



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 602 OF 2014**

**MARY KAVUVI MUTUKU.....PETITIONER**

**VERSUS**

**PARLIAMENTARY HONOURS ADVISORY COMMITTEE.....RESPONDENT**

**AND**

**HON. SENATOR JOHNSTONE MUTHAMA .....INTERESTED PARTY**

**RULING NO.1**

In the notice of motion dated 9<sup>th</sup> December, 2014 brought under Article 23 of the Constitution and Rules 4, 8, 13, 19 and 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, the Petitioner Mary Karuri Mutuku seeks orders as follows:

- “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 the Honourable Court issues conservatory order stopping the Respondent by itself, or by its officers, agents, servants and/or any person acting through it from handing over and/or presenting to the President of the Republic of Kenya the list of exemplary members to be conferred with National Honours on Friday 12 December 2014 which list of exemplary member has removed and omitted the name of Hon. Senator Johnstone Muthama.**
- 3. THAT pending the hearing and determination of this Petition, the Honourable Court issues conservatory order stopping the Respondent by itself, or by its officers, agents, servants and/or any person acting through it from handing over and/or presenting to the President of the Republic of Kenya the list of exemplary members to be conferred with National Honours on Friday 12 December 2014 which list of exemplary member has removed and omitted the name of Hon. Senator Johnstone Muthama.**
- 4. THAT the Honourable Court do issue an Order that the Respondent do reinstate Hon. Senator Johnstone Muthama name in the list of the exemplary members being**

handed over and/or presented to the President of the Republic of Kenya for conferment of National Honours on Friday 12 December 2014 pending the hearing and determination of this Application.

5. THAT the Honourable Court do issue an Order that the Respondent do reinstate Hon. Senator Johnstone Muthama name in the list of the exemplary members being handed over and/or presented to the President of the Republic of Kenya for conferment of National Honours on Friday 12 December 2014 pending the hearing and determination of this Petition.

**IN THE ALTERNATIVE AND WITHOUT PREJUDICE TO THE FOREGOING THAT in the event the list of exemplary members has been handed over and/or presented to the President of the Republic of Kenya by the Respondent, a Conservatory Order do issue before this Honourable Court stopping the President from conferring National Honours on Friday 12 December, 2014 to the persons listed in the list of the Respondent without the inclusion of Hon. Senator Johnstone Muthama's name pending the hearing and the determination of this Application and Petition.**

**6. THAT the costs of this application be provided for.”**

The application is supported by the grounds on its face, the affidavit of the Petitioner sworn on 9<sup>th</sup> December, 2014 and annexures thereto.

The Respondent namely the Parliamentary Honours Advisory Committee opposed the application through grounds of opposition dated 10<sup>th</sup> October, 2014 and filed in Court on 11<sup>th</sup> October, 2014. The grounds of opposition are:

- “1. The Orders sought against the President are a violation of the discretionary powers conferred upon the President under Article 132 (4) (c) of the Constitution.**
- 2. The Application seeks that orders be granted against the President, contrary to the protection from legal proceedings conferred upon the President pursuant to Article 143 (2) of the Constitution.**
- 3. The Application does not disclose any violation of the Constitution to warrant the intervention of this Honourable Court and there is no justiciable cause of action.**
- 4. The orders sought by the Applicant have been overtaken by events as the Respondent has already submitted the list of names to the President.**
- 5. The Notice of Motion and the Petition herein seek for this Honourable Court to usurp the statutory duties of the Parliamentary Honours Advisory Committee.**
- 6. Without prejudice to the foregoing, the jurisdiction of this Honourable Court is limited to a review of merits of a decision of a statutory body.**
- 7. The decisions of the Parliamentary Honours Advisory Committee were lawful reasonable and procedurally fair.**
- 8. The Application lacks merit.”**

Honourable Senator Johnstone Muthama who is named as the Interested Party did not file any papers but Dr. Khaminwa for the Petitioner indicated that he was also acting for the Interested Party. It is therefore apparent that the Interested Party supports the application.

When the matter was argued before me this morning, the advocates proceeded as if they were arguing the petition itself. They proceeded to submit on issues which if addressed in this ruling will end up determining the petition. At this stage the Court is not interested in considering the arguments that will be made at the hearing of the petition. What the Court is only interested in is whether a case has been made for the issuance of conservatory orders.

The grounds for issuance of conservatory orders were recently stated by the Supreme Court in

GATIRAU PETER MUNYA v DICKSON MWENDA KITHINJI & 2 OTHERS [2014] eKLR as follows:

**[86] “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 the 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 supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.**

Conservatory orders are issued to preserve the subject of the litigation before the Court.

Mr. Njoroge who appeared for the Respondent disclosed to the Court that the Secretary of the Respondent had informed him that the list of the persons to be honoured had already been forwarded to the President and prayers 1 to 5 were already overtaken by events. He was therefore of the view that the only prayer that should be considered by the Court is the alternative prayer.

The President’s power to confer honours is anchored is found in **Article 132 (4) (c)** of the Constitution which states that the President may “confer honours in the name of the people and the Republic.” This being a duty performed on behalf of the people of Kenya, the national values and principles established by **Article 10 of the Constitution** must be read into that function.

In order to give effect and establish procedures and mechanisms for conferring of national honours by the President under **Article 132 (4) (c) of the Constitution**, Parliament enacted the **National Honours Act, 2013 (the Act)**. The Act at **Section 6** establishes the Parliamentary Honours Advisory Committee whose duty as per **Section 3(3)(b)** of the Act is to recommend to the President the conferment of a national honours on a Member of Parliament, a former Member of Parliament, a public officer serving in the Parliamentary Service or a State or public officer serving in an independent commission or office.

The Petitioner through these proceedings seeks to overturn the decision of the Respondent as reported in the Standard on Sunday of 7<sup>th</sup> December, 2014. According to the newspaper article, the Respondent had removed the name of the Interested Party from the list of those recommended for honours on the ground that he was disrespectful to the President, had problems with his wife and had many pending court cases.

At this stage, this Court does not have the minutes of the proceedings of the Respondent. None of the members of Parliament cited in the article have sworn affidavits. Hopefully the minutes will be availed before the petition is heard. What has been provided to Court is hearsay evidence. Counsel for the Petitioner urged this Court to find that a newspaper report can be used to commence proceedings where there is a threat to the Bill of Rights. He cited **Sarkar’s Law of Evidence in India, Pakistan, Bangladesh, Burma and Ceylon** where at page 62 it is stated that:

**“Normally, a PIL cannot be entertained solely on the basis of information published in the newspaper but if the Chief Justice or a Judge designated finds that a particular information published in the Newspapers reveals gross violation of a fundamental right guaranteed under Part III of the Constitution of a person who does not have ready access to the Court for some incapacity or the other, particularly the right to life and liberty granted under Article 21 of the Constitution, and the Chief Justice or a Judge designated has reason to believe the information to be true, a PIL, can be entertained only on the basis of such information published in the newspapers. [S.P. Anand v. Registrar General M.P. High Court, AIR 2009 M.P. 1 (14)(FB)].”**

Mr. Njoroge submitted that a case based on information contained in a newspaper can only be commenced in exceptional circumstances. He asserted that those circumstances do not exist in this case

as the conferment of a national honour is not a constitutional right.

I do not wish to commit myself at this stage on whether there are proper proceedings before this Court. What I will only state is that the decision of the Respondent is not known to the parties and the Court. It would be therefore be unjust for this Court to issue orders on a decision that is not known.

It is also noted that under **Section 3(2)** of the Act the President can confer national honours on a national day, or at such other times as the President may consider appropriate. It is not therefore necessary to issue any conservatory orders as 12<sup>th</sup> December, 2014 is not the only day on which the Interested Party can be honoured. If at the conclusion of the hearing it is found that the Respondent erred in not recommending the Interested Party for conferment of a national honour, then appropriate orders can be issued. For now, I do not find the issuance of a conservatory order necessary. The notice of motion dated 9<sup>th</sup> December, 2014 is therefore dismissed. Costs will be in the cause.

Dated, signed and delivered at Nairobi this 11<sup>th</sup> day of December, 2014.

**W. KORIR,**

**JUDGE OF THE HIGH COURT**