REPUBLIC OF KENYA

HIGH COURT AT NAIROBI-MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 169 OF 2016

BETWEEN

HON. FERDINAND NDUNGU WAITITU ……..……. 1ST PETITIONER

HON. MOSES KURIA ……...…...……. 2ND PETITIONER

HON. DENNIS WAWERU ……..…….. 3RD PETITIONER

HON. KIMANI ICHUNG'WA ……...……4TH PETITIONER

HON. ALICE NG'ANG'A ……5TH PETITIONER

AND

THE HON. ATTORNEY GENERAL .....1ST RESPONDENT/APPLICANT

ODINGA RAILA AMOLO ……..…….. 2ND RESPONDENT

MUSYOKA KALONZO STEPHEN ……..…….. 3RD RESPONDENT

MASIKA MOSES WETANGULA …….……. 4TH RESPONDENT

COALITION FOR REFORM AND DEMOCRACY .....… 5TH RESPONDENT

ORANGE DEMOCRATIC PARTY …….....…..…… 6TH RESPONDENT

WIPER DEMOCRATIC PARTY ……....…..…… 7TH RESPONDENT

FORD KENYA PARTY ……....…… 8TH RESPONDENT

INSPECTOR GENERAL OF POLICE …9TH RESPONDENT/APPLICANT

AND

THE IEBC…….....1ST INTERESTED PARTY

THE COMMISSION FOR INTEGRATION

AND NATIONAL COHESION …….....2ND INTERESTED PARTY

REGISTRAR OF POLITICAL PARTIES .....3RD INTERESTED PARTY

RULING

Introduction

1. The Petitioners are all members of the National Assembly and they filed the present Petition on 28th April 2016 in which they sued the 2nd, 3rd and 4th Respondents, who are party leaders of the 6th, 7th and 8th Respondents respectively. Together with the Petition, the Petitioners also filed a Notice of Motion Application seeking various conservatory orders largely injunctive in nature as against the said Respondents. The application was argued before me. In my ruling rendered on 6 June 2016, I partly allowed the application and granted the following orders:

> ***"That pending the hearing and determination of the Petition herein, a conservatory order do issue by way of a mandatory order compelling the 9th Respondent to ensure security, public safety and observance of the law and order by the 2nd, 3rd and 4th Respondents and such of the members of the 5th, 6th, 7th and 8th Respondents affiliated with them, whenever and wherever the said Respondents and their members picket or demonstrate pursuant to any notification given to the 9th Respondent under the Public Order Act."***

2. Subsequently, Learned State Counsel Mr.Mwangi Njoroge, on behalf of the 1st and 9th Respondents filed a Notice of Motion Application dated 9th June 2016 under certificate of urgency seeking the following orders:

> ***1. …***
>
> ***2. That there be an interim stay of the orders of this Court given on 6th June 2016 be issued pending the hearing and determination of this application inter partes.***
>
> ***3. That the orders of this Court given on 6th June 2016 be vacated or set aside.***
>
> ***4. That the costs of and incidental to this application be in the cause.***

3. The Applicants' case is contained in their two sets of affidavits in support sworn on their behalf by one Benson Kibui, an Assistant Inspector General of Police in the National Police Service on 9th June 2016 and 13th June 2016 respectively. It was their contention that the 2nd to 8th Respondents and their followers/adherents have acted in bad faith and abused the Court orders issued on the 6th June 2016 hence they are not entitled to enjoy protection of the Constitution, the Public Order Act and the aforesaid order of this Court. That their actions are not in the public interest as the country is now experiencing loss of life and property.

4. According to the Applicants, the interests of a few cannot override public interest and that the 2nd to 8th Respondents will suffer no prejudice if the Court order is vacated as there are proper mechanisms/procedures stipulated under the Constitution to address their grievance regarding the removal of Commissioners of the Independent Electoral and Boundaries Commission.

5. Mr.Kibui deponed that despite the directions issued by this Court for the 2nd Respondent to conduct peaceful demonstrations and that the demonstrations held on the 6th June 2015 resulted in massive destruction of property, looting and loss of life in Kisumu and Siaya and that police officers who had been

deployed on scene to provide security for the demonstrators were attacked by the demonstrators in Nairobi, Kisumu, Migori and Siaya among other areas, with crude weapons such as metal rods and huge rocks were as well hurled at them and thereby endangering their lives.

6. As a result of the violent demonstrations, the police were forced to respond through the use of reasonable force befitting the circumstances and in line with the provisions in the Public Order Act and the Kenya Police Manual, 1980. In addition, that several persons were arrested and charged with various offences under the Public Order Act and the Penal Code, Chapter 63 of the Laws of Kenya.

7. According to the 1st and 9th Respondent, it has become clear through the pronouncements in the media that the 2nd to 8th Respondents and their followers intend to continue with their demonstrations and there is apprehension on the part of the National Police Service that the future demonstrations will lead to more violence as has been witnessed before.

8. Additionally, that it is clear that the 2nd to 8th Respondents and their followers are deliberately misinterpreting the order in order to cause more mayhem throughout the country and that it is not possible for police officers to provide security while the 2nd to 8th Respondents and their followers are breaking the law.

9. It was Mr.Kibui's final deposition that the 2nd Respondent acted in direct violation and contempt of Court orders to maintain, organize and conduct peaceful demonstrations by engaging in violent conduct that led to loss of life and property and as such, it is only just and fair and in the public interest that the Court does vacate the orders it had issued on 6 June 2016.

The Response

10. Learned Counsel Mr.Sisule, who appeared on behalf of the 1stInterested Party opposed the Application for setting aside the orders of 6 June 2016 and submitted that his client was contented with the said orders. Learned Counsel contended that the Applicants herein ought to have filed an appeal as opposed to filing the present Application seeking additional orders.

11. The Petitioners and other Respondents did not, for some unknown reasons, in any way participate in the present proceedings.

Discussion and Determination

12. The key issue is whether the Applicants have made out a case to warrant the setting aside of the orders granted on 6 June 2016.

13. There is no explicit provisions in the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (also known as "the Mutunga Rules") in regard to the jurisdiction of this Court to review its decisions but such jurisdiction is to be exercised pursuant to Articles 22 and 159 (2) (d) of the Constitution. That position was reaffirmed by the Court in **Anders Bruel t/a Queen Cross Aviation *vs*. Kenya Civil Aviation Authority and Another [2013]eKLR** where the Learned Judge stated , of Articles 22 and 159, that:

> "***My understanding of these provisions is that even if there is no specific provision in the Rules allowing the court to review its decision, should the court find that a case has been made out for review of its decision, then it would be duty bound to review its decision"***

14. A case for review and indeed vacation of a court's earlier orders will be deemed to have been made out when an aggrieved applicant presents sufficient reasons for such review and vacation. It is for the applicant to satisfy the Court that there are sufficient reasons to warrant the review of the Court orders. As to what constitutes 'sufficient reasons', this Court in **Wanjiru Gikonyo and 2 Others *vs*. National Assembly of Kenya and 4 Others [2016]eKLR**, rendered the position that:

"*[25] *It is practically impossible to itemize what would be 'sufficient reason' for purposes of review under the courts' "residual jurisdiction'' or inherent powers. The exceptional instances when obvious injustice would be worked by a strict adherence to the terms of the order or decree as originally passed are copious.

[26] ***However, given that a review application is not an appeal and neither must it be allowed to be an appeal in disguise where the merit is revisited, 'sufficient reason' ought to include, in my view, the statutory grounds for review as outlined in the Civil Procedure Rules. That ought to be the starting point and a fine guideline.***

[27] ***The statutory grounds are that, first, there ought to exist an error or mistake apparent on the face of the record. Secondly, that the applicant has discovered a new and important matter in evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the order was made. Thirdly, that there is sufficient reason to occasion the review."*** (Emphasis added)

15. An application for review, even in constitutional litigation, must therefore be premised on any one of the following grounds , that; (i)there is an error or mistake apparent on the record; (ii)the applicant has discovered a new and important matter in evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the order was made; and (iii) there is sufficient reason to occasion the review.

16. In the present litigation, the Applicants' case as I understand is that the 2nd to 8th Respondents and their followers have acted in bad faith and abused the Court orders in question and as such they are not entitled to the benefit of the said order. Further, they add that no prejudice will be suffered by them if the said order is vacated as there are proper mechanisms stipulated under the Constitution to address their grievance regarding the removal of the Commissioners of the Independent Electoral and Boundaries Commission. The question then that begs for answers is: on what statutory or recognized grounds is the present application premised? My answer to that question is that there exists none.

17. The Applicants' grievance is merely on the ground of non-compliance or adherence to court orders by the 2nd through 8th Respondents. In my view, the mere non-compliance with a court order cannot be a ground for the variation, setting aside or vacation of a court order in question. It would not alone constitute a ground envisioned under the law for reviewing and setting aside of court orders.

18. I say so because, there are other well set out mechanisms for prosecuting claims for non-compliance of Court orders such as the institution of contempt of Court proceedings. An Application for review and vacating Court orders cannot, in my view, be used as a substitute for contempt of Court proceedings. Furthermore, in the instant case, it has not been demonstrated to me that the 2nd through 8th Respondents are taking advantage of the court order and consequently abusing the court process. The orders sought to be vacated were indeed not directed at the 2nd through 8th Respondents. Indeed, the peace sought by the 1st and 9th Respondents can actually be achieved through the implementation of the orders of 6 June 2016 by the 9th Respondent.

19. Counsel for the 1st and 9th Respondents also alluded to the fact that the orders issued by the court on 6 June 2016 were not merited. That should not be a ground for review. A second bite at the cherry must be denied as an application for review is not a merit review. The Application herein must fail as a merit review lies at the Court of Appeal, and counsel already conceded that the Petitioners have already preferred an appeal before the Court of appeal. In the meantime, this Court cannot sit as an appellate Court on its own decision.

20. The application for review and vacation of the court's orders of 6 June 2016 deserves to be dismissed.

Disposition

21. For the above stated reasons, I am inclined to find the Notice of Motion Application dated 9th June 2016 unmerited and the same is hereby dismissed but with no order as to costs.

Dated, signed and delivered at Nairobi this 19th day August, 2016

J.L.ONGUTO

JUDGE