



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**PETITION NO. 9 OF 2011**

**IN THE MATTER OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL**

**RIGHTS AND FREEDOMS UNDER ARTICLES 37 AND 38 OF THE CONSTITUTION**

**BETWEEN**

**HONOURABLE EUGENE WAMALWA.....PETITIONER**

**VERSUS**

**THE MINISTER FOR STATE FOR INTERNAL SECURITY.....1<sup>ST</sup>  
RESPONDENT**

**THE COMMISSIONER OF POLICE.....2<sup>ND</sup> RESPONDENT**

**RULING**

The petitioner is a Member of Parliament for Saboti Constituency. By an application filed under certificate of urgency and dated January 2011 the petitioner sought the following orders:

**1. That this court be pleased to certify this application as urgent and to dispense with service of the same at the first instance.**

**2. That pending the hearing and determination of the petition filed herein this honorable court be pleased to issue a conservatory relief order prohibiting the respondents by themselves, their organs, agents, servants or employees from stopping or in any way interfering with the meeting scheduled for 29<sup>th</sup> January, 2011 at Kamukunji Grounds in Nairobi convened by the petitioner.**

**3. That the court be pleased to issue order directing the respondents, their agents to make the necessary arrangements including the provision of security to enable the petitioner proceed with the meeting scheduled for 29<sup>th</sup> January, 2011 at Kamukunji Grounds in Nairobi.**

**4. That the court be pleased to issue any other or further orders for the expeditious hearing and determination of this petition.**

**5. That the costs of this application be costs in the cause.”**

In his affidavit in support of the application, the petitioner, apart from being a Member of Parliament, stated that he is a declared presidential aspirant for the presidential election constitutionally scheduled to be held in the year 2012. He decided to formerly launch his presidential campaign at the historic Kamukunji Grounds. By a letter dated 4<sup>th</sup> January, 2011 he notified the Officer in Charge, Shauri Moyo police Station, of his intention to convene a political meeting on the 29<sup>th</sup> day of January, 2011 from 10.00 a.m. to 6.00 p.m. at Kamukunji Grounds. In the said letter he stated that the meeting shall be hosted by himself and other participants including Mr. Maina Njenga and Mr. Tony Gachoka. The last sentence of the said letter was as follows:

**“Since we expect thousands of our supporters we will require security and the protection of the police against any eventuality.”**

The letter was copied to the Provincial Police Officer, Nairobi as well as the Minister for Internal Security.

Subsequent to giving the aforesaid notice, the petitioner went on to apply for the necessary licence from the City Council of Nairobi and the National Environmental Management Authority (NEMA). He also proceeded to make other arrangements for the meeting including publicizing the same, arranging for guest speakers and mobilizing citizens to attend the meeting. The petitioner also engaged on arrangements of preparing the venue in terms of arranging tents, public address system, banners and so on. He deposed that he had spent over Kshs. 1 million in making the said arrangements.

On 25<sup>th</sup> January, 2011 the petitioner received a letter dated 21<sup>st</sup> January, 2011 from the provincial Police Officer, Nairobi, whose effect was to cancel the meeting scheduled for 29<sup>th</sup> January, 2011. In the said letter, the Police stated, *inter alia*:

**“According to our intelligence source, there exists credible intelligence reports that organized criminal groups, especially members of the prescribed (sic) Mungiki Sect have organized to attend and infiltrate your planned meeting with the aim of creating and perpetuating violence at the meeting venue, a fact that will disrupt public order within and around the area of the meeting.”**

The provincial Police Office further informed the petitioner that the planned meeting will prejudice the rights and fundamental freedoms of others and thus declined to grant the permission sought under **section 5 (8) (b)** of the **Public Order Act** and **Article 24(1)(d)** of the **Constitution of Kenya**.

The petitioner stated that the denial of permission to hold the intended meeting is a breach of his constitutional right and freedom, right to assemble, demonstrate, picket and petition contrary of **Article 38** of the **Constitution** and is also a breach of his political rights and those of other citizens contrary to **Article 37** of the **Constitution**.

The petitioner further pointed out that he had previously notified the police of his intention to host a meeting at the said venue on 12<sup>th</sup> of December, 2010 but that meeting was reschedule to 13<sup>th</sup> December, 2010. The meeting was eventually cancelled by the state. The matter was raised in parliament on 21<sup>st</sup> December, 2010 and the Assistant Minister in the Ministry of State for Provincial Administration and Internal Security gave an assurance that once the police were informed of the petitioner's intention to hold the meeting. Again, they would be able to provide security for the meeting. The petitioner annexed to his affidavit a true copy of the official report of the proceedings of the National Assembly of 21<sup>st</sup> December, 2010. The petitioner urged the court to grant the orders as sought.

The respondents filed a replying affidavit sworn by **Moses Nyakwama Ombati**, the **Deputy Provincial Police Officer, Nairobi**. He conceded that the petitioner wrote a letter to the Officer Commanding Shauri Moyo Police Station on 4<sup>th</sup> January, 2011 regarding his intention to hold a public meeting at Kamukunji Grounds, Nairobi. In his view, the letter was punctuated with a tone of fear of insecurity in the last paragraph thereof. The police conducted investigations which revealed that criminal gangs were planning to infiltrate the meeting and cause chaos and anarchy that would result to shooting and robberies. As a result, he declined to allow the meeting to proceed as scheduled.

He further stated that the Officer Commanding Shauri Moyo Police Station had informed him that the conveners of the meeting have organized to transport members of the outlawed Mungiki sect from far and wide to attend the meeting. That would be in contravention of the law and in particular **Section 3 of the Prevention of Organized Crimes Act, 2010**. He further stated that the meeting is likely to disrupt the normal business and life of the people of Nairobi and therefore urged this court not to grant the prayers sought by the petitioner.

**Mr. Majanja**, who led a group of several other advocates in representing the petitioner, made brief submissions in support of the application. He emphasized the provisions of **Article 1(1) & (2) of the Constitution** which state that:

**"(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.**

**(2) The people may exercise their sovereign power either directly or through their democratically elected representatives."**

Counsel further cited the provisions of **Articles 37 and 38 of the Constitution** which guarantee the freedom of assembly, demonstration, picketing and petition. In his view, such rights could only be limited in accordance with the provisions of **Article 24** of the Constitution which provides as hereunder:

**"A right or fundamental freedom in the bill of rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -**

**(a) the nature of the right or fundamental freedom;**

**(b) the importance of the purpose of the limitation;**

**(c) the nature and extent of the limitation;**

**(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and**

**(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."**

In his view, the reasons stated by the respondents in refusing permission to the petitioner to hold the intended meeting are insufficient and do not meet the aforesaid considerations. He further submitted that it is the duty of the State to provide security to its citizens.

**Mr. Ombwayo** for the respondents also made brief submissions in his opposition to the application. He started by citing the preamble to the Constitution which, *inter alia*, states that the people of Kenya are "**committed to nurturing and protecting the well being of the individual, the family, communities and the nation**". He said that all the relevant provisions of the Constitution as cited by the petitioner's counsel ought to be read and interpreted in light of the above quoted provisions of the preamble to the Constitution. He said that the police had advanced sufficient constitutional reasons for refusing permission to hold the intended meeting. He emphasized the fact that there were intelligence reports that members of proscribed Mungiki sect were planning to attend the meeting and disrupt the peace of Nairobi. He urged the court to strike a proper balance between the rights of the petitioner and those of the public in view of the security threats.

Having carefully considered the affidavits filed by the parties herein as well as the above submissions and considering the urgency of this matter, I wish to start by observing that in interpreting the Constitution, the constitutional interpretation principle of harmonization has to be borne in mind. That principle requires that all provisions of the Constitution concerning an issue should be considered together and applied in the circumstances of any given matter. In addition, the widest construction possible in the context of the matter has to be given to the words used according to their ordinary meaning. See **OLUM & ANOTHER vs. ATTORNEY GENERAL (1)[2002] 2 EA 508.**

The primary reason advanced by the respondents in declining to grant permission to the petitioner to hold the intended meeting is that it is feared that members of an unlawful group known as "**the Mungiki**" may attend the meeting and disrupt public order in Nairobi. The respondents cited the provisions of **Article 24(1) (d)** of the **Constitution**. However, the provisions of Articles 37 and 38 are very clear that:

**"37. Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to represent petitions to public authorities."**

**Article 38(1)** states that:

**"(1) Every citizen is free to make political choices, which includes the right -**

**(a) To form or participate in forming a political party;**

**(b) To participate in the activities of, or recruit members, for a political party; or**

**(c) To campaign for a political party or cause."**

It is agreed that a right or a fundamental freedom in the Bill of Rights can be limited as provided under **Article 24** of the Constitution. However, in interpreting the provisions of **Article 24**, this court is not oblivious of the political background that gave rise to the crave for a new Constitution. The State should not be allowed to suppress the freedom of assembly without sufficient and genuine reasons. By repressing

such freedom the State will be encouraging people to look for alternative ways and means of ventilating their ideas. Such repression of the fundamental right of assembly may also amount to breach of the freedom of expression as guaranteed under **Article 33** of the Constitution which grants every Kenyan the freedom to, *inter alia*, seek, receive or impart information or ideas.

That notwithstanding, all Kenyans and especially politicians, ought to be reminded that the right to freedom of expression does not extend to advocacy of hatred or any negative words that may constitute ethnic incitement, vilification of others on the basis of tribe, age, gender or economic status. See **Article 33 (2) (d)** and **(3)** of the Constitution.

While the court appreciates that in matters of national security the Police and the National Intelligence Service cannot be compelled to disclose their sources of information, in instances where it appears that the phrase "national security" is used as a cloak to deny a fundamental right, I think the degree of proof on the part of the State that there exists sufficient reason to limit a fundamental right, is fairly high.

In this matter, I believe the State is well able to use its wide resources and machinery to prevent the occurrence of any violence in the planned meeting. The State is capable of ensuring that every person who attends the planned meeting is unarmed. By refusing to allow the planned meeting to proceed on the pretext of security concerns as aforesaid, is tantamount to admitting that the State is incapable of dealing with members of outlawed groups or sects, which is not the case.

The petitioner is a politician and his political ambitions have been stated in his affidavit. The respondents should not be seen to be curtailing his fundamental constitutional rights because of his expressed ambitions. I hope that is not the case. This court is enjoined to interpret the Constitution in a manner that promotes its purposes, values and principles without fear, favour, affection or ill will.

Having taken into consideration all the relevant factors, I am persuaded that the wider interests of justice dictate that the prayers sought by the applicant in prayers 2 and 3 of his application, be granted which I hereby do. The respondents shall bear the costs of this application.

**DATED, SIGNED and DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF JANUARY, 2011.**

**D.MUSINGA**  
**JUDGE**

**In the presence of:**

Nazi – Court Clerk

Mr. Majanja, Mr. Kamunde, Mr. Mosota, Mr. Miketi for the petitioner

Mr. Ombwayo for the respondents

Mr. Gatitu – Amicus Curiae