



REPUBLIC OF KENYA
IN THE HIGH OF KENYA AT NAIROBI
MILIMANI LAW COURTS

Petition 328 of 2012

HON JOHN HARUN MWAU.....1ST PETITIONER
EVANS MWANIA NYAMASYO.....2ND PETITIONER
MUTUA MWENDWA.....3RD PETITIONER
PERPETUAL MUTHINA MUTINDA.....4TH PETITIONER
MAKAU KIOKO.....5TH PETITIONER
KATHAMBONI SEC. SCHOOL.....6TH PETITIONER
KITHINGIISYO PRIMARY SCHOOL.....7TH PETITIONER
KYOME PRIMARY SCHOOL.....8TH PETITIONER

AND

INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL2ND RESPONDENT

THE DISTRICT COMMISSIONER

MUKAA DISTRICT.....3RD RESPONDENT

RULING

1. The application before me is a Chamber Summons dated 31ST July 2012 which seeks the following interim orders;

(1) *That pending the hearing of this application interpartes, this Honourable Court be pleased to issue a*

conservatory order in terms of stay of section 26 of the Elections Act, 2011.

(2) That in the alternative pending the hearing of this application interpartes, this Honourable Court be pleased to issue an order compelling the 2nd and 3rd respondents to direct the Chief Executive Officer, Kenyatta National Hospital to give immediate medical attention to the 2nd, 3rd and 4th petitioners herein in view of their urgent need of emergency medical attention.

2. The contention of the applicant, Hon. John Harun Mwau, in the supporting affidavit sworn on 31st July 2012 is that **section 26** of the **Elections Act, 2011** prohibits him from conducting or participating in fund raising to help the needy and disenfranchised people he represents. **Section 26** provides,

26. (1) *A person who directly or indirectly participates in any manner in any or public fundraising or harambee within eight months preceding a general election or during an election period, in any other case, shall be disqualified from contesting in the election held during that election year or election period.*

(2) Subsection (1) shall not apply to a fundraising for a person who is contesting an election under this Act or to a fundraising for a political party.

3. He contends that he is disabled from assisting the 2nd, 3rd and 4th petitioners from receiving medical attention as he is unable to conduct harambees to raise money to pay their medical bills. The 2nd, 3rd and 4th petitioners have not sworn any depositions as to the nature and extent of the maladies.

4. According to the Hon. Mwau, “(The) 2nd and 4th petitioners are sick and require funds in order to be operated and get immediate medical attention. (see annexures marked JHM-3 being true copies of the said medical tests and referral for operations and medication).” According to the exhibits available, the 2nd petitioner, requires an “urgent crematory and excursion of the brain cyst at Kenyatta National Hospital, the cost of which is about Kshs.400,000/=.” No medical records or evidence has been attached to support the 3rd and 4th petitioner’s case.

5. I am aware that the application before me is an *ex-parte* and I am not required to make definitive finding of fact but nevertheless I must consider the material before me and whether the petitioners have discharged the burden placed on them to enable the court grant interim relief.

6. Regarding the first issue, I am unable to issue conservatory relief staying the operation of **section 26** of the **Election Act, 2011**. Every statute has a presumption of constitutionality and I am not convinced that any case has been made at this *ex-parte* stage to restrain the operation of the provision of the Act. In any case, the Election Act, 2011 was assented to on 27th August 2011 and commenced on 22nd December 2011. It is late in day to rush to court to seek an *ex-parte* order to stop its operation.

7. The second issue concerns the implementation of **Article 43(2)** which states, “**A person shall not be denied emergency medical treatment.**” The issue is whether I can decide on the basis of the material before me whether the 2nd, 3rd and 4th petitioners’ condition constitutes an “**emergency**” within the meaning of the provision.

8. Admittedly the 2nd petitioner’s condition appears serious but I am unable to state that it is an emergency requiring the coercive power of the Court to be brought to bear upon the Kenyatta National Hospital. It also appears that the 2nd petitioner has been undergoing some form of treatment at least since 3rd January 2011. This would tend to negative some form of emergency. (See the case of **Soobramoney v Minister of Health (Kwazulu & Natal) 1998(1) SA 430 D**). There is also no evidence in respect of the 3rd and 4th petitioners’ afflictions.

9. In the circumstances, I am unable to grant the conservatory orders sought.

DATED and **DELIVERED** at **NAIROBI** this 31st day of July 2012

D.S. MAJANJA
JUDGE

Mr Ombati instructed by Nchogu. Omwanza and Nyasimi Advocates for the petitioners.