**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 244 OF 2014**

**IN THE MATTER OF ARTICLE 2291), CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS AND OR FUNDAMENTAL FREEDOMS UNDER THE CONSTITUTION OF KENYA INCLUDING ARTICLES 20, 21(1), 22, 10, 27(1), 27(2), 28, 40, 47, 57**

**BETWEEN**

**JUSTICE PHILIP K TUNOI…….…….....……1ST PETITIONER**

**JUSTICE DAVID A. ONYANCHA…..... 2ND PETITIONER**

**AND**

**THE JUDICIAL SERVICE COMMISSION.....1ST RESPONDENT**

**THE JUDICIARY....….....…2ND RESPONDENT**

**R U L I N G**

1. The Petitioners in this petition are judges of the Superior Courts of Kenya. The first Petitioner is a Judge of the Supreme Court of Kenya while the 2nd Petitioner is a Judge of the High Court.
2. What provoked these proceedings were letters dated 28th April, 2014 addressed to the Petitioners by the Chief Registrar of the Judiciary. The terms of the said letters were that the Judicial Service Commission had deliberated on the Judges' retirement age and resolved that all Judges retire at the age of seventy years. According to the records of the Judiciary, it was contended, the 1st Petitioner would be attaining the said compulsory retirement age on 2nd June, 2014 while the 2nd Petitioner would be attaining the said age on 1st December, 2013, which is already past. At the end of the letter, the Petitioners' services were appreciated and they were wished well in their retirement.
3. In this petition the Petitioners intend to challenge the constitutionality and legality of the said retirement in light *inter alia* of the provisions of Section 31 of the Sixth Schedule to the Constitution.
4. Pending the hearing and determination of the petition, the Petitioners have moved this Court by

way of a Notice of Motion brought under Rules 23 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 seeking prohibitory and conservatory orders prohibiting the Respondents from removing them from office or retiring them from service.

5. According to the Petitioners, fundamental issue to be litigated has arisen from the conflicting communications made by the Judicial Service Commission with respect to the Petitioners' retirement age dated 24th May, 2011 which indicated the same to be 74 years and the other dated 27th March, 2014 from the same body determining that the retirement age for all Judges is 70 years.
6. The Petitioners therefore seeks that the Court determines which of the two decisions is in accord with the law.
7. I decided to hear the application ex parte since it is contended by the Petitioners that the impugned decision is due to take effect on 3rd June 2014 and that they attempted to have the matter resolved by the way of alternative dispute resolution mechanisms to no avail.
8. I have considered the foregoing.
9. Article 23(3)(c) of the Constitution provides that in any proceedings brought under Article 22, a court may grant appropriate relief, including a conservatory order.
10. In the petition before the Court, the following issues inter alia stand out for adjudication and determination:

1. **Whether pursuant to the provisions of section 31(1) aforesaid the Petitioners have attained the retirement age and if not so whether the determination by the Respondents is unconstitutional and illegal.**
2. **Whether the Respondents have the powers to determine the retirement age of a Judge and consequently retire him or her.**

11. In the Privy Council Case of **Attorney General vs. Sumair Bansraj (1985) 38 WIR 286 Braithwaite J.A**. expressed himself follows:

**"Now to the formula. Both remedies of an interim injunction and an Interim declaration order are excluded by the State Liability and Proceedings Act, as applied by Section 14 (2) and (3) of the Constitution and also by high judicial authority. The only judicial remedy is that of what has become to be known as the "Conservatory Order" in the strictest sense of that term. The order would direct both parties to undertake that no action of any kind to enforce their respective right will be taken until the substantive originating motion has been determined; that the status quo of the subject matter will remain intact. The order would not then be in the nature of an injunction, … but on the other hand it would be well within the competence and jurisdiction of the High Court to "give such directions as it may consider appropriate for the purpose of securing the enforcement of … the provisions" of the Constitution…In the exercise of its discretion given under Section 14(2) of the Constitution the High Court would be required to deal expeditiously with the application, inter partes, and not ex parte and to set down the substantive motion for hearing within a week at most of the interim Conservatory Order. The substantive motion must be heard forthwith and the rights of the parties determined. In the event of an appeal priority must be given to the hearing of the appeal. I have suggested this formula because in my opinion the interpretation of the word in Section 14 (2) "subject to subsection (3) and the enactment of Section 14(3) in the 1976 Constitution must have…the effect without a doubt of taking away from the individual the redress of injunction which was open to him under the 1962 Constitution. On the other hand, however, the state has its rights too…The critical factor in cases of this kind is the exercise of the discretion of the judge who must "hold the scales of justice evenly not only between man and man but also between man and state."**

12. The aforesaid principles were adopted by the High Court of the Republic of Trinidad and Tobago in the case of **Steve Furgoson & Another vs. The A.G. & Another Claim No. CV 2008 – 00639 – Trinidad & Tobago**. The **Honourable Justice V. Kokaram** in adopting the reasoning in the case of ***Bansraj*** above stated:

**"I have considered the principles of *East Coast Drilling –V- Petroleum Company of Trinidad And Tobago Limited (2000) 58 WIR 351* and I adopt the reasoning of BANSRAJ and consider it appropriate in this case to grant a Conservatory Order against the extradition of the claimants pending the determination of this motion. The Constitutional challenge to the Act made in this case is on its face a serious one. The Defendant has not submitted that the Constitutional claim is unarguable. The Claimants contends that the Act is in breach of our fundamental law and the international obligations undertaken were inconsistent with supreme law. It would be wrong in my view to extradite the claimants while this issue is pending in effect and which will render the matter of the Constitutionality of the legislation academic."**

13. Back home, **Musinga, J** (as he then was) in Petition No. 16 of 2011, Nairobi – **Centre For Rights Education and Awareness (CREAW) & 7 Others** stated that:

**"...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."**

14. In **The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012**, it was held by a majority as follows:

**"In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission."**

15. In **Judicial Service Commission vs. Speaker of the National Assembly & Another Petition No. 518 of 2013**, this Court expressed itself as follows:

**"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."**

16. Section 31(1) of the Sixth Schedule to the Constitution (Transitional and Consequential Provisions) provides:

***Unless this Schedule provides otherwise, a person who immediately before the effective date, held or was acting in an office established by the former Constitution shall on the effective date continue to hold or act in that office under this Constitution for the unexpired period, if any, of the term of the person.***

17. In **Judicial Review Miscellaneous Application No. 190 of 2014 between Hon. Lady Justice Joyce N. Khaminwa vs. The Judicial Service Commission & Another,** this Court while dealing with the said provision pronounced itself as follows:

**"In my view the transitional provisions were meant to ensure a smooth exit from the old constitutional order to the present constitutional order. The drafters of the Constitution must have appreciated that abrupt transit was bound to be bumpy and calamitous. This appreciation is much more serious for the institution of the Judiciary...*Prima facie*, the Applicant's case that she ought to continue holding office of a Judge for the unexpired period of her term, cannot be said to be frivolous at this stage in light of the foregoing provision. Accordingly, the contention that the Commission's decision to retire the Applicant before attaining the age of 74 is unconstitutional is a weighty legal issue warranting further forensic investigation...Apart from that a cursory reading of Article 172(1) of the Constitution does not on the face of it expressly grant powers to the Commission to retire a Judge. Without deciding this issue with finality, it is my view that the issue merits further investigation."**

18. I adopt the same reasoning in this petition and find that the issues raised herein are serious and merit further investigations. Apart from the said issues there are issues respecting the conflicting circulars emanating from the same office as well as the validity of retrospective operation of the retirement of the 2nd Petitioner.
19. In the above case this Court proceeded thus:

**"In the instant case, it is clear from the manner in which the instant application is framed, if a stay is not granted the outcome of the application if successful may well be rendered nugatory and an academic exercise. Apart from that whereas, the decisions, if any, which may be made by the Applicant for the limited period when the stay is in force may, if the Application fails, be undone by being set aside, if the stay sought is not granted and the Applicant is retired, the reinstatement of the Applicant may pose serious legal challenges since the Court is not aware of any provision which allows for the reinstatement of a retired Judge. To avoid such an eventuality, it is my view that the lesser evil is to direct which I hereby do that the grant of leave herein shall operate as a stay of the decision to retire the Applicant until the hearing of the substantive motion or until further orders of the Court."**

20. It is similarly my view that the Respondents ought to "hold their horses" in the meantime. Accordingly a conservatory order is hereby issued prohibiting the Respondents by themselves, their officers, servants or agents or otherwise howsoever from removing and/or retiring the Petitioners from service as Judges of their respective Superior Courts pending the hearing and determination of the application inter partes. The costs will be in the cause.

**Dated at Nairobi this 28th day of May 2014**

**G V ODUNGA**

**JUDGE**

***In the presence of Mr Ngatia for the Petitioners***

***Cc Kevin***