REPUBLIC OF KENYA

IN THE HIGH COURT KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.12 OF 2016

BETWEEN:

THE NATIONAL GENDER AND EQUALITY COMMISSION.....APPLICANT

AND

CABINET SECRETARY, MINISTER OF

INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT.....1ST RESPONDENT

THE HONOURABLE ATTTORNEY GENERAL.....2ND RESPONDENT

NATIONAL POLICE SERVICE COMMISSION.....INTERESTED PARTY

RULING

Introduction

1. This is an Application brought by way of Notice of Motion, dated 11th January 2016, seeking the following interim orders:

> *"1. THAT this Application be certified as urgent and heard ex parte in the first instance.*
>
> *2. THAT service of this application be dispensed with in the first instance.*
>
> *3. THAT this Honourable Court be pleased to issue a conservatory order staying the application and or the operation of the amendment contained in section 2 of the Statute Law (Miscellaneous Amendment) Act, 2015 deleting paragraph (b) of Section 14 of the National Police Service Act (No. 11A of 2011) pending and determination of this application inter parties.*
>
> *4. THAT this Honourable Court be pleased to issue a conservatory order staying the application and or operation of the amendment contained in section 2 of the Statute Law (Miscellaneous Amendment) Act, 2015 deleting paragraph (b) of section 14 of the National Police Service Act No. 11A of 2011) pending hearing and final determination of the petition.*
>
> *5. THAT the cost of this application be in the cause."*

2. In addition to the above relief, the Applicant later sought certification of the matter under **Article 165(4)** of the **Constitution** and submissions on that point were filed by all parties accordingly.

3. The Petition which was also filed on the same date as this Application primarily sought a declaration of invalidity of the amendments contained in **Section 2** of the **Statute Law (Miscellaneous Amendment) Act, 2015** relating to **Section 13** and **14(b)** of the **National Police Service Act (No. 11A of 2011)** (hereinafter the "**National Police Service Act**") for being inconsistent with the **Constitution**.

4. On 12th January 2016, I granted the relief sought under prayer (1) of this Application and directed that it be served to other parties for hearing the following day – 13th January, 2016. Thus what is left for determination are the two issues above which are now discussed below.

Issues and Determination

5. The first issue is whether this Court should grant the conservatory orders staying the application and operation of the amendment pending the final determination of the Petition. The second issue is whether this Court should certify this application as one raising a substantial question of law and thus warranting the constitution of an uneven bench assigned by the Chief Justice in terms of **Article 165(4)** of the **Constitution**.

Petitioner's/Applicant's case

Conservatory Orders

6. As already stated above, the Applicant seeks a conservatory order staying the application and or the operation of the impugned amendments primarily on the ground that the amendments are in violation of **Article 27 (6) and (8)** of the **Constitution**. In that regard, **Section 14(b)** of the **National Police Service Act** provides for the **"framework for gender equality mainstreaming in the National Police Service especially at top leadership as required by Article 27(6) and (8) of the Constitution"**.

7. The Applicant argues that the coming into effect of the impugned amendments on 29th December 2015 pursuant to **Article 116(2)** of the **Constitution**, poses imminent harm in that they could be applied in the appointment of a new Deputy Inspector General in charge of the Kenya Police Service. That pursuant to the exit of Ms Grace Syombua Kaindi from that Office, Mr Joel Kitili was appointed in an acting capacity until the vacancy was filled and that action was in violation of the letter and spirit of the **Constitution**.

8. Further, that the amendment deleting **Section 14(b)** of the **National Police Service Act** is in violation of **Article 24(2)** of the **Constitution** in that it does not specifically express its intention to limit the right to equality between the two genders at the National Police Service, and it is unclear which right it is limiting and that also its intention is to derogate from the core content of **Article 27** and is thus invalid.

9. Moreover, Applicant argues that the amendments ought not to have been contained in **Statute Law (Miscellaneous Amendment) Act** but rather in a separate amendment to the **National Police Service Act** as it was a major amendment and that the former action was contrary to the **Revision of the Laws Act**, **Chapter 1 of Laws of Kenya**.

10. Thus, so the argument goes, it is in the interest of justice that the conservatory orders sought be granted in order to avoid the violation of the principle of equality as guaranteed in the **Constitution**.

Certification under Article 165(4)

11. On 16th February 2016, the Applicant filed its submissions on the issue pertaining to the constitution of an uneven number judge bench in terms of **Article 165(4)** of the **Constitution**.

12. It argues that it raises a substantial question of law justifying the empanelling of a bench of at least 3

judges. This is because this matter involves the two thirds gender rule relating to appointive positions as provided for under **Article 27(8)** of the **Constitution** and that this issue has not been conclusively decided by the Supreme Court or any other superior court.

13. The Applicant in that regard distinguishes the ***Supreme Court Advisory Opinion No 2 of 2012*** from its Petition by arguing that the two thirds gender rule concerned elective positions and not appointive positions in that case. Further in that Opinion, the Supreme Court gave Parliament until 27th August 2015 to enact a framework on implementation and while that deadline has lapsed, thus far the issue of appointive positions has not been conclusively dealt with as stated above.

14. It is on these grounds that the Applicant urges this Court to certify this matter in accordance with **Article 165(4)** of the **Constitution**.

1st and 2nd Respondents' case

15. In their written submissions dated 17th February 2016, the Respondents vehemently oppose the relief sought in this Application and urge for its dismissal.

16. Relying on the Supreme Court's decision case of ***Gitirau Peter Munya v Dickson Mwenda Kithinji and 2 Others [2014] eKLR*** they submit that Applicant has neither shown any unreasonable limitation of rights as per **Article 24** of the **Constitution** nor has it challenged the constitutionality of **Section 14** of the **National Police Service Act** per se and as necessitated by the amendment.

17. They further submit that **Article 27(8)** of the **Constitution** merely requires that the principle of gender representation be considered in the composition of the whole police service and that it does not specify that the Inspector General of Police and his/her Deputies must be appointed based on gender. Furthermore, it asserts that there is no merit in this Application because the Applicant has not shown that the total composition of the police force has not complied with the constitutional dictates on gender representation.

18. Moreover, that no conservatory order should be granted because the vacancy in the office of Deputy Inspector-General is a temporary one and the current holder is merely occupying an acting position and has not been appointed as a substantive holder of the office of Deputy Inspector-General in charge of the National Police.

19. On the issue of certification in terms of **Article 165(4)** of the **Constitution**, the Respondents argue that the issues in the Petition are not complex so as to pass as raising a substantial question of law under **Article 165(4)** of the **Constitution**. For this assertion they rely on this Court's decision in ***Harrison Kinyanjui v Attorney General and Others Petition No.74 of 2013***.

20. They further argue that the issue of gender representation in an appointive and elective position and the interpretation of **Article 27** of the **Constitution** does not qualify for certification under **Article 165(4)** of the **Constitution** because it is not a novel question of law as the issue of **Article 27(8)** on appointive positions and the gender question has already been dealt with in the case of ***Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & Another Petition No 10 of [2011] eKLR*** as well as in ***Supreme Court Advisory Opinion No. 2 of 2012***.

21. They therefore urge this Court to dismiss this Application and submit that it should be expeditiously disposed of in terms of the principles in **Article 159(2)(b)** of the **Constitution**.

Determination

Conservatory Orders

22. **Article 23(3)** of the **Constitution** empowers a court to grant appropriate relief in any proceedings brought under **Article 22** – where there has been violation of or threat of a violation of a fundamental

right or freedom. Such relief may include a conservatory order.

23. The nature of such an order was elucidated in ***Judicial Service Commission v Speaker of the National Assembly & Another [2013] eKLR*** wherein this Court stated the following:

> ***"Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person."***

The Supreme Court in ***Gitirau Peter Munya v Dickson Mwenda Kithinji and 2 Others*** (supra) adopted a similar position and held as follows:

> ***"Conservatory orders' bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the "prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the applicant's case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes."***

24. The requirements for the granting of a conservatory were succinctly summarised in the recent case of ***Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board and Other Petition No.154 of 2016*** as follows:

> ***"(a) An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.***
>
> ***(b) Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and***
>
> ***(c) The public interest must be considered before grant of a conservatory order."***

25. Without making a final determination on the constitutionality of the impugned amendments to **Section 14(b)** of the **National Police Service Act**, I hold the view that the Applicant has raised a prima facie arguable case on this issue with reasonable prospects of success.

26. The Applicant has also argued that there is imminent danger that the impugned amendments could be applied in the appointment of a new Deputy Inspector-General in charge of the Kenya Police Service. On this point, I am reminded of the words of Mwongo J in ***Martin Nyaga Wambora v Speaker of the County Assembly of Embu and 3 Others, Petition No. 7 of 2014*** where he said at paragraph 60:

> *"**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.)*

27. In that regard the Applicant has not put before this Court, compelling facts to illustrate how it will suffer prejudice if the conservatory orders are not granted because as issues stand today, the impugned amendments that are the subject of the Petition have already come into effect and unless overturned, remain law.

28. In our law, like in many other jurisdictions, there is a presumption of constitutional validity of legislation until the contrary is proved. The burden rests on he/she who challenges the constitutionality of that legislation to rebut this presumption. To capture this principle, I am reminded of the remarks of my Learned Brother Ibrahim J (as he then was) in ***Mark Ngaywa v Minister of State for Internal Security and Provincial Administration and Another Petition No.4 of 2011***, guided by his earlier decision in ***Bishop Joseph Kimani and Others v Attorney General, Committee of Experts and Another Petition No 699 of 2009*** where he said:

> ***"It is a very serious legal and constitutional step to suspend the operation of statutes and statutory provisions. The Court must wade with care, prudence and judicious wisdom. For the High Court to grant interim orders in this regard, I think one must at the interlocutory stage actually show that the operation of the legislative provision are a danger to life and limb at that very moment.***
>
> ***. . .***
>
> ***It is my view that the principle of presumption of Constitutionality of legislation [is] imperative for any state that believes in democracy, the separation of powers and the Rule of Law in general. Further the courts to be able to suspend legislation during peace time where there is no national disaster or war, would in my view be interfering with the independence and supremacy of Parliament in its Constitutional duty of legislating law."***

Ibrahim J went further and reasoned that—

> *"…**legislation should only be impugned in any manner only where it has been proven to be unconstitutional, null and void**. **Conservatory orders to suspend the operation of statutes, statutory provisions or even regulations should be wholly avoided except where the national interest demand and the situation is certain**." (Emphasis added.)*

29. In declining to grant the conservatory order, the Learned Judge reasoned that the presumption of constitutionality of the Alcoholic Drinks Control Act still subsisted and had not been rebutted and further that—

> ***"It can only be rebutted after full and fair hearing of the Petition and upon the Court declaring that the said Act and regulation or parts thereof are unconstitutional. I am still of the view that there is no place for conservatory or interim order in petitions which seek to nullify or declare legislation/statutes unconstitutional null and void. It is even more premature at this stage where the application has not heard or is not being heard to seek such conservatory orders."*** *(Emphasis added.)*

30. Majanja J adopted a similar approach in ***Susan Wambui Kaguru & Others v Attorney General Another [2012] KLR*** where he stated:

> ***"I have given thought to the arguments made and once again I reiterate that every statute passed by the legislature enjoys a presumption of legality and it is the duty of every Kenyan to obey the very law that are passed by our representatives in accordance with their delegated sovereign authority. The question for the court is to consider whether these laws are within the four corners of the Constitution. No doubt serious legal arguments have been advanced and I think any answer to them must await full argument and consideration by the court. I cannot at this stage make an interim declaration which would effectively undo the legislative will unless there are strong and cogent reasons to do so."***

31. I find the above dicta most apt to this Application as well. Essentially, what the Applicant is asking this Court to do is to suspend the operation of the impugned amendments pending its Petition to have the same declared constitutionally invalid. Conservatory orders in these circumstances cannot be granted, primarily because the presumption of constitutional validity of **Section 2** of the **Statute Law**

(Miscellaneous Amendment) Act, 2015 relating to **Section 13** and **14(b)** of the **National Police Service Act** still stands. It would be premature to grant such orders at this stage as the Petition is still pending and a final determination on the constitutionality of the said amendment has not been made.

32. I further take judicial notice of the fact that the interviews to replace Ms Grace Syombua Kaindi as Deputy Inspector-General were to be conducted on 20th May 2016. This was made public by a notice issued by the National Chairperson of the National Police Service Commission on 16th May 2016. I do not see any evidence before me that the new Deputy Inspector-General will not be appointed in terms of the current law which must be in line with the **Constitution** including **Article 27(8)**.

33. I now move on to the next leg of the enquiry, which is whether the Petition would be rendered nugatory should the conservatory order not be granted. In that context, the Petition seeks a declaration of constitutional invalidity of the impugned amendments for being in violation, primarily of **Articles 27(6)** and **(8)** and **24(2)** of the **Constitution**. In this regard, there is nothing to suggest that the relief sought in the Petition would be rendered nugatory if the conservatory order is not granted. The Petition will still present a live controversy which this Court can determine and if it is in line with whatever decision the National Police Service Commission will make, the said decision will be invalidated by this Court. As it is, the process of recruitment currently being undertaken by the abovementioned Commission may actually end up complying with the expectation of the Applicant subject to what will be decided at the conclusion of the Petition. The Police Service requires complete leadership at the top in these insecure times hence the need not to derail its processes based on interim orders.

34. It is also in my view not in the public interest to grant the conservatory orders sought for the same reason set out above.

35. I also note that one of the issues raised by the Applicant is whether a miscellaneous amendment can properly be invoked to amend a major and substantive statutory or constitutional provision. That same issue is the subject of a decision to be rendered shortly by a 5 judge bench in ***Law Society of Kenya v The Attorney General Petition 13 of 2014***. That decision will give direction to this matter as well.

Certification under Article 165(4) of the Constitution

36. **Article 165(4)** of the **Constitution** provides:

> ***"Any matter certified by the Court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice."*** *(Emphasis added)*

37. The phrase *"substantial question of law"* has not been defined in the Constitution but this Court noted in ***Community Advocacy Awareness Trust & Others v The Attorney General & Others (2012) eKLR (Petition No. 243 of 2011)***:

> ***"It is left to the individual judge to satisfy himself or herself that the matter is substantial to the extent that it warrants reference to the Chief Justice to appoint an uneven number of judges not being less than three to determine the matter."***

38. This discretion must however be exercised by taking into account a multiplicity of factors which have been, through many judicial decisions, been set out.

39. This is why this Court in ***Peter Solomon Gichira v The Attorney General and Another Petition No. 313 of 2015,*** laying down the test/guidelines to assess whether a matter raises substantial questions of law, followed the much celebrated dictum in ***Chunilal V. Mehta vs Century Spinning and Manufacturing Co. AIR 1962 SC 1314*** which reads thus:

> ***"A substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the***

Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial."

40. Thus gleaned from the above exposition of the law some of the relevant factors in deciding what constitutes a substantial question of law are:

1. Whether, directly or indirectly, it affects the substantial rights of the parties; or

2. Whether the question is of general public importance; or

3. Whether it is an open question in the sense that the issue has not been settled by pronouncements of the Supreme Court; or

4. The issue is not free from difficulty; or

5. It calls for a discussion of an alternative view.

41. In the same decision, the Court went further, at paragraph 20 to set out other additional factors that may be relevant in determining this question, and held:

"Other factors which a court may consider in my view include: whether the matter is moot in the sense that the matter raises a novel point, whether the matter is complex, whether the matter by its nature requires a substantial amount of time to be disposed of, the effect of the prayers sought in the Petition and the level public interest generated by the Petition."

42. The Court continued further by stating:

"Whereas this Court appreciates that the decision of an enlarged bench may well be of the same value as a decision arrived at by a single High Court judge, the Constitution itself does recognize that in certain circumstances, it may be prudent to have a matter which satisfies the constitutional criteria determined by a bench composed by a bench of numerically superior judges and I have attempted to outline some of the issues for consideration hereinabove."

43. The above are mere guidelines and each case has to be assessed on its own unique circumstances and whether in those circumstances an appraisal of the factual and legal matrix would establish the existence of a substantial question of law. See ***Federation of Women Lawyers (Fida-Kenya) & 3 Others v Attorney General & 2 Others [2016] eKLR (Petition 226 of 2015)*** at paragraph 9.

44. In the above context, the issues raised in the Petition are by no means trivial. To the contrary, they are important constitutional issues implicating the rights under **Article 27** of the **Constitution**. The said Petition relates to the application of the constitutionally entrenched two thirds gender rule to appointive positions. This question has not been dealt with any Superior Court and its pronouncements will not only affect the National Police Service Commission in its future appointments but will be a guide to other state organs as well. In addition, it is a matter of great public importance because the gender balance debate presently occupies a big part of national discourse.

45. Lastly, I am satisfied that as the rights of women will be greatly impacted by whatever decision to be made and the process of the enactment of miscellaneous amendments will be settled, the matter has huge statutory and other implications to the public, generally.

46. I am thus satisfied that the issues raised in this application qualify as substantial questions of law as contemplated in **Article 165(4)** of the **Constitution** read in conjunction with **Article 165(3)(b) or (d)**. Therefore, I hereby exercise discretion and refer the matter to the Chief Justice to constitute a bench of

Judges under **Article 165(4)** to hear and determine the issues in contest.

47. Having so held, save that the Application dated 11th January 2016 is hereby dismissed, the matter herein is referred to the Chief Justice for constitution of an uneven number of judges under **Article 165 (4) of the Constitution**.

48. Let each Party bear its own costs.

49. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki - Court clerk

Mr. Mbithi for Petitioner

Mr. Obura for 1st Respondent

No appearance for 2nd Respondent

Order

Ruling duly delivered.

Further Order

Submissions on the petition to be filed within 14 days for directions on 10/6/2016.

ISAAC LENAOLA

JUDGE