



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 545 of 2012

SUSAN WAMBUI KAGURU.....1ST PETITIONER
CHARLES KABUGI KARIERI KIBOI.....2ND PETITIONER
STEVEN MUKONZA MBOLONZI.....3RD PETITIONER
GEORGE MURIITHI GITHINJI.....4TH PETITIONER
ALBERT KARAKACHA MUHAVALI.....5TH PETITIONER

AND

ATTORNEY GENERAL.....1ST RESPONDENT
MINISTER FOR TRANSPORT.....2ND RESPONDENT

CONSOLIDATED WITH PETITION NO. 553 OF 2012

HON. FERDINAND NDUNG’U WAITITU.....1ST PETITIONER
HON. GIDEON KIOKO MBUVI SONKO.....2ND PETITIONER
BRIAN MBUTHIA GAKERE.....3RD PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT
MINISTER OF TRANSPORT.....2ND RESPONDENT

RULING

1. I have before me today, two petitions which challenge the constitutionality of the provisions of the *Traffic (Amendment) (No 2) Act, 2012* and the *Traffic (Amendment) Act, 2012*. They two petitions have now been consolidated.
2. When the *Petition No. 553 of 2012, Ferdinand Ndung’u Waititu & Another v Attorney General*

and Another came up for directions, I did entertain an application for conservatory orders and in my ruling of 3rd December 2012, I stated, *“While I am prepared to certify the matter as urgent, the only issue for consideration is whether I should grant the ex-parte conservatory orders. Admittedly the conservatory orders seek to restrain the enforcement of a law passed by the National Assembly and assented to by His Excellency the President. Under the Constitution, the National Assembly and President exercise delegated sovereign authority of the people delegated to them in enacting laws (See Article 1(3) of the Constitution). It is for this reason that every statute that flows from the legislative process is presumed to be constitutional and valid and unless there are very clear reasons to stay enforcement of the statute, the court will not ordinarily grant conservatory orders. I have perused the Supporting Affidavit of Hon. Ferdinand Ndung’u Waititu sworn on 30th November 2012 and it sets out matters in which I think point to inconvenience of those upon whom the law applies rather than constitutionality which is a matter the court will have the opportunity to take full arguments.*

It is on the aforesaid grounds that I reject the prayers for ex-parte conservatory relief.”

3. The applicants in **Petition No. 545 of 2012** have also renewed the application for conservatory orders pending hearing and determination of the petition as is set out in the Chambers Summons dated 29th November 2012.
4. Mr Ndegwa and Mr Ondieki for the petitioners have strongly urged the court to consider issuing conservatory orders on several grounds. First, the enforcement of the law is causing a lot of suffering to commuters and the general public. Second, the Act was hurriedly enacted and brought into force without giving a chance for public consultation and participation. Third, the law was enacted without regard to an integrated transport policy framework particularly given that a key component of that framework the National Transport and Safety Authority, established under the **National Transport and Safety Authority Act, 2012** is yet to be up and running. Fourth, they contend that the old Traffic Act is sufficient to maintain law and order on our roads as evidenced by the enforcement of the “*Michuki Rules*” in 2003-2004.
5. Mr Opondo for the respondents vigorously opposed the application on the basis that the **Traffic (Amendment) Act** was legislation duly passed by Parliament and as a matter of the rule of law it had to be applied and obeyed by everyone. He noted that the Act was passed with intention of curbing road carnage. Counsel submitted that to stay the operation of the Act would be to encourage impunity on our roads.
6. I have given thought to the arguments made and once again I reiterate that every statute passed by the legislature enjoys a presumption of legality and it is the duty of every Kenyan to obey the very law that are passed by our representatives in accordance with our delegated sovereign authority.
7. The question for the court is to consider whether these laws are within the four corners of the Constitution. No doubt serious and weighty arguments have been advanced and I think any answer to them must await full argument and consideration by the court. I cannot at this stage make an interim declaration which would effectively undo the legislative will unless there are strong and cogent reasons to do so.
8. I have considered the affidavit of Susan Wambui Kaguru sworn on 29th November 2012 and it contains the same legal arguments that will be made during the hearing of the petition. I do not see any evidence that application of the Act has been done in a manner that would be unconstitutional, infringe or violate the fundamental rights of anyone or that anything done under authority of the amended Act exceeds constitutional mandates in order to enable the Court intervene. In short, what I have are legal arguments, inferences and suppositions on what will or may not happen if the legislation is enforced.
9. I would add that if the **Traffic (Amendment) Act** has caused such injury or grief to those whom the petitioners represent surely then the evidence would have been presented. As I said in my previous decision, enforcement of law and order is inconvenient but what we have is the law. The parties must now wait for the court to apply its mind to the cases before it and make its pronouncement.

10. I therefore reject the application for conservatory relief pending the hearing of the petition.

DATED and DELIVERED at NAIROBI this 6th day of December 2012

D.S. MAJANJA

JUDGE

Mr S. Ndegwa instructed by S. W. Ndegwa and Company Advocates for the Petitioners in ***Petition No. 545 of 2012.***

Mr E. Ondieki with him Mr Gathii instructed by Ondieki and Ondieki Advocates for the petitioners in ***Petition No. 553 of 2012.***

Mr Opondo, Litigation Counsel, instructed by the State Law Office for the respondents.