The Centre for Human Rights and Democracy and another Vs. The Judges and Magistrates Vetting Board and 4 Others
Petition No. 11 Of 2012
High Court of Kenya at Nairobi
M. Warsame, G.V. Odunga, G.K.Kimondo JJJ.
September 25, 2012

By NjeriGithang'a

Constitutional Law*-Conservatory orders-jurisdiction of the court to issue conservatory orders-circumstances under which conservatory orders can be issued- where the guiding factor should be whether there was a prima facie case with a probability of success at the hearing- whether the court could grant an interim protection or reliefs in view of the weighty and substantial questions raised by the applicants*

The petition before the High Court arose from the Vetting of Judges and Magistrates process. Before the Vetting of Judges and Magistrates Board completed its mandate its term expired resulting into the necessity to grant an extension for the finalization of the task bestowed under section 23 of the Sixth Schedule and the Vetting of Judges and Magistrates Act (the Act). By the Statute Law (Miscellaneous Amendments) Act 2012, No 12 of 2012 purportedly granted an extension. The Act was signed by the President on the 6th July 2012 and gazetted on 12th July 2012. Section 23(2) of the Act was deleted and in its place the following subsections were inserted:

(2) The Board shall be divided into three panels for purposes of vetting, and the three panels shall vet the judges simultaneously while the Judicial Service Commission shall vet the Magistrates,

(3) The vetting process once commenced shall be concluded not later than the 28th February, 2013, and any review of the decision of the Board or of the Judicial Service Commission shall be heard and concluded within the above specified period.

It was these amendments that provoked the petition before the court. It was the petitioners' contention that under section 23 of the Schedule the time limited for vetting of Judges and Magistrates was one year hence the amendment to extend the said period was unconstitutional. Secondly, it was argued that whereas Act No. 12 of 2012 purported to extend the time limited under section 23 of the Act, there was no corresponding extension of the term of the Board Members hence any proceedings and determination by the Board after the expiry of their mandate under the amended section 23 of the Act were null and void.

The Constitutional petition before the court sought a number of conservatory orders pending the hearing and determination of the petition. Among the conservatory orders sought were;the Court to issue a conservatory order staying the operation of Section 22 of the Vetting of Judges and Magistrates Act No. 2 of 2011 and further stayof all the proceedings of the 1st respondent pending the determination of the 1st respondent's jurisdiction to proceed with the process of vetting of Judges and Magistrates and the constitutionality of the entire vetting process in view of S. 23 of the Sixth Schedule to the Constitution of Kenya, 2010, S. 23 (1) of the Vetting of Judges and Magistrate's Act, the Statute Law (Miscellaneous Amendments) Act No. 12 of 2012 repealing S. 23 (2) of the Vetting of Judges and Magistrates Act and the substitution thereof with the current provisions of S. 23(2) of The Vetting of The Judges and

Magistrates Act No. 2 of 2011.

The main issue for determination was whether the court could to grant an interim protection or reliefs in view of the weighty and substantial questions raised by the applicants.

Held,

1. Under Article 23(3) (c) of the Constitution of Kenya, 2010, the Court had powers to grant conservatory orders at any stage of the proceedings if it deemed fit to do so. However, the court had to be satisfied with;

a. the credentials of the petitioners,

b. the prima facie correctness or nature of information available to Court;

c. whether the grievances are genuine, legitimate, deserving and or appropriate;

d. whether the applicant has shown or demonstrated the gravity and seriousness of the dispute; and

e. whether the petitioners have engaged in wild, vague, indefinite or reckless allegations against the respondent.

2. The role of the High Court was to secure observance of Constitutional, Statutory and International Standards of all persons and to ensure that the basic human rights, benefits and privileges are protected, preserved and often times enhanced.

3. The matters raised were not frivolous and indeed needed further inquiry both at the stage of the hearing of the chamber summons and the petition itself. The court had to eventually examine the contours and boundaries of section 23 of the Sixth Schedule and the entire Vetting Act.

4. A party seeking a conservatory order only required to demonstrate that he had a prima facie case with a likelihood of success and that unless the court granted the conservatory order, there was real danger that he would suffer prejudice as a result of the violation or threatened violation of the Constitution.

5. 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 had 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. That was meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission.

6. The determination was not in any way a final definition or determination of the dispute. It was meant to give an interim protection as sought by the applicants.

7. Since the issues raised were weighty and substantial and in order to give the matter a fair and comprehensive interpretation it was appropriate for the composition of the bench be enlarged to five judges.

PerG.K.Kimondo J.(Dissenting)

1. Though the amendments to section 23 of the Vetting of Judges and Magistrates Act invited serious constitutional scrutiny, they could only be determined upon hearing all the parties and examining the evidence and materials before the court. The court was 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.

2. The conservatory orders sought on the other hand were so far reaching and extensive as to bring to a complete halt the operations of the Board. The orders sought permeate the boundaries of the case for the petitioners to extend to all and any other determinations by the board.

3. Key respondents had not had their full say on the application for interim orders. There was also the public interest and costs to be weighed, and further the vetting process was on a strict timetable. The overriding interest and concept of proportionality demanded for the petition to be canvassed fully on the merits.

4. Given the principles of proportionality and balance *vis a vis* the public, there was undeniably a great public interest in the implementation of the Constitution of Kenya, 2010 that had to override the private right or interest to halt possible prejudice to the administration of justice. There was a legitimate public expectation that the vetting process which had a timeline within which to complete its work had to continue.

Conservatory order denied

Order by the Majority

Matter to be placed before the Chief Justice for purposes of enlarging the panel to five; all matters or proceedings before the Board stayed for a period of 14 days or until further orders

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 CONSTITUTION OF KENYA 2010

&

IN THE MATTER OF THE SUPREMACY OF THE CONSTITUTION 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

&

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/APPLICANT

BISHOP FRANCIS RANOGWA OZIOVA..3RD PETITIONER/3RD APPLICANT

VERSUS

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

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

JUDICIAL SERVICE COMMISSION..3RD RESPONDENT/3RD RESPONDENT

&

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

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

R U L I N G

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. This application involves two justices of the Superior Courts and has far reaching ramifications on all judicial officers who were in office as at 27th August 2010. It was hardly expected that a Judge who a few months ago was adjudicating between plaintiffs and defendants would seek redress before the High Court. As they say the rich and powerful too cry and when they do their refuge is in the fountain of justice. It sounds like a hunter being hunted or haunted.

As a result of the new and emerging trends which require accountability and transparency in all spheres of life, the High Court is often called upon to stand between all parties seeking justice and alleging violation or infringement of their rights. As part and core of our Constitutional and statutory obligations we have to innovate new methods and devise new strategies for purposes of providing access to justice to all persons who are or were or about to be denied their basic fundamental and human rights. The High Court is the eyes and the ears of all citizens of this beautiful country at all times. In our daily menu we do a balancing exercise guided by our judicial oath and bearing in mind that our authority or powers are derived from the people of Kenya.

Be that as it may, the matter before us is a Constitutional Petition dated 10th August 2012 and filed in this Court on 13th August 2012. By Chamber Summons dated 10th August 2012 similarly filed on 13th August 2012, the petitioners herein sought a number of conservatory orders pending the hearing and determination of the Petition.

When the matter came before us on 24th September 2012 for directions, the petitioners urged the Court to grant prayers (b) and (d) of the said Chamber Summons. The said prayers sought the following orders:

(b) Pending the hearing and determination of this application inter partes, this Honourable Court be pleased to issue a conservatory order staying the operation of Section 22 of the Vetting of Judges and Magistrates Act No. 2 of 2011 and further staying any proceedings and or the determination of any application for Review currently pending before the 1st Respondent under the provisions of the said Section 22 of the Act until such time as the constitutionality of section 22 of the Act shall have been determined and or until further orders of court.

(d) Pending the hearing and determination of this application interpartes, this court be pleased to issue a conservatory order staying all the proceedings of the 1st Respondent pending the determination of the 1st Respondent's jurisdiction to proceed with the process of Vetting of Judges and Magistrates and the Constitutionality of the entire vetting process in view of the Provisions of S. 23 of the Sixth Schedule to the constitution of Kenya 2010, the Provisions of S. 23 (1) of the Vetting of Judges and Magistrate's Act, the Provisions of the Statute Law (Miscellaneous Amendments) Act No. 12 of 2012 repealing the Provisions of S. 23 (2) of the Vetting of Judges and Magistrates Act and the substitution thereof with the current provisions of S. 23(2) of The Vetting of The Judges and Magistrates Act No. 2 of 2011.

Learned counsel for the 1st respondent, **Mr. Wilfred Nderitu** informed the Court that the 3rd respondent needed adequate time to respond to the said application. The same position was taken by **Mr. Kiage**, learned counsel for the 2nd respondent. In the interest of justice and pursuant to the provisions of Article 23(3)(c) we heard counsel for the parties on the propriety of granting interim relief pending the hearing and determination of the said application. The said provision provides:

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(c) a conservatory order;

This ruling is therefore not a determination of the application dated 10th of August 2012 which application will, if necessary, be determined at a later stage.

In the petition before the Court, the following issues stand out for adjudication and determination:

1. Whether this Court has jurisdiction to entertain this petition or matters arising from the powers mandate and duties of the Vetting Board.

2. Whether the Judges and Magistrates Vetting Board (the Board) had jurisdiction, after 23rd May 2012 to entertain any proceedings and make any determination in respect of the Judges of the High Court and the Court of Appeal under the Act in light of:

(a). The time frame stipulated under provisions of 23(1)(a) of the Vetting of Judges and Magistrates Act (the Act) as read with section 23 of the Sixth Schedule to the Constitution (the Schedule).

(b). Whether the mandate of the Board or Commissioners was ever extended or enlarged.

3. Whether the lifespan of an Act of Parliament with a stipulated timeframe can be extended and the format of extension.

4. Whether Parliament acted in accordance with the law.

We mention in passing that an issue arose with respect to the composition of this bench. We say in passing because, that issue is not the subject of the present ruling and its determination will have to await a later stage.

The Board derives its mandate from section 23 of the Sixth Schedule which provides:

(1) Within one year after the effective date, Parliament shall enact legislation, which shall operate despite Article 160, 167 and 168, establishing mechanisms and procedures for vetting, within a timeframe to be determined in the legislation, the suitability of all judges and magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in Articles 10 and 159.

(2) 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.

Pursuant to the foregoing provision Parliament enacted the Vetting Act which came into force 22nd March 2011. The said Act established and or created the Vetting of Judges and Magistrates the Board whose timeframe for vetting is provided under section 23 of the Act as hereunder:

23. (1) The vetting process once commenced shall not exceed a period of one year, save that the National Assembly may, on the request of the Board, extend the period for not more than one year.

(2) Subject to subsection (1)—

(a) the vetting of the Judges of the Court of Appeal and the High Court shall be finalised within three months;

(b) the vetting of magistrates shall be finalised within six months; and

(c) all the requests for reviews granted under section 22 shall be considered after the vetting of all judges and magistrates under paragraphs (a) and(b) and shall be finalised within one month.

Before the Board completed its mandate its term expired resulting into the necessity to grant an extension for the finalisation of the task bestowed under section 23 of the Sixth Schedule and the Vetting Act.

By the Statute Law (Miscellaneous Amendments) Act 2012, No 12 of 2012 (Act No. 12 of 2012) purportedly granted an extension. The Act was signed by the President on the 6th July 2012 and gazetted on 12th July 2012. Section 23(2) of the Act was deleted and in its place the following subsections were inserted:

(2) The Board shall be divided into three panels for purposes of vetting, and the three panels shall vet the judges simultaneously while the Judicial Service Commission shall vet the Magistrates,

(3) The vetting process once commenced shall be concluded not later than the 28th February, 2013, and any review of the decision of the Board or of the Judicial Service Commission shall be heard and concluded within the above specified period.

It is these amendments that have principally provoked the present petition. It is the petitioners' contention that under section 23 of the Schedule the time limited for vetting of Judges and Magistrates was one year hence the amendment to extend the said period is unconstitutional. Secondly, it is argued that whereas Act No. 12 of 2012 purported to extend the time limited under section 23 of the Act, there was no corresponding extension of the term of the Board Members hence any proceedings and determination by the Board after the expiry of their mandate under the amended section 23 of the Act are null and void.

As we have already stated hereinabove we are not properly seized of the Chamber Summons at this stage and we recognize that we must be cautious not to make any definitive finding thereon whose effect may prejudice the hearing of the said application and the entire petition. We however, recognize and it is our view that under Article 23(3)(c) aforesaid, the Court has powers to grant conservatory orders at any stage of the proceedings if it deems fit to do so. Before we do so, we must be satisfied with the credentials of

the petitioners, the prima facie correctness or nature of information available to Court; whether the grievances are genuine, legitimate, deserving and or appropriate; whether the applicant has shown or demonstrated the gravity and seriousness of the dispute; and lastly but not least whether the petitioners have engaged in wild, vague, indefinite or reckless allegations against the respondent. We must also bear in mind that the role of the High Court is to secure observance of Constitutional, Statutory and International Standards of all persons, that the basic human rights, benefits and privileges are protected, preserved and often times enhanced.

We have considered the submissions that were made by counsel for the parties before us and we form a peremptory view that the matters raised are not frivolous and need further inquiry both at the stage of the hearing of the Chamber Summons and the Petition itself. The Court will eventually examine the contours and boundaries of section 23 of the Sixth Schedule and the entire Vetting Act. We cannot at this stage say that the matters raised by the petitioners are small and or trifling but are maters open to judicial interpretation and scrutiny. The Court will eventually undertake an onerous mission in exploring the real intention, original purport and objective of the Vetting Board beyond any doubt and will expand the principles underlying the philosophy of the Constitution and declare what the Constitution speaks about and mandates. The Court would have to undertake an exploration to the new unresolved and unforeseen challenges mounted by the petitioners, bearing in mind (speaking for ourselves) that the Court does not create any new rights not known to the Constitutional text or history but merely discovers and announces only the existing rights so far hidden under the surface of the Constitution. The Court will also investigate and navigate whether the Board misunderstood its mandate in law or it is perhaps more apt or accurate to say taken account of an immaterial consideration. Equally the Court will determine whether the petitioners and others are out to frustrate, derail and or delay a genuine exercise of a Constitutional and or statutory mandate of the vetting Board in order to defeat the intention of section 23 of the Sixth Schedule. That needs an objective sober reasonable and above all a brave mind. That task or determination would be done after hearing both sides conclusively and clearly. We have noted that the debate before us is largely to determine who between the High Court and the Vetting Board is entitled to have the last and final say in the matters involving vetting and removal of judges. Our role is not to determine who is entitled to greater importance or is to take the winner's prize at the end of the debate. We appreciate there is no agreement, concurrence, competition in the powers, privileges and duties of both sides. But one thing is clear, both perform an important function in the administration of justice as currently structured.

The question before us is whether to grant an interim protection or reliefs in view of the weighty and substantial questions raised by the applicants. In doing so we are guided by the emerging legal pronouncements made locally and internationally. The guiding factor being whether there is a prima facie case with a probability of success at the hearing.

In the Privy Council Case of **ATTORNEY GENEAL –V- SUMAIR BANSRAJ (1985) 38 WIR 286** **Braithwaite 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 the1976 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."

The aforesaid principles were adopted by the High Court of the Republic of Trinidad and Tobago in the case of **STEVE FURGOSON & ANOTHER –VS- THE A.G. & ANOTHER claim No. CV 2008 – 00639 – Trinidad & Tobago**. The **Honourable Justice V. Kokaram** in adopting the reasoning in the case of **BANSRAJ** above stated:

"I have considered the principles of *EAST COAST DRILLING –V- PETROLEUM COMPANY OF TRINIDAD AND TOBAGO LIMITED (2000) 58 WIR 351* and I adopt the reasoning of BANSRAJ and consider it appropriate in this case to grant a Conservatory Order against the extradition of the claimants pending the determination of this motion. The Constitutional challenge to the Act made in this case is on its face a serious one. The Defendant has not submitted that the Constitutional claim is unarguable. The Claimants contends that the Act is in breach of our fundamental law and the International Obligations undertaken were inconsistent without supreme law. It would be wrong in my view to extradite the claimants while this issue is pending in effect and which will render the matter of the Constitutionality of the legislation academic."

Back home, **Musinga, J** in Petition No. 16 of 2011, Nairobi – **CENTRE FOR RIGHTS EDUCATION AND AWARENESS (CREAW) & 7 OTHERS** stated that:

"………………………………………………………It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."

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.

Having heard Counsel for the parties at this nascent stage of the petition we are of the considered view that taking into account the issues raised both in the Chamber Summons and the Petition itself, it would be just and fair to grant the orders sought for a period of 14 days or until further orders.

We have also addressed our minds that the issues raised are weighty and substantial and in order to give the matter a fair and comprehensive interpretation we think the composition bench be enlarged to five judges. Consequently we make the following orders:

1. We direct that this matter be placed before the Hon. The Chief Justice as soon as possible for purposes of enlarging the panel to five.

2. In exercise of our powers under Article 23(3)(c) of the Constitution and having addressed our minds to all the issues raised we grant an order directing or ordering that all matters or proceedings before the Board be and is hereby stayed for a period of 14 days or until further orders.

3. Costs shall be in the cause.

Ruling read, signed and delivered in court this 25th day of September 2012

MOHAMED WARSAME **G. V ODUNGA**

JUDGE **JUDGE**

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