



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 208 OF 2012

**CENTRE FOR RIGHTS EDUCATION AND AWARENESS (CREAW)1ST
PETITIONER**

**CAUCUS FOR WOMEN'S LEADERSHIP (CAUCUS).....2ND
PETITIONER**

**WOMEN IN LAW AND DEVELOPMENT IN AFRICA (K)3RD
PETITIONER**

**DEVELOPMENT THROUGH MEDIA (DTM)4TH
PETITIONER**

**COALITION OF VIOLENCE AGAINST WOMEN (COVAW)5TH
PETITIONER**

**YOUNG WOMEN LEADERSHIP INSTITUTE (YWLI)6TH
PETITIONER**

**INTERNATIONAL CENTRE FOR POLICY AND CONFLICT7TH
PETITIONER**

CONSOLIDATED WITH

MISC APPL. NO 207 OF 2012

**PATRICK NJUGUNA1ST
PETITIONER**

**CHARLES OMANGA2ND
PETITIONER**

AND

**THE ATTORNEY GENERAL.....1ST
RESPONDENT**

THE MINISTER FOR INTERNAL SECURITY AND PROVINCIAL ADMINISTRATION.....2ND

RESPONDENT

RULING

1. The application for consideration is the Notice of Motion dated 19th July 2012 which was filed under certificate of urgency where the applicant, Yusuf Dagane, seeks the following orders;

(1) That this application be certified as urgent and be heard ex-parte in the first instance.

(2) That the Honourable Court be pleased to grant leave to the applicants to be enjoined as interested parties in the consequential proceedings of Petition No. 208 of 2012.

(3) That the Honourable Court be pleased to strike out the Notice of Appeal filed on 10th July 2012 for being incompetent and offending to the rule of law and an affront to the principles of Constitutionalism.

(4) That the Honourable Court be pleased to issue any such further orders it may deem fit and convenient in the circumstances of this case.

(5) Costs.

2. On 24th February 2012, Hon. Lady Justice M Ngugi delivered a judgment in this matter in which she declared as follows;

(i) The President had no power to appoint or deploy County Commissioners as he purported to do under Gazette Notice No. 6604 of 11th May 2012 and Gazette Notice No. 6937 of 23rd May 2012.

(ii) Even if the President had had power to make such appointments or deployments, the appointments or deployments violated Article 10 and 27 of the Constitution.

(iii) The purported deployment of County Commissioners by Gazette Notice No. 6937 of 23rd May 2012 was therefore unconstitutional, null and void.

3. After judgment was delivered a Notice of Appeal was filed against the judgment by the Minister for Internal Security and Provincial Administration (“the Minister”). It is this Notice that the applicant claims is an attempt to undermine the rule of law by infringing on the power and authority of the Attorney General. The contention of the applicant is that in light of **Article 156** it is only the Attorney General who as a party to these proceedings and the guardian of public interest who can appeal against the judgment.

4. When the matter came up for inter-parties hearing the counsel for the petitioners, Mr Oluoch and Ms Thongori informed the court that a stay order had been sought in the Court of Appeal by the Minister and that they proposed to raise preliminary objections to the application and the Notice of Appeal.

5. In the circumstances, I requested Mr Ondieki to show cause why the application should not be struck out as incompetent. Mr Ondieki submitted that the application was *sui generis* in nature and the court should apply the constitutional principles set out in **Article 3** and **21(1)** to breathe life into and uphold the Constitution. He stated that this was a case where the office of the Attorney General was undermined and the court had to act fast to forestall a constitutional breach.

6. Mr Kibe Mungai stated that the issues raised by the applicant belong to the Court of Appeal and there is nothing about undermining the Attorney General’s authority.

7. I have considered the matter and in my view this matter is to be determined on first principles. The principles of jurisdiction and court’s authority were not overthrown by the Constitution. First, the issue of jurisdiction is not a mere technicality nor can it be wished away based on broad notions and arguments of

the Constitution. The Supreme Court in ***Re The Matter of the Interim Independent Electoral Commission Constitutional Application 2 of 2011 (Unreported)*** at para. 29 and 30 discussed the issue of jurisdiction in the following terms; “[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in ***Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited*** [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14): **“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”** [30] The ***Lillian ‘S’*** case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.

8. Second, rules of practice and procedure are essential fair play, containment of costs of litigation and indeed access to justice guaranteed under **Article 48**. Without rules the courts would lack the ability to organise litigation in a manner that would lead to optimum utilisation of available resources. In any case a careful reading of **Article 159(2)(d)** shows that what is frowned upon is not procedural technicalities but “*undue regard to technicalities*”.

9. The matter at hand is now before the Court of Appeal. The ***Appellate Jurisdiction Act (Chapter 9 of the Laws of Kenya)*** and the ***Court of Appeal Rules*** govern how the right of appeal is to be exercised including how and by whom the Notice of Appeal is to be filed.

10. It therefore becomes very clear, that this court cannot entertain an application to strike out a notice of appeal. It is the Court of Appeal that has jurisdiction to hear and determine all issues relating to the validity or otherwise of the Notice of Appeal including the issue whether the person lodging the notice has capacity to do so. This is an issue that is pending before that court and to proceed in the manner suggested by applicant would undermine the jurisdiction of the appellate court.

11. I am aware that the court has often adopted a liberal attitude toward joinder of parties to matters concerning the enforcement of fundamental rights and freedoms and the Constitution but the Court retains the power to halt an abuse of this process and ensure that its processes are not clogged by unnecessary litigation that saps time and resources in a manner that undermines **Article 159(2)(b)** and access of justice for other people.

12. It must be abundantly clear that the joinder of the applicant is intimately tied to the issue of attacking the Notice of Appeal and since this court lacks jurisdiction to strike out the Notice of Appeal, the application is incompetent.

13. The application is therefore one for striking out, it is struck out with no order as to costs.

DATED and DELIVERED at NAIROBI this 27th July 2012

D.S. MAJANJA
JUDGE