



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL PETITION NO. 6 OF 2014**

**IN THE MATTER OF ARTICLES 3, 10, 20 (1), 21, 23 (1), 27 (1), 165 (3) (d), 245 and 246 OF THE  
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF NATIONAL POLICE SERVICE ACT**

BETWEEN

SENATOR, DR. BONI KHALWALE ..... PETITIONER/APPLICANT

VERSUS

THE ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT

THE INSPECTOR GENERAL ..... 2<sup>ND</sup> RESPONDENT

THE NATIONAL POLICE SERVICE

COMMISSION ..... 3<sup>RD</sup> RESPONDENT

**RULING**

The petitioner filed a petition on 24<sup>th</sup> March 2014 seeking the following orders and declarations –

- a. That the 2<sup>nd</sup> respondent is in gross violation of the Constitution.
- b. That the 2<sup>nd</sup> respondent has no power to transfer, redeploy, demote or do any other act that may interfere with the station of any police officer and any such actions by the 2<sup>nd</sup> respondent is null and void ab initio.
- c. That the 2<sup>nd</sup> respondent being a public officer has failed to respect, uphold and defend the Constitution as he has usurped powers vested in the 3<sup>rd</sup> respondent.
- d. Costs of the petition.

The petition was filed with an affidavit in support.

On the same date, the petitioner filed a Chamber Summons under Rule 21 (a) of the High Court Practice and Procedure Rules 2012. This ruling relates to the application brought by way of Chamber Summons.

The prayers in the Chamber Summons application are as follows –

1. That the present application be certified urgent and be heard ex-parte in the 1<sup>st</sup> instance.
2. That pending the hearing of this application inter-partes, a conservatory order of stay do issue against the 2<sup>nd</sup> respondent, staying his unilateral decision to transfer and/or deploy the officers appearing on the annexed list.
3. That pending the hearing of this petition the redeployment and the transfer of the listed officers be stayed by the grant of the conservatory order of stay.
4. That the aforesaid officers do retain their positions pending the hearing and final determination of this petition.

The list of the affected officers was annexed to the affidavit in support of the application as well as the affidavit in support of the petition. Needless to say, the application was filed under certificate of urgency.

When the application or matter was placed before me on 26<sup>th</sup> March 2014, I certified the application urgent. I ordered that it be served for inter-partes hearing and fixed the hearing date for 31<sup>st</sup> March, 2014.

From the documents filed herein, the application and hearing notice was served on the Inspector General of Police (2<sup>nd</sup> respondent) on 27/3/2014, and on the National Police Service Commission and the Attorney General (3<sup>rd</sup> and 1<sup>st</sup> respondents respectively) on 28/3/2014. The Attorney General was served through the Kakamega office where they received service under protest indicating that the period was too short to respond.

When the matter or application came up for hearing today, none of the respondents appeared or was represented in court.

Mr. Munyendo, learned counsel for the petitioner emphasized that the conservatory or stay orders sought should be granted on interim basis as the effective date for compliance was tomorrow 1/4/2014. Counsel submitted that though none of the affected officers was a party nor filed any documents, some of them had talked to the petitioner who was the Senator of Kakamega County. Counsel also submitted that the Kakamega High Court was the right forum to file the case, as the proceedings were filed by the sitting Senator from that County. No case authorities were cited to me.

This is an application for conservatory or interim orders arising from the filing of a Constitutional petition. The petitioner is not one of the affected officers. However, in terms of Article 22 (2) (c) of the Constitution of Kenya 2010, he has *locus standi* to bring such proceedings. For the sake of clarity, the said Article provides –

**22 (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by**

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**(c) a person acting in the public interest; or**  
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In my view, the petitioner has locus standing to bring the present proceedings though he is not directly affected by the acts complained of.

Though in the petition, the petitioner has talked of discrimination, demotion and dismissal, the documents filed and averments in the petition and affidavits do not give any factual allegations to support these.

I have considered the application, as well as submissions of counsel and the law.

This application was filed by way of Chamber Summons. Rule 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 requires that such an application be brought by way of Notice of Motion or informal document. The error committed by the petitioner in my view is procedural rather than substantive. The application is therefore a proper application.

Under rule 23, this court has jurisdiction to grant conservatory or interim orders. Having considered the totality of the application, I am of the view that the orders sought are not merited.

Firstly, under rule 8 (1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 – Legal Notice No. 117 in the special issue of the Kenya Gazette of 28<sup>th</sup> June 2013, such proceedings should have been filed in Nairobi, where the Inspector General of Police made the directives. The said rule Provides –

**8 (1) Every case shall be instituted in the High Court within whose jurisdiction the alleged violation took place.**

**(2) Despite sub rule (1), the High Court may order that a petition be transferred to another court of competent jurisdiction either on its own motion or on the application of a party.**

Though sub-rule (2) above appears to provide a safety valve for the sustenance of proceedings filed in a court other than where a violation is alleged to have taken place, in my view, the filing of such a case away from the locus of the violation can deny a party the grant of conservatory or interim orders. This is because such an action can cause the respondent great hardship in time and distance if he or she has to be heard.

It is also obviously a cost to such party. In our present case service of documents was effected either on 27<sup>th</sup> or 28<sup>th</sup> of March 2014. The 29<sup>th</sup> and 30<sup>th</sup> March were a Saturday and a Sunday respectively, which for the Kenya Public Service are not working days. In my view, these circumstances are a sufficient ground for declining to grant the prayers sought in the application.

The second reason why this application will not succeed is the fact that the circular from the Inspector General of Police relied upon by the petitioner was dated 19/3/2014. The 1<sup>st</sup> of April 2014 was merely the date by which the officers were required to report to new stations. No evidence was filed or provided to show that the officers have not moved already. This court should not and cannot act in vain. With the facts placed before me, the grant of the prayers sought will most probably be acting in vain by the court. I will not grant orders in vain.

The third reason why the application will fail is that it seeks to stop effecting of transfers, while there is no prayer in the petition for revoking or cancelling the said transfers. In my view, interlocutory applications should not be used to expand the scope of pleadings. They are only meant to assist in making the substantive prayers effective, so that they are not overtaken by events or rendered nugatory. The petitioner's attempt to expand the prayers in the petition through this application cannot be accepted. This court will not allow such prayers.

To conclude, I find no merits in the application. The same is dismissed. As none of the respondents appeared in court, I make no orders as to costs.

***Dated and delivered at Kakamega this 31<sup>st</sup> day of March, 2014***

**George Dulu**

**JUDGE**