



**Judicial Service Commission v Speaker of the National Assembly & another (Petition 518 of 2013)
[2013] KEHC 911 (KLR) (Constitutional and Human Rights) (3 December 2013) (Ruling)**

Judicial Service Commission v Speaker of the National Assembly & another [2013] eKLR

Neutral citation: [2013] KEHC 911 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 518 OF 2013

GV ODUNGA, J

DECEMBER 3, 2013

**IN THE MATTER OF ENFORCEMENT & INTERPRETATION OF THE CONSTITUTION
AND IN THE MATTER OF THE INDEPENDENCE OF
CONSTITUTIONAL COMMISSIONS AND INDEPENDENT OFFICES**

BETWEEN

JUDICIAL SERVICE COMMISSION PETITIONER

AND

SPEAKER OF THE NATIONAL ASSEMBLY 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

Whereas a person may not be committed for contempt of a court order which he is unaware of, his unawareness does not sanitise the illegal action which would still be null and void

The application sought the stay of the suspension of six commissioners of the Judicial Service Commission. The court highlighted the factors to consider in determining whether or not to grant conservatory orders sought. The court further stated that it did not matter that the person alleged to have acted in contempt of court was unaware of the existence of the order. Whereas he may not be committed for contempt of a court order which he was not aware of, his unawareness did not sanitise the illegal action which would still be null and void.

Reported by Kakai Toili

Civil Practice and Procedure – orders – breach of court orders - where the President constituted a tribunal pursuant to a resolution passed in breach of an existing court order – what was the effect actions undertaken in breach of court orders - whether being unaware of the existence of a court order sanitized an action taken contrary to a court order.



Civil Practice and Procedure - conservatory orders - nature of conservatory orders – what were the factors to consider in determining whether or not to grant conservatory orders.

Constitutional Law - national values and principles - rule of law – claim that the President constituted a tribunal pursuant to a resolution passed by the National Assembly in breach of an existing court order - whether an attempt to ignore a court order contrary to the national values and principles of governance amounted to an attempt to usurp the powers of the people which the people reserved unto themselves under article 255 of the Constitution - whether being unaware of the existence of a court order sanitized an action taken contrary to a court order - Constitution of Kenya, 2010; articles 10(2) and 255.

Brief facts

On October 30, 2013 the court issued orders restraining the Justice and Legal Affairs Committee of the National Assembly (the Committee) from debating a petition for the removal of six commissioners of the Judicial Service Commission (the petitioner) pending *inter partes* hearing of the matter. However, the Committee proceeded to deliberate on the petition and forwarded its report to the House. On November 6, 2013, the court issued further orders restraining Parliament from deliberating on the report by the Committee. In violation of the court orders, the Speaker permitted the debate and the House via a resolution adopted the Committee's report and forwarded a petition to the President to constitute a Tribunal to investigate the issue of the removal of the subject commissioners of the petitioner. On November 29, 2013, a special Gazette Notice was issued in which the Tribunal was set up to be chaired by Hon. (Rtd) Justice Aaron Gitonga Ringera and composed of Jennipher Shamalla, Ambrose Weda and Mutua Kilaka as members.

The petitioner moved the court seeking orders staying the Gazette Notice, grant of leave to join the Chairman and members of the Tribunal to the petition and orders of injunction jointly and severally against them from being sworn in and commencing any work in the way of investigating the six commissioners of the petitioner. The petitioner also sought further orders clarifying that in light of the orders of the Court the said six commissioners to remain in the office thus staying their suspension.

Issues

- i. Whether being unaware of the existence of a court order sanitized an action taken contrary to a court order.
- ii. What was the effect of actions undertaken in breach of orders of the court.
- iii. Whether an attempt to ignore a court order contrary to the national values and principles of governance amounted to an attempt to usurp the powers of the people which the people reserved unto themselves under article 255 of the Constitution.
- iv. What was the nature of conservatory orders and the factors to consider in determining whether or not to grant conservatory orders.

Held

1. Whether in light of the earlier orders restraining the Parliamentary Committee from tabling its report before the National Assembly, it was proper to constitute a tribunal pursuant to a resolution passed in blatant breach of an existing court order was a matter which was still at large and would be dealt with it at a later stage.
2. The intended 3rd to 6th respondents were appointed members of the tribunal tasked with investigating the issue of the removal of the subject commissioners of the petitioner. Whether their mandate would be in furtherance of disobedience of a court order would await the determination of the issues raised in the petition. However, the issues could not be investigated without the said persons being given an opportunity to be heard in the petition as to do so would amount to a breach of the rules on natural justice.
3. Since the Kenyan nation had chosen the path of democracy rather than dictatorship, the courts had to stick to the rule of law even if the public may in any particular case want a contrary thing and even if



- those who were mighty and powerful might ignore the court's decisions. The courts had to continue to give justice to all and sundry irrespective of their status or former status.
4. Under article 1(1) of the Constitution of Kenya, 2010 (the Constitution) all sovereign power belonged to the people of Kenya and shall be exercised only in accordance with the Constitution and since the courts were the temples of justice and the last frontier of the rule of law, court decisions had to be respected and the dignity of the court upheld at all times.
 5. The Judiciary as a bastion of the rights of the people was the safeguard and watchdog of the rights, which were fundamental to human existence, security and dignity. The old school of thought that judges must be like lions, but yet lions who sit at the feet of the throne had no place.
 6. The people of Kenya in enacting the Constitution recognized in the preamble thereto that they aspired for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. Article 4(1) of the Constitution declared the national values and principles of governance as the foundation upon which Kenya as a multi-party democratic state was grounded.
 7. In article 10 of the Constitution, national values and principles of governance bound all State organs, State officers, public officers and all persons whenever any of them-- applied or interpreted the Constitution; enacted, applied or interpreted any law; or made or implemented public policy decisions. One of the values and principles of governance under that article was the rule of law and under article 255 of the Constitution the people of Kenya took those values and principles of governance so seriously that they provided that any amendment thereto must be subjected to a referendum. Therefore, an attempt to ignore the same could amount to attempt to usurp the powers of the people which the people reserved unto themselves under article 255.
 8. Judicial power in Kenya was vested in the courts and other tribunals established under the Constitution and it was a fundamental tenet of the rule of law that court orders had to be obeyed. It was not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a court of law. The consequences of failure to obey court orders were that any action taken in breach of the court order was a nullity and of no effect.
 9. Where an act was a nullity, it was void and if an act was void, then it was in law a nullity as it was not only bad but incurably bad and there was no need for an order of the court to set it aside, though sometimes it would be convenient to have the court declare it to be so. Where the court found that to be so, the actions taken in pursuance of actions taken in breach of a court order had to therefore break-down once the superstructure upon which it was based was removed since one could not put something on nothing and expect it to stay there as it would collapse.
 10. It did not matter that the person alleged to have acted in contempt of court was unaware of the existence of the order. Whereas he may not be committed for contempt of a court order which he was not aware of, his unawareness did not sanitise the illegal action which would still be null and void.
 11. If it turned out that the action by the President of appointing the Tribunal was undertaken in breach of the orders of the court, that action would be null and void and of no effect. It would be as if it was never done in the first place and never existed. To permit the Tribunal to commence its duties under such circumstances before all the parties were heard in the application would not only amount to abetting and aiding the disobedience of the court order but could end up being a waste of public funds.
 12. It was in the interest of the applicants, the Tribunal and the public that the Tribunal be halted so as to remove the uncertainty in which the Tribunal was likely to find itself as to whether it could safely proceed with action while proceedings challenging the very basis upon which it had been constituted was still pending.
 13. Both remedies of an interim injunction and an interim declaration order were 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 was 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 would be taken until the substantive originating motion had been determined; and the status quo of the subject matter would 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.
14. The critical factor in such cases was 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.
 15. Where a legal wrong or a legal injury was caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden was imposed in the contravention of any constitutional or legal provision or without the authority of the law or any such legal wrong or injury was threatened, the High Court had powers to grant appropriate reliefs so that the aggrieved party was not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. That was meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission.
 16. Conservatory orders were not ordinary civil law remedies but were remedies provided for under the Constitution, the supreme law of the land. They were not remedies between one individual as against another but were meant to keep the subject matter of the dispute *in situ*. Therefore, such remedies were remedies *in rem* as opposed to remedies *in personam*. In other words, they were remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.
 17. The Judiciary had made great strides in regaining public confidence in an attempt to regain its place as one of the three arms the Government as opposed to its perceived status as the third arm of the Government. In an effort to do so, the Judiciary's image had been tremendously enhanced and any move that was likely to erode that confidence had to be treated with cynicism.
 18. The petitioner played a central role in ensuring that there was smooth administration of justice in Kenya and the suspension of the six commissioners could impact negatively on the smooth operation of the petitioner hence hamper the petitioner from ensuring that there was proper administration of the Judiciary.
 19. In deciding whether or not to grant the orders sought, the court had to, so far as possible, secure that any transitional motions before the court did not render nugatory that ultimate end of justice. The argument that the law was cast in stone was not correct, for the law had always kept growing to greater levels of refinement, as it expanded, to cover new situations not exactly foreseen before. Even as those must remain the basic tests, it was worth adopting a further, albeit rather special and more intrinsic test which was in the nature of general principle. The court should always opt for the lower rather than the higher risk of injustice.
 20. In determining whether or not to grant the orders sought the court was enjoined to consider the principle of proportionality. The circumstances of the case dictated that the operations of the petitioner continue since that would be the lower risk as opposed to bringing the petitioner's operations to a halt.
 21. In the premises it was only fair that pending the hearing *inter partes* of the application the administrative operations of the Judiciary proceed in the usual manner. That was more so in the light of the fact that the order of the court barring the suspension of the commissioners was still in force. The effect of the grant of the stay orders would be to stay the suspension of the six commissioners pending the *inter partes* hearing of the application and or further orders of the court.
 22. Article 165(4) of the Constitution permitted the constitution of a bench of more than one High Court judge where the Judge certified that the matter raised a substantial question of law. The issues raised in the petition were substantial questions of law with respect to interpretation of the Constitution more particularly with regard to the relationship between the three arms of Government and the separation of powers between them.



Application allowed

Orders

- i. *Justice (Rtd) Aaron Gitonga Ringera, Jennipher Shamalla, Ambrose Otieno Weda and Mutua Kilaka to be joined in the proceedings as Respondents and the petition to be amended accordingly.*
- ii. *The Special Gazette Notice No. 15094 appointing the intended 3rd to 6th Respondents as members of a Tribunal to investigate the conduct of six commissioners of the Judicial Service Commission to be stayed pending the hearing and determination of the application inter partes.*
- iii. *The Chairperson and the Members of the Tribunal barred from commencing the investigations into the conduct of the Commissioners the subject of the said Gazette Notice pending the hearing and determination of the Notice of Motion dated 2nd December 2013 inter partes.*
- iv. *The Commissioners to remain in the office pending the inter partes hearing of the application and or further orders of the court.*
- v. *The petition to be placed before the Hon. The Chief Justice of the Republic of Kenya forthwith to consider empanelling a bench of at least three judges to hear and determine the issues raised in the petition.*

Citations

East Africa

1. *Centre for Human Rights and Democracy & Others v Judges and Magistrates Vetting Board & Others* Constitutional Petition No 11 of 2012 –(Explained)
2. *Central Bank of Kenya & another v Ratilal Automobiles Limited & others* Civil Application No Nai 247 of 2006 –(Explained)
3. *Commercial Bank of Africa Ltd v Isaac Kamau Ndirangu* [1990-1994] EA 69 –(Explained)
4. *Murungaru v Kenya Anti-Corruption Commission & another* [2006] 1 KLR 77 –(Explained)
5. *Nabori & 9 others v Attorney General & 3 others* [2007] 2 KLR 331 –(Explained)
6. *Omega Enterprises (Kenya) Ltd v KTDC & 2 others* Civil Appeal No 59 of 1993 –(Mentioned)
7. *Suleiman v Amboseli Resort Limited* [2004] 2 KLR 589 –(Explained)

Trinidad & Tobago

1. *Attorney General v Sumair Bansraj* (1985) 38 WIR 286 –(Explained)

United Kingdom

1. *Macfoy v United Africa Co Ltd* [1961] 2 All ER 1169 –(Mentioned)

Statutes

East Africa

1. *Constitution of Kenya, 2010* articles 1(1); 4(1); 10; 144; 160; 162(2); 165(4); 191; 251; 255 –(Interpreted)

RULING

- 1 The Petitioner herein, the Judicial Service Commission, has moved this Court by way of a Notice of Motion datend December, 2013, seeking the following Orders:
 - 1 That for reasons to be recorded, this application be certified as urgent, service on the Respondents thereof be dispensed with and the application be heard exparte.
 - 2 That leave be granted to join Justice (Rtd) Aaron Gitonga Ringera, Jennifer Shamallah, Ambrose Otieno Weda and Mutua Kilaka as the 3rd to 6th Respondents in the Petition and the Petition be amended accordingly.



- 3 That there be a stay of the Special Gazette Notice No. 15094 appointing the 3rd to 6th Respondents as members of a Tribunal to investigate the conduct of six commissioners of the Judicial Service Commission.
 - 4 That pending the hearing and determination of the Petition, there be a stay of the suspension of Justice Mohamed Warsame, Prof. Christine Mango, Dr. Samuel Kobia, Ms. Emily Ominde, Mr. Ahmednasir Abdullahi and Ms. Florence Mwangangi as Judicial Service Commissioners.
 - 5 That pending the hearing and determination of the Petition, an order do issue restraining and prohibiting Aaron Ringera, Ambrose Weda, Mutua Kilaka and Jenniffer Shamalla from taking oath, assuming office, carrying on or in any way discharging their mandate as members of the Tribunal appointed under Special Gazette Notice No. 15094.
 - 6 That the costs of this application be provided for.
- 2 In his submissions in support of the application, Mr Muite, Senior Counsel who appeared together with Mr Isaa Mansour stated that on 30th October 2013, this Court issued orders restraining the Justice and Legal Affairs Committee of the National Assembly (hereinafter referred to as the Committee) from debating the Petition by one Mugambi pending inter partes hearing of the matter. From the Court file the affidavit shows that the orders were duly served on the Speaker and on the 2nd Respondent, the Hon. Attorney General who is constitutionally the Chief Legal Adviser of the Government. In defiance of the Court order, Mr Muite submitted the Committee proceeded to deliberate on the Petition and forwarded its report to the House. However on 6th November 2013, it was submitted the Court issued further orders restraining Parliament from deliberating on the report by the Committee and again the affidavit of service of the said orders on the Speaker and the Attorney General are on record.
 - 3 However in blatant defiance and violation of the Court orders the Speaker permitted the debate and the House via a resolution adopted the Committee's report and forwarded a Petition to the President to constitute a Tribunal. It was submitted that the orders of 6th November 2013 specifically stayed the commencement of any removal proceedings in respect of the six Commissioners and according to Mr Muite, the Petitioner legitimately expected that the Hon. Attorney General who is a member of the Petitioner would appropriately advise the President that a resolution of the National Assembly asking the President to appoint a Tribunal passed subsequent to the Court order in defiance thereof cannot constitute a constitutionally legal basis for setting up a Tribunal as it is a nullity.
 - 4 On 29th November 2013, a special Gazette Notice was issued in which the said Tribunal was set up to be chaired by Hon. (Rtd) Justice Aaron Gitonga Ringera and composed of Jennipher Shamalla, Ambrose Weda and Mutua Kilaka as members.
 - 5 It is for the foregoing reasons that Mr Muite urged the Court to certify the matter urgent, grant orders staying the said Gazette Notice, grant leave to join the Chairman and members of the Tribunal to this petition and grant orders of injunction jointly and severally against them from being sworn in and commencing any work in the way of investigating the six Commissioners of the Petitioner. Learned Senior Counsel also sought further orders clarifying that in light of the orders of the Court the said six Commissioners to remain in the office thus staying their suspension.
 - 6 According to Mr Muite there is a misconception of the law that under Article 251 of the Constitution the President had to set up a Tribunal yet there are many other Articles including Article 160 of the Constitution which confers exclusive the jurisdiction on the Court with respect to matters relating to interpretation of the Constitution and adjudication of disputes hence a resolution made in



- contravention of a court order is a nullity. In Mr Muite's view, had the President received proper advice he would not have set up a Tribunal pursuant to a resolution passed in violation of the Court order.
- 7 He posed that the Petitioner is at the heart of administration of justice and if Court orders granted to it are disobeyed with abandon what confidence would Wanjiku and Atieno (i.e. the common Mwananchi) have in the administration of justice. In his view, this matter goes beyond the Petitioner and the Respondent as it points to whether the country is going to be governed by the Rule of Law and he urged the Court to rise to the occasion and grant the orders sought pending the hearing of the Petition as a way of safeguarding the authority of the Court.
- 8 According to Senior Counsel, the Petitioner reserves the right to institute contempt of court proceedings against the Speaker which proceedings would be commenced in due course.
9. I have considered the application, the supporting affidavit as well as the submissions made on behalf of the Petitioner. Onth November 2013, I granted an order to the effect that the said six Commissioners of the Judicial Service Commission who are the subject of the petition filed by Riungu Nicholas Mugambi, shall not be suspended or removed from the office as such Commissioners based on the said petition pending the hearing and determination of this petition or until further orders of the Court.
- 10 Whether in light of the earlier orders restraining the Parliamentary Committee from tabling its report before the National Assembly, it was proper to constitute a Tribunal pursuant to a resolution passed in blatant breach of an existing court order is a matter which is still at large and I do not wish to deal with it at this stage.
11. From the Gazette Notice Number 15094 dated 29th November 2013, it is clear that the intended 3rd to 6th respondents were appointed members of the Tribunal tasked with investigating the issue of the removal of the subject Commissioners of the petitioner. It is alleged that their mandate would be in furtherance of disobedience of a Court order. Whether that is true or not will similarly await the determination of the issues raised herein. However, it is clear that the issues cannot be investigated without the said persons being given an opportunity to be heard in this petition as to do so would amount to a breach of the rules on natural justice. Accordingly, it is only just that Justice (Rtd) Aaron Gitonga Ringera, Jennipher Shamalla, Ambrose Otieno Weda and Mutua Kilaka be joined in these proceedings as Respondents. The order for joinder necessarily warrants the amendment of the Petition. Accordingly I grant the prayers sought in prayer 2 of the Notice of Motion dated 2nd December 2013.
- 12 With respect to prayer 3, I wish to reiterate the decision of the Court of Appeal in *Dr. Christopher Ndarathi H Murungaru vs. Kenya Anti-Corruption Commission & Another Civil Application No. Nai. 43 of 2006* [2006] 1 KLR 77 where it was held:
- “Since the Kenyan nation has chosen the path of democracy rather than dictatorship, the Courts must stick to the rule of law even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the Court's decisions since occasionally those who have been mighty and powerful are the ones who would run and seek the protection of the Courts when circumstances have changed.....The courts must continue to give justice to all and sundry irrespective of their status or former status.”
- 13 Lest we forget under Article 1(1) of the Constitution, all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution and since the courts are the temples of justice and the last frontier of the rule of law, Court decisions must of necessity be respected and the dignity of the Court upheld at all times. I associate myself with the sentiments of Rawal, J (as she



then was) in *Charles Lukeyen Nabori & 9 Others Vs. The Hon. Attorney General & 3 Others* Nairobi HCCP No. 466 of 2006 [2007] 2 KLR 331 that the Judiciary as a bastion of the rights of the people is the safeguard and watchdog of the rights, which are fundamental to human existence, security and dignity and that the old school of thought articulated by Sir Charles Bacon, that “Judges must be like lions, but yet lions who sit at the feet of the throne” has no place.

- 14 The people of Kenya in enacting the Constitution recognized in the preamble thereto that they aspired for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.

Article 4(1) of the Constitution, declares the national values and principles of governance as the foundation upon which Kenya as a multi-party democratic state is grounded. In Article 10 of the Constitution, the people of the Republic of Kenya enacted that national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them—

- a) applies or interprets the Constitution;
- (b) enacts, applies or interprets any law; or
- (c) makes or implements public policy decisions.

One of the values and principles of governance under that Article is the rule of law and under Article 255 of the Constitution the people of Kenya took these values and principles of governance so seriously that they provided that any amendment thereto must be subjected to a referendum. It is therefore clear that an attempt to ignore the same may amount to attempt to usurp the powers of the people which the people reserved unto themselves under the said Article 255.

- 15 In this case it is in effect contended that the orders of this Court issued on 6th November 2013 have been abrogated or abridged by brazen or subtle schemes and manoeuvres in the name of Article 251 of the Constitution.

- 16 In *Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others* Civil Application No. Nai. 247 of 2006, the Court of Appeal held that Judicial power in Kenya vests in the Courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law. The consequences of failure to obey Court orders are that any action taken in breach of the court order is a nullity and of no effect. See *Commercial Bank of Africa Ltd. vs. Isaac Kamau Ndirangu* Civil Appeal No. 157 of 1995 [1990-1994] EA 69. Where an act is a nullity it is trite that it is void and if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. Where the Court finds this to be so the actions taken in pursuance of actions taken in breach of a Court order must therefore break-down once the superstructure upon which it is based is removed since you cannot put something on nothing and expect it to stay there as it will collapse. See *Macfoy vs. United Africa Co. Ltd* [1961] 2 ALL ER 1169 at 1172 & *Omega Enterprises (Kenya) Ltd. vs. KTDC & 2 Others* Civil Appeal No. 59 of 1993.

- 17 In my view it does not matter that the person alleged to have acted in contempt of court was unaware of the existence of the order. Whereas he may not be committed for contempt of a court order which he was not aware of, his unawareness does not sanitise the illegal action which would still be null and void.



18. If therefore it turns out that the action by His Excellency the President of appointing the Tribunal was undertaken in breach of the orders of this Court, that action may well be null and void and of no effect. It is as if it was never done in the first place. It is as if it never existed.
19. To permit the Tribunal to commence its duties under such circumstances before all the parties are heard in the present application would not only amount to abetting and aiding the disobedience of the Court order but may end up being a waste of public funds.
20. It is therefore in the interest of the applicants, the Tribunal and the public that the said Tribunal be directed to hold its horses so as to remove the uncertainty in which the Tribunal is likely to find itself as to whether it can safely proceed with action while proceedings challenging the very basis upon which it has Petition No. 518 of 2013 (Stay of Tribunal)Page 10 been constituted is still pending. Accordingly pending the hearing and determination of this application inter partes I grant an order staying the Special Gazette Notice No. 15094 appointing the intended 3rd to 6th Respondents as members of a Tribunal to investigate the conduct of six commissioners of the Judicial Service Commission. For avoidance of doubt the Chairperson and the Members of the Tribunal appointed vide Gazette Notice No. 15094 dated 29th November 2013 are hereby barred from commencing the investigations into the conduct of the Commissioners the subject of the said Gazette Notice pending the hearing and determination of the Notice of Motion dated 2nd December 2013 inter partes as stated hereinbelow.
21. The petitioners have urged the court to clarify that in light of the orders of the Court made on 6th November 2013, the said Commissioners do remain in the office. In the Privy Council Case of Attorney General –V- Sumair Bansraj (1985) 38 WIR 286Braithwaite 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.”



22 In Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret High Court Constitutional Petition No. 11 of 2012 the Court held by a majority that:

“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. Our determination is not in any way a final definition or determination of the dispute. It is meant to give an interim protection as sought by the applicants.”

23 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.

24 This Court is aware that in the recent past the Judiciary has made great strides in regaining public confidence in an attempt to regain its place as one of the three arms of the government as opposed to its perceived status as the third arm of the government. In an effort to do so, the judiciary’s image has been tremendously enhanced and any move that is likely to erode that confidence ought to be treated with cynicism. This position was similarly recognised by the same decision in Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others (supra):

“Today a vast revolution is taking place in the judicial arena, old judges are being subjected to vetting by an autonomous body and new judges are recruited in a competitive and transparent manner. There is a sense of new environment created, that all Kenyans can approach Courts without hindrance or impediments. The politicians, sugar barons and drug cartels are no longer calling the shots and giving direction in the theatre of justice. There is a profound sense of relief and excitement within the corridors of justice. However there are new players, new victims and new litigants. It appears the ground and the players are fast changing within the administration of justice.”

25 The Court takes judicial notice of the central role played by the petitioner in ensuring that there is smooth administration of justice in this country and that the suspension of the said six Commissioners may impact negatively on the smooth operation of the petitioner hence hamper the petitioner from ensuring that there is proper administration of the judiciary. At this stage we are not concerned with the merits or otherwise of the allegations made against the said Six Commissioners of the Petitioner but in deciding whether or not to grant the orders sought the Court must as was held by Ojwang, J (as he then was) in Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589

“It is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory that ultimate end of justice...The argument that the law.....is cast in stone is not correct, for the law has always kept growing to greater levels of refinement, as it expands, to cover new situations not exactly foreseen before.....Even



as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court.....should always opt for the lower rather than the higher risk of injustice.”

26. In other words in determining whether or not to grant the orders sought the Court is enjoined to consider what has become known as the principle of proportionality. In my view the circumstances of this case dictate that the operations of the petitioner continue since that would be the lower risk as opposed to bringing the petitioner’s operations to a halt at this stage.
27. In the premises it is only fair that pending the hearing inter partes of this application the administrative operations of the judiciary do proceed in the usual manner. This is more so in the light of the fact that the order of this Court barring the suspension of the said Commissioners is still in force. Accordingly and needless to say the effect of the grant of the stay orders herein will be to stay the suspension of the said six Commissioners pending the inter partes hearing of this application and or further orders of the court. In effect the said Commissioners shall remain in the office pending the inter partes hearing of this application and or further orders of the court.
28. Having said that Article 165 of the Constitution provides as follows:
 - (1) There is established the High Court, which—
 - (a) shall consist of the number of judges prescribed by an Act of Parliament; and
 - (b) shall be organised and administered in the manner prescribed by an Act of Parliament.
 - (2) There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.
 - (3) Subject to clause (5), the High Court shall have—
 - (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and
 - (e) any other jurisdiction, original or appellate, conferred on it by legislation.



- (4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.
 - (5) The High Court shall not have jurisdiction in respect of matters—
 - (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
 - (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).
 - (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
 - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
29. From the foregoing it is clear that Article 165(4) of the Constitution permits the constitution of bench of more than one High Court judge where the Judge certifies that the matter raises a substantial question of law:
1. Whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; or
 2. That it involves a question respecting the interpretation of this Constitution and under this is included
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191.
30. It is my considered view that the issues raised in this petition are substantial questions of law with respect to interpretation of the Constitution more particularly with regard to the relationship between the three arms of government and the separation of powers between them.
31. In the premises I direct that this petition be placed before the Hon. The Chief Justice of the Republic of Kenya forthwith to consider empaneling a bench of at least three judges to hear and determine the issues raised in this petition.
26. Orders accordingly.

RULING READ, SIGNED AND DELIVERED IN COURT THIS 3RD DAY OF DECEMBER 2013

G.V. ODUNGA

JUDGE



In the presence of

