagonists in these fast unfolding events.

5. I will say no more on the issue.

6. The matter before me is an application filed by the Applicant herein, CORD, in which it seeks the following orders:

> **1. This matter be certified as urgent and service be dispensed with in the first instance.**
>
> **2. Leave be granted to the Ex parte Applicant to commence Judicial Review proceedings and that leave so granted does operate as stay.**
>
> **3. An order of Certiorari to bring before this honourable court for purposes of being quashed and to quash the decision of the 1st Respondent dated 27th May 2016 purporting to disallow the Ex parte Applicants notification to hold a Public rally at Uhuru Park on 1st June 2016, effectively outlawing the said Rally.**
>
> **4. Pending the hearing and determination of this application this honourable court do issue an order of Prohibition prohibiting the Respondents one and all howsoever, themselves, their agents, servants and or assigns from blocking, stopping or in any way interfering with the Petitioners planned Rally to be held on 1st June 2016 at Uhuru Park in Nairobi City.**
>
> **5. An order of Prohibition prohibiting the Respondents herein in any manner whatsoever from directing, continuing to direct, and harassing or continuing to harass, arresting the leadership and membership of the Ex parte Applicant herein for their planned Rally to be held on 1st June 2016 at Uhuru Park in Nairobi City.**
>
> **6. The costs of this application be in the cause.**

7. The grounds on which the application was based are as follows:

> **1) The Applicant is a Coalition of Political Parties duly registered under the Laws of Kenya**
>
> **2) In exercise of its constitutional right of assembly, the Applicant has organized a Public Rally to be held at Uhuru Park within the City of Nairobi.**

**3) In furtherance of these plans, on the 22nd May 2016 the Applicant sought from the 2nd Respondent permission to hold its planned rally at the said venue on the said date, which permission was granted on the 25th May 2016.**

**4) The Applicant duly paid to the 2nd Respondent the requisite fees use of the said venue on the said date.**

**5) On 23rd May 2016 in compliance with the law, the Applicant notified the 1st Respondent of its planned rally at the said venue on the said date and requested the 1st Respondent to provide it with the necessary security.**

**6) The Applicant subsequently learnt through the media hat a 3rd party had allegedly paid for use of the said venue on the said date.**

**7) On 27th May 2016, the Applicant received a letter dated the same day from the 1st Respondent informing it that the Venue had allegedly been booked by a third party and that therefore the Applicants Notification dated 23rd May 2016 "was therefore not approved"**

**8) Further on 29th May 2016 the 3rd Respondent Major Gen (Rtd) Joseph Nkaissery through a press statement to the media threatened to arrest or direct the 1st and 4th Respondents to arrest the Applicants leaders should they proceed with their planned rally on 1st June 2016 at Uhuru Park.**

**9) Under the 4th Schedule of the Constitution of Kenya, Public amenities such as Uhuru Park are strictly within the control of the 2nd Respondent and the 1st 3rd and 4th Respondents as agents of the Central Government have no legal right to control or direct its use.**

**10) Despite the 2nd Respondent informing the 1st 3rd and 4th Respondents and the alleged 3rd Party hirer that Uhuru Park had been reserved for use by the Applicant, the 1st Respondent has purported to outlaw the Respondent's planned Rally at the said venue on the said date on the flimsy excuse that it had been allegedly reserved for the said 3rd Party.**

**11) The 1st 3rd and 4th Respondents action is manifestly unconstitutional, ultra-vires, illegal, irrational and malafides**

**12) It is in the interest of justice that the orders sought herein are granted.**

8. According to the Applicant, on 22nd May 2016 it wrote to the Nairobi City County Government requesting for permission to hold a public rally at Uhuru Park grounds on 1st June 2016. Similarly, on 23rd May 2016 it wrote to the Office Commanding Central Police Station notifying him about the its intention to hold a rally at the same venue and requested him to make the necessary security arrangements for the rally. The Officer however refused to receive the letter and instead directed that the applicant submits it to the County Police Commander. On 24th May 2016 the said letter was delivered to the County Police Commander.

9. On 25th May 2016, it was averred that the Applicant received a letter dated the same day from the Nairobi City County confirming reservation of the same venue for the Applicant's exclusive use on 1st June 2016. However, on 27th May 2016 the Applicant received a letter dated the same day from the City County Police Commander informing it that Uhuru Park had already been booked for three days by a group calling itself the Prayers Beyond Boundaries and that therefore the Applicant's notification to hold a rally at the same venue could not be "approved".

10. It was disclosed that on 27th May 2016 the Nairobi City County Government wrote to the City County Police Commander informing him that by their letter on 25th May 2016, they had granted the sole authority to the ex parte Applicant to hold a rally at Uhuru Park. By a letter dated 27th May 2016 the Nairobi City County wrote to the Prayers Without Boundaries notifying them that they had purportedly made payment before the County authorities had granted approval and since the venue had already been reserved for another function, their request had been declined.

11. However, on 28th May 2016 the Applicant received a copy of the letter dated the same day from the City County Police Commander addressed to the Nairobi City County insisting that since the prayers beyond boundaries group had made payment, the request by CORD, which had made reservation a head of the latter could not purportedly be "approved"

12. To the Applicant all the correspondences made by the City County Police are patently illegal within the meaning of sections 2 and 5 of the ***Public Order Act***. In its view, the power to grant authority to use Uhuru Park grounds is vested in the City County of Nairobi who have through official correspondence granted the same for exclusive use by the ex parte Applicant. It was therefore the Applicant's view that the attempt by the City County Police Commander to determine who has the right to use Uhuru Park grounds is manifestly illegal, lacks legal foundation and is therefore null and void.

13. The applicant took the position that the regulating officer contemplated under section 5 aforesaid for purposes of receiving notification for holding a public gathering is the Officer Commanding a Police Station within the meaning of section 2 of the ***Public Order Act***. It therefore asserted that the conduct and decision of the City County Police Commander is actuated with bad faith, malice and laced with bias.

14. By a further affidavit, it was disclosed that through a press statement by the Government Spokesman, the National Security Advisory Council had banned the ex parte applicant's rally at Uhuru Park citing security threats. To the Applicant the said Council is an administrative organ that is unknown to law and cannot make decisions on matters relating to the holding of public rallies in the country hence its decision was null and void.

15. The Applicant also disclosed that there was a statement issued by the Kenya National Human Rights Commission which stated that the entity that was allegedly claiming the right to use the Park had withdrawn its quest for the same. To the Commission there is no law that stops the right of assembly during a public holiday.

16. When the matter came before me, I certified the same urgent and after considering the application granted leave to commence judicial review proceedings. Taking into account the nature of the orders sought, I however deferred the hearing of the limb for directions that the leave so granted do operate as a stay for hearing *inter partes* pursuant to the proviso to provisions of Order 53 rule 1(4) of the ***Civil Procedure Rules.*** It is that limb that is the subject of this ruling.

17. When the matter was called out for hearing at 11.35 am only the applicants were represented. I however stood over the matter to 12.00pm in order to satisfy myself that service had been effected. At 12.05pm when the hearing resumed apart from the applicants and the 2nd Respondent, no other respondents were represented. Having satisfied myself as to the service and considering the agency of the matter I decided to hear the application.

18. The Applicant's case was put forward through its learned counsel, **Hon. James Orengo, SC** and **Mr Edwin Sifuna,** who appeared in the matter together with **Mr Eric Mutua, Mr Paul Mwangi, Hon. Peter Kaluma** and **Mr Magaya**. In their submissions they emphasised that the 1st, 3rd and 4th Respondents had no power to ban a rally that had been licensed by the 2nd respondent and that the reasons adduced by the said respondents were mere excuses meant to deny the Applicant from enjoying its Constitutional rights. In their view, the said respondents were still suffering from the hangovers of the retired constitution which had been discarded by Kenyans when the current Constitution was enacted.

19. The Application was supported by **Mr Ogola**, learned Counsel for the 2nd Respondent who reaffirmed that it is the responsibility of the 2nd Respondent to grant permission for the use of Uhuru Park and that the same was granted to the Applicant herein.

**Determination**

20. I have considered the foregoing. As the 1st, 3rd and 4th Respondents chose not to appear for the hearing, the factual depositions by the Applicant were not controverted.

21. The principles that guide the grant of an order that the leave do operate as stay of the proceedings in question have been crystallised over a period of time in this jurisdiction. A stay can be granted where either the decision being challenged has not been made or where even if made is still in the course of implementation. See **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005.**

22. However even where the leave is granted, it was held in **Jared Benson Kangwana vs. Attorney General Nairobi HCCC No. 446 of 1995** that in considering whether the said leave ought to operate as a stay of proceedings the Court has to be careful in what it states lest it touches on the merits of the main application for judicial review and that where the application raises important points deserving determination by way of judicial review it cannot be said to be frivolous.

23. **Maraga, J** (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** was of the view that:

> **"…as injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction…I also want to state that in judicial review applications like this one the Court should always ensure that the *ex parte* applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application. Therefore where the order is efficacious the Court should not hesitate to grant it. Even with that in mind, however, it should never be forgotten that the stay orders are discretionary and their scope and purpose is limited. What then is the scope and purpose of stay orders in the judicial review jurisdiction? The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made. It is not limited to judicial or quasi-judicial proceedings as some people think. It encompasses the administrative decision making process (if it has not yet been completed) being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. A stay is only appropriate to restrain a public body from acting. It is, however, not appropriate to compel a public body to act. With this legal position in mind I now wish to turn to the facts of this case and decide whether or not the Ex parte Applicant's case is deserving of a stay order. The Ex-parte Applicant seeks:**
>
> > **"THAT the grant of leave do operate as a stay stopping each and all the Respondents from restraining the Applicant from the exercise of his office, functions, duties and powers as the Mayor of Mombasa and as a nominated councilor in the Municipal Council of Mombasa."**
>
> **Can I grant this prayer in view of the scope and purpose of the stay order as stated above? I think not. Not as it is framed. To grant it as prayed would be compelling the Respondents to reinstate the Ex-parte Applicant to his position as Mayor before hearing them. Even in the cases cited by Mr. Orengo stay orders were not granted in the circumstances and terms as sought in this case. As I have already said, however, when dealing with applications like this the court should always ensure that the applicant's application is not rendered nugatory. Having considered all the circumstances of this case I am satisfied that the Ex-parte Applicant is deserving of a stay order but not as prayed in the application. What I think is an**

**appropriate order to make in the circumstances of this case is to direct, which I hereby do, that the leave granted shall operate as a stay to restrain the Respondents jointly and severally from nominating or causing to be nominated another councilor or to hold the elections or elect the Mayor of Mombasa until this matter is heard and determined."**

24. As this Court held in Miscellaneous Application No. 363 of 2013 **In Re: Meridian Medical Centre**;

> **"....it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review nugatory or an academic exercise that the Court would stay the said proceedings the strength or otherwise of the applicant's case notwithstanding...It must be shown that the probability of a determination being made in the challenged proceedings, are high and such probability cannot be said to have been achieved on mere conjecture and speculation. It follows that the stage at which the said proceedings have reached may be crucial in determining whether or not to grant the stay sought though that is not the determinant factor."**

25. Whereas the general rule is that stay will not be granted where to do so would have the effect of reversing an already made decision, this Court appreciates that in certain cases a stay may be granted even where its effect may be to temporarily reverse the decision. However, that remedy may only be resorted to in exceptional cases and the onus is upon the applicant to prove that such exceptional circumstances exist. It is in this light that this Court understands the decision of **Gladwell LJ** in **Republic vs. Secretary of State for Education and Science, ex parte Avon County Council (No. 2) CA (1991) 1 All ER 282** where he said that:

> **"An order that a decision of a person or body whose decisions are open to challenge by judicial review shall not take effect until the challenge has been finally determined is, in my view, correctly described as a stay."**

26. In this matter the starting point must necessarily be Articles 33, 36 and 37 of the Constitution which provide as follows:

***33. (1) Every person has the right to freedom of expression, which includes—***

***(a) freedom to seek, receive or impart information or ideas;***

***(b) freedom of artistic creativity; and***

***(c) academic freedom and freedom of scientific research.***

***(2) The right to freedom of expression does not extend to—***

***(a) propaganda for war;***

***(b) incitement to violence;***

***(c) hate speech; or***

***(d) advocacy of hatred that—***

***(i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or***

***(ii) is based on any ground of discrimination specified or contemplated in Article 27 (4).***

***(3) In the exercise of the right to freedom of expression, every person shall respect the rights and***

***reputation of others.***

***36. (1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.***

***(2) A person shall not be compelled to join an association of any kind.***

***(3) Any legislation that requires registration of an association of any kind shall provide that—***

***(a) registration may not be withheld or withdrawn unreasonably; and***

***(b) there shall be a right to have a fair hearing before a registration is cancelled.***

***37. Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.***

27. Article 19(3) of the Constitution provides as follows:

***(3) The rights and fundamental freedoms in the Bill of Rights—***

***(a) belong to each individual and are not granted by the State;***

***(b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter; and***

***(c) are subject only to the limitations contemplated in this Constitution.***

28. It is therefore clear that the State does not grant rights and fundamental freedoms to any person. This is necessarily so because human rights are generally universal and inalienable rights of human beings. A Constitution simply recognises the natural and original human rights of mankind which any and every human being should have in order to lead a dignified life till his or her natural death. To emphasise that the State does not grant the same Article 3(b) is clear that the rights and fundamental freedoms in the Constitution ***do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with the Bill of Rights***. Therefore the rights contained in the Constitution are not the only rights to be enjoyed by persons but are just examples of the same. That the rights and fundamental freedoms are not favours dished by the State was made clear by **Nyamu, J** (as he then was) in **Kenya Bus Services Ltd & 2 Others vs. Attorney General [2005] 1 KLR 787** where he held that:

**"The only difference between rights and the restrictions are that the restrictions can be challenged on the grounds of reasonableness, democratic practice, proportionality and the society's values and morals including economic and social conditions etc. whereas rights are to the spiritual, God given, and inalienable and to the non-believers changeless and the eighth wonder of the World."**

29. As was appreciated by **Nyamu, J** (as he then was) in **Richard Nduati Kariuki vs. Honourable Leonard Nduati Kariuki & Another HCMA No. 7 Of 2006 [2006] 2 KLR 356:**

**"The International instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (The ICCPR) and International Covenant on Economic Social and Cultural Rights (The ICESC) give recognition that human rights belong to an individual as a human being, hence the inherent dignity and the fact that those rights are equal and inalienable of all human beings. The rights are inherent to man. They are universal and inalienable and hence their ethical base, since they are intrinsic to the human condition. They are not dependent on the states or the geographical location. They are**

**owed to all persons. For the above reasons human rights are owed by the States to all individuals within their jurisdiction and in certain situations to groups of individuals. It is a general principle in international human rights law that human beings cannot be deprived of the substance of their rights hence reference to their individuality. It is only the exercise of some of the rights that can be limited in certain circumstances. Many Constitutions of the world provide for state responsibility for not complying with the legal obligations as regards human rights. It is now recognized, that under international law, States incur responsibility or liability for not complying with their legal obligations to respect and ensure, that is, to guarantee, the effective enjoyment of the human rights recognized either by International instruments binding on the State concerned or any other source of law. An impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the legal, source concerned."**

30. The only avenue via which these rights and fundamental freedoms can be limited is pursuant the provisions of Article 24 of the Constitution which provides as follows:

> ***(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—***
>
> ***(a) the nature of the right or fundamental freedom;***
>
> ***(b) the importance of the purpose of the limitation;***
>
> ***(c) the nature and extent of the limitation;***
>
> ***(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and***
>
> ***(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.***
>
> ***(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—***
>
> ***(a) in the case of a provision enacted or amended on or after the expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;***
>
> ***(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and***
>
> ***(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.***
>
> ***(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.***

31. In matters dealing with rights and fundamental freedoms, Article 24 provides that there can be no presumption of constitutionality with respect to legislation that limits fundamental rights: it must meet the criteria set in the said Article. The criteria in such circumstances was set in **Lyomoki and Others vs. Attorney General [2005] 2 EA 127** where the Constitutional Court of Uganda set out the following principles:

**(i) The onus is on the petitioners to show a *prima facie* case of violation of their constitutional**

**rights.**

**(ii) Thereafter the burden shifts to the respondent to justify that the limitations to the rights contained in the impugned statute is justified within the meaning of Article 43 of the Constitution. Both purposes and effect of an impugned legislation are relevant in the determination of its constitutionality.**

**(iii) The constitution is to be looked at as a whole. It has to be read as an integrated whole with no particular provision destroying another but each supporting the other. All provisions concerning an issue should be considered together so as to give effect to the purpose of the instrument.**

**(iv) Where human rights provisions conflict with other provisions of the Constitution, human rights provisions take precedence and interpretation should favour enjoyment of the human rights and freedoms.**

32. The same position was adopted in **Institute of Social Accountability & Another vs. National Assembly & 4 Others High Court Petition No. 71 of 2014 [2015] eKLR**.

33. In this case, the reason for banning the exercise of freedom of assembly by the Applicant, if the press statement is anything to go by, is based on security reasons. The issue of security, however, has not come from the law enforcement agencies, but from the Government Spokesperson. However, the agency with the Constitutional mandate of enforcing law and order is the police and Article 239(2) and (3) of the Constitution provides as follows:

***(2) The primary object of the national security organs and security system is to promote and guarantee national security in accordance with the principles mentioned in Article 238 (2).***

***(3) In performing their functions and exercising their powers, the national security organs and every member of the national security organs shall not—***

***(a) act in a partisan manner;***

***(b) further any interest of a political party or cause; or***

***(c) prejudice a political interest or political cause that is legitimate under this Constitution.***

34. It is therefore clear that the police n undertaking their Constitutional mandate are expected to be neutral in that mandate. Under Article 244(a) they are expected to be professional in their duties. They are expected to be independent not to be at the beck and call of any particular political class. That, in my view, is the whole idea behind the "*utumishi kwa wote*" slogan. Article 245(4) of the Constitution provides that whereas Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of ***policy*** for the National Police Service, no person may give a direction to the Inspector-General with respect to the enforcement of the law against any particular person or persons. In other words, in matters of enforcement of the law the buck stops with the Inspector General of Police. In none of the documents exhibited herein has the Inspector General of Police alluded to the fact that he will be unable to enforce law and order if the intended rally takes place.

35. To the contrary, its disapproval the Applicant's rally was based on the ground that two groups are claiming the right to hold their functions at the same venue. In my view the State has the machinery and is in a better position to determine who has the right to use the said venue and it cannot renege in its duty to do so by simply denying both parties the right to use the grounds on the ground that there is confusion as to who is entitled to exercise its rights and fundamental freedoms. To do so amounts to shirking from it Constitutional obligation under Article 21(1) of the Constitution which provides that:

***It is a fundamental duty of the State and every State organ to observe, respect, protect, promote***

***and fulfil the rights and fundamental freedoms in the Bill of Rights.***

36. To do otherwise, in my view would amount to the State abetting and encouraging the violation of the rights of a person who is otherwise lawfully entitled to exercise his or her rights and fundamental freedoms. It is its duty to lawfully determine who ought to use the grounds. To lock out both groups is with due respect an escapist way of resolving a dispute. In light of the evidence before me it is prima facie that the person lawfully entitled to the use of the Uhuru Park is the applicant.

37. The reasons adduced by the 1st, 3rd and 4th Respondents beg the question whether there are no less restrictive means to ensure that security is assured during the intended rally. Where the State is in doubt as to who should use the venue such as Uhuru Park, and where possible the State can ensure that the two groups carry on with their functions without interference by creating a buffer zone between the two. That in my view is one of the lesser means of achieving the purpose.

38. In enacting unto them the current Constitution and retiring the old one, Kenyans intended to discard the old traditions in which the enjoyment of their rights and fundamental freedoms were routinely curtailed by invocation of such vague phrases as "security reasons". While appreciating that in certain circumstances the enjoyment of the same may reasonably be curtailed, Kenyans, in my view, intended that such curtailment be done in accordance with the national values and principles of governance which include, human dignity, transparency, accountability and good governance. In my view just like the greatest commandment in the Bible is love, the greatest right and fundamental freedom in our Constitution is to be found in Article 28 around which all other rights and fundamental freedoms revolve. That Article provides that:

***Every person has inherent dignity and the right to have that dignity respected and protected.***

39. That Kenyans in the spirit of *Madaraka* or self governance have been going about their business during such occasions in the past without their activities being criminalised is not in doubt. It is not unheard of for Kenyans to go to Temples, Mosques and Churches; to enjoy social activities such as sports; to visit the less fortunate members of the society; or to just spend the day sleeping. For others it is business as usual and you will find them carrying on with their daily chores unperturbed. That in my view is the way it should be. As long as Kenyans decide to go on with their lawful activities, it should not and hopefully it shall never be, the case that such activities will be curtailed or criminalised. That in my view is the spirit behind *madaraka*.

40. In my view unless it is contended that the police would be unable to maintain law and order, which is their primary role, during the said rally, and the police have not said so, I do not see any reason to find that there are no less restrictive means to ensure that security is not maintained apart from banning the said rally.

41. This is not to say that the organizers of the said rally have no duty to ensure that the rally is conducted in a lawful and orderly manner. The Applicants must appreciate that their rights to freedom of expression does not extend to (a) propaganda for war; (b) incitement to violence; (c) hate speech; or (d) advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm or is based on any ground of discrimination specified or contemplated in Article 27(4). The applicants must appreciate that not all Kenyans share in their ideologies and they must respect the rights of the said Kenyans to go about their businesses without harassment.

42. In my view the police are under an obligation to protect innocent Kenyans from being harassed by the people attending the said rally and also to ensure that other persons do not unlawfully disrupt the same. The Police ought to work hand in hand with the organizers of the said rally to ensure that peace and order is maintained before, during and after the said rally. The police or the State cannot purport to curtail the exercise of Constitutional rights of Kenyans unless the exceptions under the Constitution as shown to exist and the burden is upon those persons or entities purporting to limit the said rights and fundamental freedoms to satisfy the Court that that is the position. Such satisfaction cannot be fulfilled by bare allegations but ought to be based on satisfactory evidence. In this case there is no evidence before me on

the basis of which I can find that the curtailment of the enjoyment of the said rights and fundamental freedoms are constitutionally justified or warranted.

43. Accordingly it is my view that there exist less restrictive means of ensuring that law and order is maintained during the said rally other than banning the same. This Court must therefore opt for the lesser evil and in my view the lesser evil would be to permit the said rally to go on while ensuring that peace prevails.

44. In the premises, I direct that the grant of leave herein shall operate as a stay of the decision to ban or prohibit the rally intended to be held by the Applicant herein at Uhuru Park on 1st June, 2016 on condition that the Applicants maintain law and order. The Inspector General of Police is hereby directed to ensure that there is sufficient security for those attending the rally and those going about their businesses. Towards this end the organizers of the rally and the Inspector General of Police are hereby directed to cooperate in ensuring that no violence occurs before, during and after the said rally as a result thereof.

45. In effect as long as the Applicant operates within the law I grant the following orders:

> **1) An order of Prohibition prohibiting the Respondents by themselves, their agents, servants and or assigns from blocking, stopping or in any way interfering with the Petitioners planned Rally to be held on 1st June 2016 at Uhuru Park in Nairobi City,.**
>
> **2) An order of Prohibition prohibiting the Respondents herein in any manner whatsoever from directing, continuing to direct, and harassing or continuing to harass, arresting the leadership and membership of the Ex parte Applicant herein for their planned Rally to be held on 1st June 2016 at Uhuru Park in Nairobi City.**

46. The costs of this application will be in the cause.

47. Orders accordingly.

**Dated at Nairobi this 31st day of May 2016**

**G V ODUNGA**

**JUDGE**

***In the presence of :***

***Hon Orengo, SC, Mr Paul Mwangi, HonKaluma, Mr Eric Mutua Mr Sifuna and Mr Magaya for the Applicant***

***Mr Munene for the 3rd and 4th Respondents***

***Cc Mutisya***