



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 351 of 2012

ANDREW OKIYA OMTATAH OKOITI.....1<sup>ST</sup> PETITIONER

MICHAEL S. CHEPKWONY.....2<sup>ND</sup> PETITIONER

SIMON L. KALALE.....3<sup>RD</sup> PETITIONER

PETER NJOROGE .....4<sup>TH</sup> PETITIONER

AND

THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT

COMMISSION FOR IMPLEMENTATION OF THE CONSTITUTION.....2<sup>ND</sup> RESPONDENT

RULING

1. The petitioners are public spirited individuals who bring this petition for the public benefit. The petition seeks clarity on the nature and extent of presidential immunity from legal proceedings during his term in office for anything done or not done in the exercise of his powers conferred by the Constitution.
2. The genesis of the petition is the publication of **Gazette Notice No. 6604** published on 11<sup>th</sup> May 2012, where the President appointed County Commissioners. Two suits were filed to challenge this appointment namely, *Nairobi High Court Misc. App. JR No. 207 of 2012, Patrick Njuguna & Another v Attorney General* and *Nairobi High Court Petition No. 208 of 2012 Centre for Rights Education and Awareness (CREAW) and Others v Attorney General*.
3. The two cases were consolidated and heard by Lady Justice Ngugi and by a judgment dated 29<sup>th</sup> June 2012 (“the judgment”), she found and held 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 11<sup>th</sup> May 2012 and Gazette Notice No. 6937 of 23<sup>rd</sup> May 2012.*
  - (ii) *Even if the President had power to make such appointments or deployments, the appointments or deployments violated Articles 10 and 27 of the Constitution.*
  - (iii) *The purported deployment of County Commissioners by Gazette Notice No. 6937 of 23<sup>rd</sup> May 2012 was therefore unconstitutional null and void.*

(iv) *In view of the public interest nature of this matter, I make no orders as to costs.*

4. The petitioners contend that by dint of **section 3(2)** of the **Sixth Schedule** to the Constitution, **sections 23** and **24** of the former Constitution remains in force until the first general election under the Constitution is held. In the premises the petitioners aver that the judgment is unconstitutional to the extent that it purports to declare that **sections 23** and **24** of the former Constitution are not in force.

5. Further to the foregoing, the petitioners contend that the President having made **Gazette Notice No. 6604** of 11<sup>th</sup> May 2012 and **Gazette Notice No. 6937** of 23<sup>rd</sup> May 2012 in exercise of his powers under **sections 23** and **24** of the former Constitution, the two cases aforementioned were null and *void ab initio* and no person could challenge the legality of the said legal notices until the expiry of the President's term of office.

6. The petitioners also argue that under the former Constitution, the President could only be held accountable by Parliament for the manner in which he exercises his powers and functions under the Constitution or any other law. In legal terms under **section 59(3)** of the former Constitution where the President is alleged to have violated the law, the National Assembly can pass a resolution declaring that it has no confidence in the Government of Kenya.

7. The petitioners' further state that with regard to the raging controversy over the exercise of the High Court's jurisdiction in relation to the exercise of executive powers the second respondent has adopted an indifferent attitude despite the fact that some of the High Court decisions on the matter raise fundamental questions likely to affect the implementation of the Constitution. In the premises it is necessary for the Commission for the Implementation of the Constitution (CIC) to be a party in this matter in order to ensure that the decision of the Court in this petition will be factored during the implementation of the Constitution.

8. In view of the foregoing, the petitioners aver that it is now incumbent for the High Court to interpret the practical meaning and effect of presidential immunity and executive powers under the various provisions of the Constitution pursuant to its duty to promote and safeguard constitutionalism and the rule of law.

9. In the petition the petitioner has framed nine questions for determination as follows;

(1) *Whether sections 23 and 24 of the former Constitution are in force by dint of section 3(2) of the Sixth Schedule to the Constitution of Kenya, 2010.*

(2) *Whether by dint of section 14 of the former Constitution the High Court has jurisdiction to determine the legality of presidential exercise of powers under sections 23 and 24 of the former Constitution during the President's tenure of office.*

(3) *Whether Article 143 of the Constitution renders the exercise of presidential powers under Articles 131 and 132 of the Constitution a non-justiciable matter during the President's tenure of office.*

(4) *Whether the invocation of the Court's jurisdiction under Article 165(3) of the Constitution to adjudicate over legal proceedings in relation to the exercise of presidential powers under sections 23 and 24 of the former Constitution or Articles 131 and 132 of the new Constitution violates the doctrine of separation of powers under which the President is accountable to the National Assembly during his term of office in relation to how he exercises executive authority and power.*

(5) *Whether provision for removal of President by impeachment under Article 145 of the Constitution is an absolute bar of any legal proceedings against the President during his tenure of office.*

(6) *Whether under Sections 23 and 24 of the former Constitution and Articles 131 and 132 of the new Constitution the President's Ministers (secretaries) and subordinates are legally – vicariously or expressly – responsible for the exercise of presidential or executive power vested in the President.*

(7) *Whether during the President's tenure in office Articles 27 and 50 of the Constitution would be violated by institution of civil or criminal proceedings against the President or his subordinates in relation the actions and omissions of the president in exercise of his powers under Sections 23 and 24 of the former Constitution or Articles 131 and 132 of the new Constitution.*

(8) *Whether the sovereignty, dignity, respect and legitimacy of the Kenyan State would be eroded or compromised by subjecting the President – as Head of State and Government, symbol of national unity and Commander in-chief of the Armed Forces – to civil or criminal proceedings during his tenure of office for anything done or omitted to be done in exercise of his functions or powers.*

(9) *Whether Gazette Notice No. 6937 published in the Kenya Gazette of 23<sup>rd</sup> May 2012 is justiciable in the High Court or any other Court established under the Laws of Kenya during President Kibaki's tenure in office.*

10. As a consequence of the questions, the petitioner thereafter seeks the following reliefs from the Court;

(a) *That a declaration be issued to declare that by dint of section 3(2) of the Sixth Schedule to the new Constitution, sections 23 and 24 of the former Constitution remain in force until the first general election under the new Constitution is held.*

(b) *That a declaration be issued to declare that by dint of Section 14 of the former Constitution, during the President's tenure of office the High Court or any other Court established under the Laws of Kenya have no jurisdiction to adjudicate over the actions and omissions of the President in exercise of his powers under section 23 and 24 of the former Constitution.*

(c) *That a declaration be issued to declare that by dint of Article 143 of the Constitution of Kenya, 2010 during the President's tenure of office the High Court or any other Court established under the Laws of Kenya have no jurisdiction to adjudicate over the actions and omissions of the President in exercise of his powers under Articles 131 and 132 of the Constitution.*

(d) *That a declaration be issued to declare that during the President's tenure of office the doctrine of separation of powers absolutely bars the High Court or any other Court established under the laws of Kenya from adjudicating over legal proceeding in relation to the exercise of presidential powers under sections 23 and 24 of the former Constitution and Article 131 and 132 of the new Constitution.*

(e) *That a declaration be issued to declare that during the President's tenure of office the provision for removal of the President by impeachment under Article 145 of the Constitution is the exclusive mechanism or lawful devise to hold the President accountable for the exercise of his powers under Articles 131 and 132 of the Constitution.*

(f) *That a declaration be issued to declare that under sections 23 and 24 of the former Constitution and Articles 131 and 130 of the new Constitution, the President's Ministers (Secretaries) subordinates are not legally – expressly or vicariously – responsible for the exercise of presidential or executive power vested in the President.*

(g) *That a declaration be issued to declare that during the President's tenure of office the institution of legal proceedings against his subordinates in relation to the exercise of Presidential powers under sections 23 and 24 of the former Constitution or Articles 131 and 132 of the new Constitution violates Articles 27 and 50 of the Constitution.*

(h) *That a declaration be issued to declare that the institution or legal proceedings against the President – as Head of State and Government, symbol of National Unity and Commander-in-Chief of the Armed Forces – during his tenure of office erodes and compromises the sovereignty, dignity, respect and legitimacy of the Kenyan State.*

(i) That a declaration be issued to declare that during the tenure of President Mwai Kibaki Legal Notice No. 6937 published in *The Kenya Gazette* of 23<sup>rd</sup> May 2012 is not justiciable before the High Court or any other Court established under the laws of Kenya.

(j) That the costs of this petition be borne by the first respondent in any event.

### **Issue for Determination**

11. When this matter came up for hearing on 4<sup>th</sup> December 2012, I directed the petitioners to show cause why this matter should not be dismissed as it amounts to a collateral attack on the judgment of Hon. Lady Justice M. Ngugi in *Nairobi Petition No. 208 of 2012* and *Nairobi High Court Misc. App. JR No. 207 of 2012* (“the consolidated case”) which is now pending in the Court of Appeal.

### **The Submissions**

12. Mr K. Mungai, counsel for the petitioners, submitted that the dispute raises an issue of Presidential immunity from legal process and the nature and purport of immunity from legal proceedings when the President is in office under the Constitution. Counsel contended that **Article 143** which deals with Presidential immunity from legal proceedings which was not an issue in petition and the judgment and it will not be an issue on appeal. Counsel noted that the Court should bear in mind its jurisdiction under **Article 165** to interpret the Constitution. Mr Mungai further submitted that resolving this controversy is critical and cannot be an academic issue and whereas the pending appeal from the judgment casts a shadow on this matter, it is proper that this matter await the determination of the Court of Appeal whereupon the petitioner may then address the Court on the issues raised.

13. Mr Mungai also submitted that there were three issues for determination in the consolidated case as follows; (a) Whether *Gazette Notice No. 6604 of 2012* is valid (b) whether the President had power to appoint County Commissioners (c) whether the appointment of Commissioners complied with the 1/3 gender rule required for public bodies under **Article 27**. The current petition raises different issues framed and this matter should proceed on its own merit.

14. Mr Bitta, counsel for the Attorney General, submitted that the petitioner’s case is premised on the judgment in the consolidated cases and in effect it seeks a review of the judgment. Counsel relied on the case of *Peter Ng’anga Muiruri v Credit Bank Limited and Others Nairobi Civil Appeal No. 203 of 2006 (Unreported)* for the proposition that this High Court cannot review the orders of a Judge of concurrent jurisdiction. Mr Bitta argued that there must be an end to litigation and since the petitioner was fully aware of the matters that were subject of the judgment of Justice Ngugi, the Court should strike out the petition.

### **Analysis and Determination**

15. The petitioners have framed issues for determination which they contend are different from those in the previous suits hence, this matter should be allowed to proceed. In my view, the issues in controversy cannot be unmoored from the facts of the case as pleaded. The petitioners’ case was pleaded on the basis of the exercise of power by the President to appoint County Commissioners, absent that basic fact, the other issues raised become academic issues which would require the Court to enter upon a dissertation on the President’s power.

16. Whether the present case differs from the previous proceedings before Justice Ngugi should be approached from the position of substance rather than form. The test is not how the petitioners frame the issues but what the effect of the suit to be litigated will be on the judgment that has fallen from the pen of Justice Ngugi.

17. The foundation of the petitioners’ case is that the President has power to appoint County Commissioners and that the President cannot be challenged by way of a suit and Justice Ngugi was wrong to pronounce the judgment impugning the President’s act in civil proceeding. The result of granting the

prayers sought in the petition would be to set aside the judgment.

18. The petitioners' case is that the High Court should intervene to resolve raging controversies surrounding the Presidential power and capacity to be sued and related important questions that would have grave implications on the implementation of the Constitution. The jurisdiction of the High Court under **Article 165** is wide but it does not exist in a vacuum to be exercised when a party requests the Court to answer a "question." The "question" contemplated in **Article 165** must arise from a real controversy or case. Indeed the right granted to parties either to challenge any of by any person, office, organ or authority contemplates a real controversy or case.

19. **Article 22(1)**, which gives a party the right to enforce the Bill of Rights, states, "**Every person has the right to institute of Court proceedings claiming that a right of fundamental freedom in the Bill of Rights has been deceived, violated or is infringed.**" A similar provision is to be found at **Article 258(1)**, which provides, "**Every person has the right to institute court proceedings, claiming that this Constitution has been contravened or is threatened with a contravention.**" Thus, for a party to move the court there must be a contravention or threat of contravention. Whether there is a contravention or threat of the Bill of Rights or any other provisions of the Constitution is a question of fact in each case. What is clear, in my view, is that the "questions" referred to in **Article 165** cannot be divorced from the factual situation of the case that demonstrates the threat or contravention of specific provisions of the Constitution and not just a controversy in the popular sense of the word. My reasoning is further underpinned by the fact that it is only the Supreme Court that is empowered to issue an advisory opinion under the provisions of **Article 163(6)** as read with **Article 165(5)(a)** clearly demonstrating that, apart from the Supreme Court in the instance cited, all other courts are required to address themselves to resolution of real issues (See also *Peter Kaluma v Attorney General Nairobi Petition No. 79 of 2011 (Unreported)*, *Harun Mwau and Others v Attorney General and Others Nairobi Petition No. 65 of 2011 (Unreported)* and *Jesse Kamau and 25 Others v The Attorney General, Nairobi Misc. App. No. 890 of 2004 (Unreported)* ).

20. In other jurisdictions the exercise of judicial power implies the existence of a true dispute. In the case of *Muskrat v United States* 219 US 346(1911) Justice Day of the United States Supreme Court stated that judicial power is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. Chief Justice Marshall of the United States Supreme Court also observed in the famous case of *Marbury v Madison* 5 US 137; 2 L.Ed 60 (1803). 1 Cranch that the right to declare an Act of Congress unconstitutional could only be exercised when a proper case between opposing parties is submitted for judicial determination. The same principle case be found in other cases from Australia and the United Kingdom to the same effect, i.e., *Re Judiciary Act 1903 – 1920 & In Re Navigation Act 1912-1920* (1921) 29CLR 257 and *The Queen (on the application of (1)A(2)B by their litigation friend and Official Solicitor (3)X (4)Y Claimants v East Sussex County Council* [2003] EWHC 167.

21. The "questions" for determination in this case then cannot be divorced from the subject of adjudication by Hon Lady Justice Ngugi and as I stated elsewhere in this ruling, if reference to that judgment is removed from the petition, the petition becomes devoid of any basis for a dispute or controversy. I do not therefore agree with Mr Muigai that this matter should be stayed pending determination of the pending appeal. To allow it to stay on the court rolls would aggravate the abuse of process as it will necessarily mean that the same issues will be re-litigated once the Court of Appeal has pronounced itself on the matters in issue.

22. The substance of the Justice Ngugi's determination was the President's power and whether the President is subject to the law. If the inquiry in the present petition proceeds and succeeds, the Court would have to examine and analyse the judgment and categorically state that Justice Ngugi was wrong. This is the approach that is not permitted as it is a collateral attack on a valid judgment of a competent Court.

23. I agree with the respondent that in light of the case of *Peter Ng'ang'a Muiruri v Credit Bank Limited and Others (Supra)*, it is now well established that the a litigant will not be permitted to

challenge the decision of a High Court Judge by filing a separate petition to challenge the judgment (See also *Philip Kipchirchir Moi v Attorney General Limited and Another Nairobi Petition No. 65 of 2012 (Unreported)*, *Robert Mwangi v Shepherd Catering Limited and Another Nairobi Petition No. 84 of 2012 (Unreported)*, *John Githongo and Others v Harun Mwau and Others Nairobi Petition No. 44 of 2012 (Unreported)*).

**Disposition**

24. On the basis of what I have stated, I am afraid I cannot permit the case to proceed on the course proposed by the petitioners. I find and hold that this petition is an abuse of the court process and it calls to be struck out. It is hereby struck out with no order as to costs.

**DATED and DELIVERED at NAIROBI** this 14<sup>th</sup> day of December 2012

**D.S. MAJANJA**

**JUDGE**

Mr K. Mungai instructed by Murgor and Company Advocates for the petitioner.

Mr E. Bitta, Senior Litigation Counsel, instructed by the State Law Office for the 1<sup>st</sup> respondent.