REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.285 OF 2013

BETWEEN

MIKE SONKO GIDION KIOKO……...…….PETITIONER

AND

ATTORNEY GENERAL…….....……...1ST RESPONDENT

CABINET SECRETARY FOR INTERIOR AND

CO-ORDINATION OF NATIONAL GOVERNMENT……..…2ND RESPONDENT

INSPECTOR GENERAL OF POLICE...…….....3rd RESPONDENT

RAILA AMOLO ODINGA……..…4TH RESPONDENT

KALONZO MUSYOKA…….5TH RESPONDENT

MOSES WETANGULA……6TH RESPONDENT

ORANGE DEMOCRATIC MOVEMENT……....7TH RESPONDENT

WIPER DEMOCRATIC MOVEMENT OF KENYA……...8TH RESPONDENT

FORD KENYA……9TH RESPONDENT

RULING

1. In the Petition dated 1st July 2014 the Petitioner, Mike Sonko Gidion Kioko seeks certain orders against all the Respondents, largely to do with the events of 7th July, commonly known as "Saba Saba Day" *(Seven Seven Day).* Saba Saba is associated with political events in the 1990s that are credited with the opening up of democratic space in Kenya culminating in the promulgation of the Constitution, 2010 on 27th August 2010.

2. Before the Petition could be heard and as the Saba Saba event of 2014 was approaching, the

Petitioner filed an Application seeking to stop the Respondents from holding any political rallies prior to, during and after 7th July 2014. This Court declined to grant those orders and on 2nd July 2014, the Petitioner filed another Application seeking the following specific orders;

> ***"(1) That this Application be certified as urgent and its service be dispensed with in the first instance.***
>
> ***(2) That pending the hearing and determination of this Application, this Court issues a conservatory order in the nature of an injunction to restrain the 4th to 9th Respondents namely; Raila Amolo Odinga, Kalonzo Musyoka, Moses Wetangula, Orange Democratic Movement, Wiper Democratic Movement Kenya and Ford People, whether by their Registered officials, members or by their agents, servants and any person acting through them from conducting or purporting to call for mass action on the 7th July 2014 commonly known as Saba Saba.***
>
> ***(3) That pending the hearing and determination of this Petition, this Court issues a conservatory order in the nature of an injunction to restrain the 4th to 9th Respondents namely, Raila Amolo Odinga, Kalonzo Musyoka, Moses Wetangula, Orange Democratic Movement, Wiper Democratic Movement Kenya and Ford People, whether by their Registered officials, members or by their agents, servants and any person acting through them from conducting or purporting to call for mass action on the 7th July 2014 commonly known as Saba Saba.***
>
> ***(4) Pending the hearing and determination of this Application, a declaration do issue that 7th July 2014 commonly known as Saba Saba is not a prescribed holiday and any such calls for the Rallies being made and held by the 4th to 9th Respondents namely Raila Amolo Odinga, Kalonzo Musyoka, Moses Wetangula, Orange Democratic Movement, Wiper Democratic Movement Kenya and Ford People, whether by their Registered officials, members or by their agents, servants and any person acting through them or their authority are null and void.***
>
> ***(5) That leave be and is hereby granted to the Petitioner/Applicant to advertise in the local daily newspapers with national circulation the pendency of these proceedings and such orders herein made in the public interest, such members of the public as may elect to be enjoined herein as interested parties do so within 14 days of the making of this order.***
>
> ***(6) That cost of this Application be provided for".***

3. The advocate for the Petitioner appeared ex-parte on 2nd July 2014 and this Court again declined to grant any of the orders sought and directed him to serve the Respondents for hearing inter-partes on 4th July 2014. On that day, the record would show that the representation for the parties was as follows;

i. Mr. Harrrison Kinyanjui and Mr. Martin Mbichire for the Petitioner,

ii. Miss Anastacia Kamande for 1st, 2nd and 3rd Respondents,

iii. Miss Celestine Opiyo for 4th, 5th, 6th, 7th, 8th and 9th Respondents.

4. Although not on the Court record, I recall that I took the initiative (although Miss Opiyo had

sought an adjournment to respond to the Application) and directed the advocates for the parties to step out, discuss the matter and see whether they could reach an agreement on any aspect of the Application as 4th July 2014 was a Friday and yet the Saba Saba Rally was scheduled to be held in Nairobi the following Monday. I also directed that if they were unable to reach any agreement then I would give directions in the usual manner. I must hasten to add that pursuant to **Article 159** of the **Constitution**, this Court is enjoined to ensure that parties before it are facilitated in reaching a resolution on any dispute by use of alternative dispute resolution and without undue regard to technicalities.

5. In any event, when the advocates returned to Court, Mr. Kinyanjui, Lead Counsel for the Petitioner, informed the Court that ***"happily we have reached an agreement"*** and proceeded to read out the Consent Order crafted by all the advocates appearing. The Consent was then recorded as an Order of the Court in the following terms;

> ***"(1)(i) That 7th July 2014 commonly known as "Saba Saba" is not a prescribed public holiday and any such calls for such a public holiday being made by the 4th – 9th Respondents namely; Raila Odinga, Kalonzo Musyoka, Moses Wetangula, CORD, Wiper and Ford-Kenya political parties whether by their registered officials, members or by any of their agents, servants and any person acting through or under their authority is null and void.***
>
> ***(ii) Pending the hearing and determination of the Petition herein, a conservatory order by way of an injunction be and is hereby issued restraining the 4th – 9th Respondents as aforesaid from calling or purporting to call for MASS ACTION on 7th July 2014 commonly known as Saba Saba or any other public rally convened by the said parties thereafter***.
>
> iii. ***The public meeting set for 7th July 2014 convened by the 4th – 9th Respondents aforesaid shall proceed as scheduled during which participants there at shall be at liberty to exercise their constitutional right to assemble peacefully without being armed in any manner and without any incitement, inflammatory or defamatory rhetoric being uttered during such meeting and without interrupting business activities of the day of such of the members of the public not taking part in the said public meeting or such meetings thereafter.***
>
> ***(iv) The 4th – 9th Respondents shall be held personally liable for any breach of the aforesaid terms.***
>
> ***(v) The Petition shall be set for hearing expeditiously.***
>
> ***(vi) Service of this order be effected by means of an advertisement in local Daily Newspapers having national circulation and such FM Radio stations as may be necessary for a full and effectual transmission of this order to the Kenyan Public at the Petitioners expenses."***

6. The above orders caused a huge furore in the public domain and the less said about that issue at this stage the better but on 7th July 2014, the 4th, 5th, 6th, 7th, 8th and 9th Respondents filed a Notice of Motion premised on the provisions of **Articles 19(3) (a)** and **3(c), 20(1) (2) (3) (4)** and **(5), 21(1), 22(1), 23(1) (3), 24(1), 50(1),2 159(2) (e), 165(3)(d)(ii), 258(1) and 259(1)** of the **Constitution,** 2010 seeking the following orders;

> ***"(a) This Application be certified urgent, service be dispensed with thereof and the same be heard ex parte in the first instance.***
>
> ***(b) This Court be pleased to review, set aside, vary and/or vacate the Consent***

Orders of this Court issued on the 4th July 2014 and in particular order 1(ii) restraining the 4th to the 9th Respondents from calling or purporting to call mass action on the 7th July 2014 commonly known as Saba Saba or any other public rally convened by the said parties thereafter.

(c) The Court be pleased to set aside the orders of this Court issued on the 4th July 2014 and in particular order 1(iv) holding the 4th – 9th Respondents personally liable for any breach of the aforesaid terms.

(d) That there be a stay of Execution and/or implementation of the Consent orders 1(ii) and (iv) issued on the 4th July 2014 pending the hearing and determination of this Application.

(e) In the alternative, this Court be pleased to stay the implementation and the execution of the said Consent Orders issued on 4th July 2014and any proceedings pending the lodgment of an intended Appeal.

(f) The Application be heard inter parties on such date and time as this Court may direct."

7. Although in Submissions, the advocates appearing for the Applicants argued as if the whole Consent Order was under challenge, a casual reading of the above prayers would show that in fact it is really Consent Orders Nos.1(ii) and (iv) that have caused their Clients' ire and this Court will therefore oblige and address those two orders only. The effect of that finding will therefore be that Orders Nos.(i), (iii), (v) and (vi) remain in force. In any event, the remaining orders all relate to the specific events of 7th July 2014 which date and event have all passed, save for the Contempt Application by the Petitioner filed on 16th July 2014.

Case and Submissions for the Respondents/Applicants

8. Mr. Orengo, SC, Mr. Oluoch and Miss Opiyo, advocates, appeared for the Applicants and their case was based on two Affidavits by one, Johnston Muthama, Senator for Machakos County and CORD Coalition Chief Whip in the Senate. The Affidavits were sworn on 7th July 2014 and 9th July 2014, respectively. The three advocates also made Submissions before me in turns and in a nutshell the case made out is as hereunder.

9. That the impugned Consent Orders had the cumulative effect of imposing limitations upon the enjoyment of rights enshrined in **Article 36** and **37** of the **Constitution** and were thus vitiated and/or tainted with illegalities and were therefore a nullity. Further, that by shifting the burden of ensuring the protection of property, maintenance of order and provision of security during the Saba Saba Rally to the 4th – 9th Respondents, the orders were rendered illegal and unconstitutional.

10. Mr. Muthama further deponed that the CORD Coalition had peacefully held other rallies in Kisii, Busia and Ugunja and no violence had occurred in any of them and to equate the Saba Saba Rallies with violence such as had occurred in Mpeketoni in Lamu County would be akin to bringing extraneous matters into the proceedings. In any event, that the Police were aware of the Rallies and had promised to provide security and any criminal actions by anyone should be dealt with under the **Penal Code (Cap 63 Laws of Kenya)** and other Statutes that define and punish offences.

11. In Submissions, learned Counsel, while reiterating the above matters also added that where the Consent Order was tainted with illegality, then it ought to be set aside as ex debito Justiciae. Reliance was placed on the following authorities in that regard (among others);

i. **New York Time vs Sullivan – 376 U.S. 254 (1964)** where it was held *inter-**alia** **"the maintenance of the opportunity for free political discussion to the end that Government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."***

ii. **Republic vs Zundel [1992] 2 SCR 731** – where the Supreme Court of Canada discussed at length what constitutes the freedom of expression and specifically found that ***"before a person is denied [that] protection …it must be certain that there can be no justification for offering protection."***

For the above and other reasons, the Applicants now seek the orders elsewhere reproduced above.

Case and Submissions for the Petitioner/Respondent

12. The Petitioner in response to the Application filed a Replying Affidavit sworn on 8th July 2014 and raised the following issues;

13. Firstly, that the Consent Orders were entered into voluntarily, without any form of duress, without misrepresentation or fraud and with the free participation of Counsel for the 4th – 9th Respondents/Applicants. In the end, since none of the grounds known in law for vitiating a Consent Order has been cited, then the Application must fail.

14. Secondly, that the Court ought to weigh the benefits of the Consent Order to the larger public as opposed to the narrow construction adopted by the present Applicants.

15. Thirdly, that the overall effect of the Consent Order was to promote the Rule of Law and Constitutionalism and the orders issued were not unlawful.

16. Fourthly, that the right to assemble and the freedom of speech are all limited and are not absolute as seems to be the argument by the Applicants.

17. Fifthly, that calls for ***"Mass Action"*** as understood by the Petitioner, is what led to the 2007-2008 post-election violence and the deaths of more than 1,500 Kenyans.

18. Sixthly, that the preservation of **Public Security Act, Cap.57** is meant to secure the security of persons and property and to prevent and suppress rebellion, mutiny, violence, intimidation, disorder and crime and the Consent Order as crafted also had the same aim and so it cannot be termed as being unlawful.

19. Seventhly, the **Public Order Act, Cap.56** creates offences for example where a person has an offensive weapon during a public meeting and therefore the Consent Order merely reiterated that law and is therefore lawful.

20. Eighthly, the organisers awareness of the Saba Saba Rallies owe the public a duty of care and owe Kenyans a duty to protect their properties, life and democracy.

21. Ninthly, that similar to the ***"polluter-pays"*** principle in the **Environmental Management and Co-ordination Act, Cap.387**, those who cause chaos in political events must pay for the result thereof.

22. Lastly, that the Application is without merit and ought to be dismissed with costs.

Case and Submissions for the 1st, 2nd and 3rd Respondents

23. On his part, the Attorney-General on behalf of the 1st to 3rd Respondents responded to the

Application by filing a Replying Affidavit of Mutea Iringo, the then Principal Secretary in the Ministry of Interior and Co-ordination of National Government, sworn on 7th July 2014. Miss Kamande also made Submissions on their behalf.

24. Mr. Mutea deponed that there are no valid grounds that had been laid before the Court to show that there was coercion, misrepresentations, fraud and collusion in the recording of the Consent Orders so as to warrant the setting aside of the said Consent Orders. He also contended that there was clear justification for the limitations that formed part of the impugned Consent Orders. Further, that all orders issued by the Court on 4th July 2014 were positive in nature and in accordance with the spirit of the Constitution in that they focus on the maintenance of peace and order during the Saba Saba rally.

25. The 1st, 2nd and 3rd Respondents also associated themselves with the Submissions made on behalf of the Petitioner and added as follows;

That *"The policy of the Court"* with regard to setting aside of Consent Orders includes the fact that matters before a Court of law must come to an end either by a Court delivering a decision or by parties settling the dispute through an agreement as provided for under the provisions of **Article 159(2)** of the **Constitution**.

Further, that it was in public interest that the violence experienced in 2007-2008 should not be repeated as was stated in Mutea Iringo's Affidavit and that no Affidavit had been brought to show that ***"peace"*** and **"Mass Action"** are synonymous with each other.

26. They thus urged the Court to sustain the Consent order for the wider public interest and dismiss the present Application with costs.

Determination

27. I should begin by stating that although the Consent Order was recorded and signed by all the advocates for the Parties, I must strongly deplore the brouhaha that emanated from some of the Parties to the Petition herein. It was obvious to me that the Consent Orders became the unnecessary subject of politicization, and even the same conduct was exhibited in Submissions. This is not a Court of Politics but of Law sworn to uphold the Constitution and the Constitution alone. The shifting minds of politics and the fickle nature of its realm have no place in this Court and so I have summarized the rival Submissions only to the extent that they address legal and procedural issues and I have cut out political rhetoric and gerrymandering.

28. I have deliberately digressed to make the point that the principles for setting aside a Consent Order are settled and the nature of the case is not a factor at all in that regard. These principles are best captured in the celebrated case of **Hiram vs Kassam (1952) 19EACA 131** where the Learned Judge stated thus;

> ***"Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and on those claiming under them…… and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the Court…… or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement." (Emphasis mine)***

29. Much later, in **Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd, Civil Case No.1728 of 1979**, the Court stated as follows;

> ***"That the making by the court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either***

personally or through their advocates and when made, such an order is not lightly to be set aside or varied save by consent or an order on one or either of the recognized grounds…. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement." (Emphasis mine)

30. As regards the role of Counsel when recording a Consent Order, in **Re Wedge (1908) 98 LT 436,** it was stated thus;

> ***"That the circumstance that a material fact within the knowledge of the client and his solicitor had not been communicated to counsel at the time when he gives his consent to an order in Court, is not a sufficient ground for the client withdrawing his consent to the order before it is passed and entered even if counsel states that he would not have given consent if he had known of the fact."***

31. In addition, Majanja J. in **Edwin Thuo vs The Attorney General and Another, Nairobi Petition No.212 of 2011** said this about the use of constitutional provisions to set aside a Consent Order.

> ***"What the decisions I have cited and considered show is that whether the issue before me was approached as an attack on a consent judgment, issue of estoppel, res judicata or an abuse of process of court, the principles upon which the court acts in such circumstances are clearly within the limitations to fundamental rights and freedoms envisaged under Section 70 of the old Constitution. I therefore hold that as long as the Agreement remains binding on the parties, neither party can circumvent the effect and consequences of this Agreement by attacking it under the guise of a petition to enforce fundamental rights and freedoms."***

32. I am in complete agreement with all the holdings above and will adopt them as if they were mine and applying them to the present Application, the Applicants have not argued that the Consent Orders were recorded under duress (although there was such an insinuation, a matter I will return to later), neither was it obtained by fraud, misrepresentation or that it was made by mistake. The Applicants argued only one point; that the Consent Orders under attack were patently illegal. What is the law on such an argument?

33. In **Kantilal vs Ranchhossas (1953)AIR (Bombay) 98,** the Court stated that;

> ***"Now, it must be observed that the word "illegal" and "void" is often loosely used as synonymous terms even by lawyers, jurists and sometimes judges. Nonetheless as for the purposes of the present discussion, it is essential to distinguish between what is legal and what is merely void. All unlawful or illegal agreements are void, but all void agreements are not necessarily illegal."***

34. Further, in **Lian Mong Yee vs Abdul Rashid Maidin and Others (2001) 3 CLJ 905,** the Court held that;

> ***"… the jurisdiction to set aside a contract is universal and extends to all types of void contracts. It demonstrates the flexibility of equity in the field of remedies and its ability to do complete justice in cases where the common law is found wanting. Like any other equitable jurisdiction, it is subject to discretionary bars that operate upon the conscience of the particular litigant. So, laches unclean hands, want of mutuality and so forth are grounds upon which equitable relief may be denied. In the present instance, if the respondents are right in their argument, the consent order is void for illegality. It may therefore be set aside like any other agreement."***

35. More fundamentally, and in addition in **Makula International Ltd vs His Eminence Cardinal Nsubuga and Another (1982) HCB II**, the Court of Appeal of Uganda held as follows;

> ***"… a Court of law cannot sanction what is illegal and illegality once brought to the attention of the court, overrides all questions of pleadings, including admissions made thereon."***

36. I am in complete agreement with all the above findings and I must now pose the question whether the Consent Orders Nos.1(ii) and (iv) were illegal in their tenure and content.

37. I should begin with the easier of the two; Order No.1(iv) of the Consent Order which reads as follows;

> ***"the 4th–6th Respondents shall be held personally liable for any breach of the aforesaid terms"***

What are the **"aforesaid terms"?** They are;

a. That they will not declare "Saba Saba Day" a public holiday, neither will the Political Parties they represent, as well as their agents, servants and any other person acting through them or under their authority.

b. That they will not call for or purport to call for Mass Action on 7th July 2014 or at any other public rally convened thereafter.

c. That the public meeting set for 7th July 2014 convened by themselves amongst others, shall be held peacefully, without any incitement, inflammatory or defamatory rhetoric being used and without interrupting business activities of the day for those not taking part in the meeting

38. Although the Applicants and the Respondents had read and ought to have known the import of the above order, they all read it as if it was only criminal culpability that had been assumed by the 4th-9th Applicants with regard to issues (a), (b) and (c) above.

In fact it is obvious that they are all wrong. Issue No.(a) cannot be an issue for debate and I have repeatedly told the Parties so. The issue of Public Holidays is a matter settled in law. **Article 9(3), (4)** and **(5)** provide as follows;

> ***"(1) …***
>
> ***(2) …***
>
> ***(3) The national days are—***
>
> ***(a) Madaraka Day, to be observed on 1st June;***
>
> ***(b) Mashujaa Day, to be observed on 20th October; and***
>
> ***(c) Jamhuri Day, to be observed on 12th December.***
>
> ***(4) A national day shall be a public holiday.***
>
> ***(5) Parliament may enact legislation prescribing other public holidays, and providing for observance of public holidays."***

39. Neither the 4th, 5th and 6th Respondents/Applicants therefore have the constitutional mandate to

declare a public holiday and if they do so, the law will take its course. They shall also be held personally liable for any utterance directly attributable to them in declaring a public holiday but they cannot be held personally liable for the utterances of any other person in that regard . I say so because the Petitioner at paragraphs 21, 22 and 23 of his Replying Affidavit made the point that one Cornel Rasanga, Governor of Siaya County had declared Saba Saba Day a Public Holiday in Siaya County. While I do not have sufficient facts on that matter, I am certain that neither the 4th - 6th Respondents/Applicants can be held personally liable for the actions or utterances of the said Cornel Rasanga and the Petitioner should pursue that matter elsewhere than in this Court and most certainly not against, the 4th - 6th Respondents.

40. On issue No.1(b) above, the advocates for the Applicants made a lot out of the words, "MASS ACTION", used in the Consent Order but failed to define it in the context of our Constitution. References were therefore made to the actions of Mahatma Gandhi and Rev. Martin Luther King without contextualizing them within **Article 36** and **37** of the **Constitution** which provides as follows;

> ***"(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."***

41. While the above Articles do not expressly use the words, *"Mass Action"* in Belarus, the law actually does so. In that regard, **Law No.114-z of 30th December 1997** as amended by **Law No.233-Z of 7th August 2003** as further amended by **Law No.166-Z of 6th October 2006** establishes the procedure of the organization and holding of gatherings, street rallies, demonstrations, picketing and other mass actions and the law is directed towards the creation of conditions for the realization of constitutional rights and freedoms of the people, securing public safety and the presentation of order during such actions in the streets and in other public places. In that regard, **Article 2** of the above **Law** defines ***"Mass Action"*** as ***"a gathering, meeting, street rally, demonstration picketing and other mass action".*** It further defines ***"Street Rally"*** as ***"an organized mass movement of a group of citizens on pedestrian or traffic area of a street (road) for the purposes of drawing attention to any problems or for public expression of their public or political records for a protest."***

42. Mass Action as defined above therefore is completely akin to the **Article 37** actions and rights but which also limits the said rights to the following extent;

i. The individual exercising the right must do so peacefully and

ii. Must be unarmed.

43. I need not go further than this save to add that while the Applicants argued as if **Article 37** grants

unlimited rights, over and above the limitations in **Article 24** of the Constitution, the Article is self-limiting. Can the 4th – 6th Respondents be held personally liable if they call for "Mass Action" as defined above? It is obvious that they have a constitutional right to call for and participate in mass action but they must do so peacefully and without being armed. To that extent and without belabouring the point, any Consent Order that takes away that right is illegal and I so find.

44. On issue No.(c) above, it is obvious to me that the said issue is a reproduction of **Article 37** save that there is the additional issue whether any speeches made during the Saba Saba Rally should be without incitement, inflammatory or defamatory rhetoric. Again, I see no reason to belabor the latter point because all those actions are specifically barred by law. The **National Cohesion and Integration Act** at **Section 13** defines the offence of "**Hate Speech"**, as follows;

"(1) A person who-

a. ***uses threatening, abusive or insulting words or behavior, or displays any written material;***

b. **…**

c. **…**

d. **…**

e. ***provides, produces or directs a programme, which is threatening, abusive or insulting or involves the use of threatening, abusive or insulting words or behavior commits an offence if such person intends thereby to stir up ethnic hatred, or having regard to all the circumstances, ethnic hatred is likely to be stirred up.***

> ***(2) Any person who commits an offence under this Section shall be liable to a fine not exceeding one Million Shillings or to imprisonment for a term not exceeding three years or to both.***
>
> ***(3) In this Section, "ethnic hatred" means hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins."***

Further, **Sections 81** and **94** of the **Penal Code** provide as follows***;***

> ***"(81)(1) Any administrative officer or magistrate, or, in his absence, any gazette officer or inspector of the Kenya Police Force or any commissioned officer in the military forces to Kenya, in whose view twelve or more persons are riotously assembled, or who apprehends that a riot is about to be committed by twelve or more persons assembled within his view, may make or cause to be made a proclamation, in such form as he thinks fit, commanding the rioters or persons so assembled to disperse peaceably.***
>
> ***(2) For the purposes of this section, "military forces" includes naval and air forces."***
>
> ***"(94)(1) Any person who is in a public place or at a public gathering uses threatening, abusive or insulting words or behavior with intent to prove a breach of the peace or whereby a breach of the peace is likely to be occasioned is guilty of an offence and is liable to a fine not exceeding five thousand shillings or to imprisonment for a term not exceeding six months or to both.***

(2) In this section, "public gathering" means-

a. ***any meeting, gathering or concourse of ten or more person in any public place; or***

b. ***any meeting or gathering which the public or any section of the public or more than fifty persons are permitted to do attend, whether on payment or otherwise; or***

(c) any procession in, to or from a public place."

All the above offences must be looked at in the obvious context that criminal actions are personal to the offender or offenders.

45. Having held as above, it is obvious to me that the 4th – 6th Respondents can be properly held liable for any actions that contravene the law but since the Consent order is worded in general terms and seem also to make them culpable for the actions of others, it is best that the said Consent Order is set aside, subject to what I shall say at the end of this Ruling.

46. Regarding Order No.1(ii) as reproduced elsewhere above, therefore, I have already held that **Article 37** of the Constitution has certain rights which amount to Mass Action. **Article 37** also has limitations which are embedded in it and which anyone exercising it is enjoined to uphold; that of acting peacefully and without being armed. I need not return to my findings in that regard but must reiterate them and so the Consent Order in as far as it outlaws the actions lawfully contemplated by **Article 37** aforesaid is illegal and cannot stand. I therefore set it aside and it is also obvious why.

Conclusion

47. This matter caused such a huge kerfuffle and brouhaha that at some instances it was akin to the surreal. Political excitement took the place of reason, facts and the law. Undue focus was sometimes directed at the Court without full knowledge of what transpired on 4th July 2014 and social media activists took turns at offering unsolicited opinion on the events of that day. While this Court will protect and preserve the right to expression, insults directed at it will not advance the cause of justice, however warranted they may be. Respect for the Courts and its decisions is at the centre of any democracy and lessons of the past in Kenya are a stark reminder of that reality.

48. Regarding the role of politicians in securing peace in a Nation that is as diverse as any can get and where politically instigated violence is easy to achieve, Musinga J. *(as he then was)* in **Eugene Wamalwa vs Minister for State, Internal Security & Anor [2011] eKLR** had this clear message;

> ***"That notwithstanding, all Kenyans and especially politicians ought to be reminded that the right to freedom of expression does not extend to advocacy of hatred or any negative words that may constitute ethnic incitement, vilification of others on the basis of tribe, age, gender or economic status"***

49. I agree with the Learned Judge and that is what I understood the impugned Consent Order to have been intended to achieve and I reiterate that obiter.

50. As I close this rather untidy matter, it will be remiss of me to conclude this Ruling without saying something about the conduct of Counsel in proceedings that have political implications. They are officers of this Court and while they have a strong duty towards their clients, they have an equally heavier duty towards the Court and the administration of justice. In this case, insinuations were made that this Court may have pressurized one particular advocate to negotiate, agree to and sign the Consent Order. Nothing could be further from the truth and I agree with Mr. Kinyanjui's Submissions in that regard. This Court was not present during the discussions leading to the Consent Order and the said advocate was in fact the first to confirm its terms and the first to sign

it. It is completely unprofessional of that particular advocate or any other advocate to insinuate, however faintly, that he/she had no idea what he/she was doing. If the advocate had no idea about the wording of the Consent Order, blame should forever be with the said advocate and not the Court. I shall say no more.

Disposition

51. For the above reasons, the proper Orders to make as regards the Application dated 7th July 2014 are the following;

a. **This Court hereby recalls, reviews, sets aside and vacates the following Consent Orders of this Court issued on the 4th July 2014:**

i. **Order No.1(ii) restraining the 4th to the 9th Respondents from calling or purporting to call for mass action on the 7th July 2014 commonly known as Saba Saba Day or on any other public rally convened by the said Parties thereafter and;**

ii. **Order No.1(iv) holding the 4th – 9th Respondents personally liable for any breach of the terms of the Orders aforesaid and which were recorded by Consent of Parties.**

b. **Prayers (d) and (e) of the Application dated 7th July 2014 are dismissed**

c. **The other orders issued on the same day shall remain in force.**

d. **Let each Party bear its own costs**.

52. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 26TH DAY OF AUGUST, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Kariuki – Court clerk

Miss Opiyo for Applicants

Mr. Kinyanjui for 1st Respondent/Petitioner

Miss Kamande for 2nd -4th Respondent

Order

Ruling duly delivered.

ISAAC LENAOLA

JUDGE

Further Order

Application dated 16th July 2014 is stood over for hearing on 20th November 2014. Parties to file Submissions thereafter. Alleged contempnors to be served and copies of the Ruling to be supplied to Parties.

ISAAC LENAOLA

JUDGE