REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Constitutional Petition 11 of 2012

IN THE MATTER OF ARTICLES 1,2,3,10,19,20,21,23,28,47(1), 49,50,73,165(3), 168, 171,172,258,259 AND 260 OF THE CONSTITUION OF KENYA 2010

AND

IN THE MATTER OF THE SUPREMACY OF THE CONSTITUITON PURSUANT TO ARTICLE 2 OF THE CONSTITUTION

AND

IN THE MATTER OF THE VETTING OF JUDGES AND MAGISTRATES ACT NO. 2 OF 2011

IN THE MATTER OF SECTION 9, 23, 30 AND 76 OF THE INTERPRETATION

AND GENERAL PROVISIONS ACT, CAP 2 OF THE LAWS OF KENYA

AND

IN THE MATTER OF STATUTE LAW (MISCELLANEOUS AMENDMENTS) ACT NO. 12 OF 2012

THE CENTRE FOR HUMAN RIGHTS AND DEMOCRACY.....1ST PETITIONER /1ST APPLICANT

RICHARD ETYAN'GA OMANYALA.....2ND PETITIONER/2ND APPLICANT.

VERSUS

THE JUDGES AND MAGISTRATES VETTING BOARD.....1ST RESPONDENT/1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT/2ND RESPONDENT

JUDICIAL SERVICE COMMISSION.....3RD RESPONDENT

AND

HON. JUSTICE MOHAMMED IBRAHIM.....1ST INTERESTED PARTY

HON JUSTICE ROSELYNE NAMBUYE.....2ND INTERESTED PARTY

RULING OF G.K. KIMONDO, J

1. The petitioners have lodged a petition dated 10th August 2012. It seeks various declarations and reliefs. In a synopsis, it is pleaded that section 22 of the Vetting of Judges and Magistrates Act No 2 of 2011 is unconstitutional and should be struck out. It also seeks to impugn any and all proceedings or determinations of the The Judges and Magistrates Vetting Board. A declaration is also sought that the repeal of section 23 (2) by the Statute Law (Miscellaneous Amendments) Act 2012 is unconstitutional and contravenes section 23 of the sixth schedule to the Constitution of Kenya 2010. The petitioners thus pray for an order prohibiting the board from hearing and determining any matter or review under the Act.

2. The petitioners have contemporaneously with the petition filed a chamber summons of even date seeking conservatory orders. We were urged to grant the prayers numbered (b) and (d) in the summons. Prayer (b) is for stay of operation of section 22 of the Vetting of Judges and Magistrates Act and for all proceedings by the board. Prayer (d) is a plea for stay of all proceedings pending determination of the constitutionality of the entire vetting process.

3. When the matter came up for mention for directions on 24th September 2012, learned counsel for the board Mr. Wilfred Nderitu said he required time to respond to the application for an interim relief. And so did Mr. Kiage, learned counsel for the Attorney General. To my mind those are the principal respondents. The two learned counsels nevertheless opposed the grant of any conservatory orders. The Law Society of Kenya, which was enjoined into these proceedings, opposed grant of conservatory orders. Its learned counsel Mr. Kanjama took up cudgels on the High Court's jurisdiction to deal with the petition in view of section 23 (2) of the sixth schedule of the constitution. The section provides:

"A removal, or a process leading to the removal, of a judge, from office by virtue of the operation of legislation contemplated under subsection (1) shall not be subject to question in, or review by, any court".

The constitutional underpinning of the vetting of judges and magistrates has been the subject of other litigation in the High Court. The Court of Appeal has also dealt with the matter most recently in *Dennis Mogambi Mongare Vs Attorney General and others* Nairobi, Court of Appeal Civil Appeal No 265 of 2011 [2012] e KLR.

4. The matters raised in the petition are weighty. The submissions by the petitioner's counsel are not prosaic. They are well crafted and arguable. That is precisely the reason why the Honourable the Chief Justice has empanelled a three Judge bench to hear and determine the petition. On the face of it, the amendments to section 23 of the Vetting of Judges and Magistrates Act invite serious constitutional scrutiny. But that can only be determined upon hearing all the parties and examining the evidence and materials before the court. This court is now enjoined by article 159 of the constitution as well as sections 1A and 1B of the Civil Procedure Act to do substantial justice to the parties. The conservatory orders sought on the other hand are so far reaching and extensive as to bring to a complete halt the operations of the Board at this stage. The orders sought permeate the boundaries of the case for the petitioners to extend to all and any other determinations by the board. Some of the declarations now sought have been the subject of other litigation. The orders sought are discretionary. I am well alive that under article 23 (3) (c) as read together with article 22 of the constitution this court may grant an appropriate relief including a conservatory order. As I have said, key respondents have not had their full say on the application for interim orders. There is also the public interest and costs to be weighed. I am also cognizant that the vetting process is on a strict timetable. The overriding interest and concept of proportionality demand that

this petition should be canvassed fully on the merits. The circumstances and grounds of the conservatory order may be different now. But the words of the Court of Appeal in the ***Mongare*** case (Supra) ring true. The Honourable judges of the Court of Appeal delivered themselves thus:

"The judicial officers themselves have said that they are not opposed to the vetting process as was clearly evident in submissions before us, and, indeed, before the High Court. Their complaint is essentially with some parts of the Act, which they believe are unlawful, and an infringement of their fundamental rights. They want the process to be fair and lawful. Can that be accomplished by halting indefinitely the process? We think not, given the principles of proportionality and balance vis a vis the public. There is undeniably a great public interest in the implementation of the Constitution that must override the private right or interest to halt possible prejudice to the administration of justice. Here there is a legitimate public expectation that the vetting process must continue, and we must take judicial notice of the fact that the Vetting Board is ready to begin its work; that it has a timeline within which to complete its work; and that considerable public funds have been invested into this process. We simply cannot halt its work. The balance of convenience is not in favour of the applicant".

5. Granted all the above reasons and considering the interests of justice, I would decline to grant any conservatory order at this stage. But as my learned brothers do not agree, the orders shall be as proposed by the Honourable Mohamed Warsame and the Hon George Odunga. In view of the nature of the petition, I concur with the direction that this matter be placed before the Honourable the Chief Justice to empanel a bench of at least 5 Judges to hear and determine the petition.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 25th day of September 2012.

G.K. KIMONDO

JUDGE