



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 281 of 2013

- THE LAW SOCIETY OF KENYA PETITIONER
AND
THE NATIONAL ASSEMBLY OF THE REPUBLIC OF KENYA1ST RESPONDENT
THE PARLIAMENTARY SERVICE COMMISSION 2ND RESPONDENT
THE SPEAKER OF THE NATIONAL ASSEMBLY 3RD RESPONDENT
THE ATTORNEY GENERAL 4TH RESPONDENT
THE SALARIES AND REMUNERATION COMMISSION 5TH RESPONDENT
THE CONTROLLER OF BUDGET 6TH RESPONDENT

RULING

- 1. The petitioner in this cause is the Law Society of Kenya which, as part of its objects, and in public interest, has moved the Court by a petition dated 30th May 2013. Together with the petition is a Notice of Motion dated 30th May 2013 seeking conservatory orders to restrain the respondents from acting on or enforcing Motion No. 8 of the National Assembly dated 28th May 2013 in which it adopted 'The Report of its Committee of Delegates Legislation on the Constitutionality of the Kenya Gazette Notices No. 2885, 29886, 2887 and 2888 published in the Kenya Gazette of 1st March 2013 by the Salaries and Remuneration Commission.'
2. The Gazette Notices in question were published by the Salaries and Remuneration Commission pursuant to the power and authority granted to it under Article 230 of the Constitution. The core mandate of the Commission is to set and regularly review the remuneration and benefits of all state officers and advise the national and county governments on the remuneration and benefits of all other State officers.
3. The National Assembly being dissatisfied with the determination of the Commission as evidenced by the Gazette Notices moved to nullify the notices. As a consequence of its resolution, the clerk of the National Assembly issued on 28th May 2013 a Certificate titled, 'Certificate - Nullification of Gazette Notices No 2885, 2886, 2887 and 2888 by the Salaries and Remuneration Commission' which states as follows;

CERTIFICATE - NULLIFICATION OF GAZETTE NOTICES NO 2885, 2886, 2887 AND 2888 BY THE SALARIES AND REMUNERATION COMMISSION.

I JUSTIN NTHIIRI BUNDI, Clerk of the National Assembly, do hereby certify that the National Assembly, in exercise of its oversight role under Article 95(a) and (b) of the Constitution, did on Tuesday, 28th May 2013 resolve that:-

- (1) Gazette Notice Numbers 2885, 2886, 2887, and 2888 date 28th February 2013 and published by the Salaries and Remuneration Commission in the Kenya Gazette of 1st March 2013 are unconstitutional, unlawful, ultra vires and therefore null and void.*
- (2) The National Assembly Remuneration Act (Cap 5) and the Parliamentary Pensions Act (Cap 196) of the Laws of Kenya being in force shall continue to govern the remuneration of Members of Parliament.*
- (3) The Salaries and Remuneration Commission and other Constitutional Commissions to strictly adhere to the Constitution and the law when executing their Constitution mandates.*
- (4) The National Assembly in the exercise of its powers under Article 95(5) of the Constitution to review the conduct, composition and functioning of the Salaries and Remuneration Commission as well as all other Constitution Commissions and Independent officers.*

Signature: (signed)

Clerk of the National Assembly.

Date: 29.5.2013

4. The petitioner's case is that the certificate raises fundamental constitutional issues pertaining to separation of powers, mandate of the National Assembly, independence of Constitutional Commissions, the rule of law and constitutionalism. At this stage I am satisfied that prima facie the petition is not frivolous. It indeed raises grave constitutional issues for resolution by the court.

5. I am also satisfied, that there is likelihood that the certificate of nullification is likely to be affected with serious consequences. Mr Kitonga, SC., learned counsel for the petitioner, submitted that the effect of the nullification is to do away all salaries set for State officers even those whose salaries are not covered by the **National Assembly Remuneration Act**. It also impairs the ability of the Commission to conduct its mandate. I accordingly find and hold that this matter is very urgent and I accordingly certify it as such.

6. Finally, I must consider whether to grant conservatory orders pending the hearing of the application. I have already alluded to the grave consequences that may follow nullification of the Gazette Notices. The conservatory orders are, in my view, necessary to prevent loss to the public coffers of sums that would be paid out and in the event the ultimate decision of the court is that the cause taken by the National Assembly is unconstitutional, would be difficult to recover. A conservatory order will normally be issued where there is real danger that the public will suffer substantial prejudice of violation of the Constitution by a State organ. The conservatory order in my view is intended to preserve the integrity of constitutional bodies and processes so as not to diminish or undermine public confidence in them. On one hand State and public authorities should not be permitted to proceed and implement decisions that violate the Constitution and on the other hand the mandate of the Constitutional Commissions should be protected from erosion by the Legislature.

7. The balance is best maintained by the Court stopping everything in its tracks. It is the Judiciary that has the ultimate authority to assert the supremacy of the Constitution. The High Court and the other Superior Courts will have the final word on what the Constitution means and it is only appropriate in these circumstances to permit the legal process now commenced by this petition to take its course to settle the fundamental issues raised in the petition. I am therefore satisfied that conservatory orders are warranted.

8. I therefore issue the following orders:

- (1) The Notice of Motion dated 30th May 2013 and the Petition be and are hereby certified as urgent.**
- (2) A conservatory order be and is hereby issued restraining all State organs, Commissions, independent offices, State and public officers and any person howsoever from implementing, enforcing or in any manner acting upon howsoever on *the Certificate of Nullification of Gazette Notices No. 2885, 2886, 2887 and 2888 issued by the Salaries And Remuneration Commission* dated 28th May 2012 issued by the Clerk of the National Assembly pending the hearing the Notice of Motion dated 30th May 2013 or until further orders of the Court.**
- (3) The petition and application shall be served on all the respondents forthwith and notice of institution of this shall be published in at least one newspaper with national circulation on or before Tuesday, 4th June 2013.**
- (4) This order shall be published in at least one newspaper with national circulation by Tuesday, 4th June 2013.**
- (5) This matter shall be mentioned at 12.00 noon on 31st May 2013 for further directions/orders.**

DATED and DELIVERED at NAIROBI this 30th May 2013

D.S. MAJANJA

JUDGE

Mr N. Kitonga, S.C., instructed by Nzamba Kitonga Advocates for the petitioner *ex-parte*.