



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

PETITION NUMBER 16 OF 2011

IN THE MATTER OF ARTICLES 22 AND 23 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 3, 10, 27, 73(1) (A), 129, 131, 156, 166, 228 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA AND SECTIONS 12, 24 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF THE NOMINATIONS FOR APPROVAL AND EVENTUAL APPOINTMENTS TO THE OFFICES OF THE CHIEF JUSTICE, THE ATTORNEY GENERAL, THE DIRECTOR OF PUBLIC PROSECUTIONS AND THE CONTROLLER OF BUDGET UNDER THE CONSTITUTION OF THE REPUBLIC OF KENYA

BETWEEN

1. CENTRE FOR RIGHTS EDUCATION AND AWARENESS (CREAW).....1ST PETITIONER
2. CAUCUS FOR WOMEN'S LEADERSHIP (CAUCUS)2ND PETITIONER
3. TOMORROWS CHILD INITIATIVE (TCI)3RD PETITIONER
4. WOMEN IN LAW AND DEVELOPMENT (K)4TH PETITIONER
5. DEVELOPMENT THROUGH MEDIA (DTM)5TH PETITIONER
6. COALITION OF VIOLENCE AGAINST WOMEN (COVAW)6TH PETITIONER

7. YOUNG WOMEN LEADERSHIP INSTITUTE (YWLI)
7TH PETITIONER

8. THE LEAGUE OF KENYA WOMEN
VOTERS8TH PETITIONER

VERSUS

THE HON. ATTORNEY
GENERALRESPONDENT

RULING

The petitioners are non Governmental Organizations and Associations incorporated and registered as such under the Laws of Kenya. They are also members of the Gender 10 and Gender Plus coalitions which are networks of Civil Society Organizations advancing and advocating for gender considerations in all spheres of development. They brought a petition as groups and associations acting on behalf of their members, on behalf of the women of Kenya and in the public interest.

The petitioners moved this court by way of a petition dated 2nd February, 2011 where they sought the following orders:

“(a) A declaration that the office of the President is an institution bound by the Constitution and that is under a duty to respect, uphold and defend the Constitution in terms of Article 2(1), 3(1), 129 and 131 of the Constitution of the Republic of Kenya.

(b) A declaration that the nomination of only people of the male gender for approval by Parliament is gender insensitive, discriminatory against women, disrespectful of women and contrary to Articles 27, 129 and 131 of the Constitution of the Republic of Kenya and is therefore null and void.

(c) A declaration that the nominations for purposes of approval and eventual appointment to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget made by the Office of the President on 28.01.2011 were in violations of Articles 3, 10, 27, 129, 131 and 166 of the Constitution and Sections 12 and 24 of the Sixth Schedule of the Constitution hence are unconstitutional, null and void.

(d) A declaration that any appointments that may be made in like manner as the appointments to the office of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget made by the Office of the President on 28.01.2011 would be in violation of Articles 3, 10, 27, 129, 131 and 166 of the Constitution and Sections 12 and 24 of the Sixth Schedule of the Constitution hence are unconstitutional, null and void.

(e) An order restraining any further purported approval and eventual appointment of the nominations made by the Office of the President on 28.01.2011 or any other nominations that may be made in like manner without compliance with the letter and majesty of the Constitution of the Republic of Kenya.

(f) Or that such other orders as this honourable court shall deem just.”

It is important that the court highlights various contents of the petition so that the context in which the aforesaid prayers were made can be grasped. I can do no better than cite a portion of the petition as hereunder:

“THE LEGAL FOUNDATIONS OF THE PETITION.

- 3. The Constitution of Kenya 2010 was promulgated and came into force on 27.08.2010.**
- 4. Article 2(1) of the Constitution of Kenya pronounces the supremacy of the Constitution and provides that the Constitution binds all State organs at both levels of government.**
- 5. Article 2(5) of the Constitution of the Republic of Kenya provides among other things that any act or omission in contravention of the Constitution is invalid.**
- 6. Article 3 of the Constitution of the Republic of Kenya obligates every person to respect, uphold and defend the Constitution.**
- 7. Article 10 of the Constitution of the Republic of Kenya sets out the national values and principles of governance that bind all state officers, state organs, public officers and all persons whenever they apply or interpret the Constitution, enact, apply or interpret any law, make or implement public policy decisions.**
- 8. Among the national values and principles of governance are, national unity, the rule of law, participation of the people, equity, inclusiveness, equality, human rights, non-discrimination, good governance, transparency and accountability.**
- 9. Article 27 of the Constitution of the Republic of Kenya provides for equality and freedom from discrimination and in particular provides that:**
 - (a) every person is equal before the law and has the right to equal protection and equal benefit of the law.**
 - (b) Women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres.**
 - (c) The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.**
- 10. Article 73 of the Constitution of the Republic of Kenya provides that authority assigned to a state officer is a public trust to be exercised in a manner that is consistent with the purposes and objects of the Constitution, demonstrates respect for the people, brings honor and dignity to the office and promotes public confidence in the integrity of the office.**
- 11. Under Article 129 of the Constitution of the Republic of Kenya, the Executive Authority of the Republic should be exercised in accordance with the Constitution and in a manner compatible with the principle of service to the people of Kenya and for their well being and benefit.**
- 12. Under Article 131 of the Constitution the President of the Republic of Kenya is under a duty to respect, uphold and safeguard the Constitution, promote and enhance the unity of the nation and ensure the protection of human rights and fundamental freedoms and the rule of law.**
- 13. Article 166 of the Constitution of the Republic of Kenya provides for the process of appointment of the Chief Justice, which is, appointment by the President in accordance with the recommendation of the Judicial Service Commission and subject to the approval of the National Assembly.**
- 14. Article 156 of the Constitution of the Republic of Kenya provides for the appointment of the Attorney General which is nomination and appointment by the President subject to approval by the National Assembly.**

15. Article 157 of the Constitution of the Republic of Kenya provides for the process of appointment of the Director of Public Prosecutions which is nomination and appointment by the President subject to approval by the National Assembly.

16. Article 228 provides for the appointment of the Controller of Budget which is nomination and appointment by the President subject to approval by the National Assembly.

17. Section 12 of the Sixth Schedule of the Constitution of the Republic of Kenya saves the persons occupying the offices of the President and the Prime Minister immediately before the effective date (27.8.2010) in accordance with the National Accord and Reconciliation Act, 2008, until the first General Election held under the Constitution.

18. Section 24 of the Sixth Schedule of the Constitution of the Republic of Kenya provides for the termination of the term of office for the person serving as the Chief Justice on the effective date and provides that such person shall vacate office within six months from the effective date and the successor in office shall be appointed by the President subject to the National Accord and Reconciliation Act, and after consultation with the Prime Minister and with the approval of the National Assembly.

19. Article 259 of the Constitution of the Republic of Kenya provides that the Constitution must be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.”

The petitioners complained that on 28th January, 2011 the Office of the President announced the nomination for approval and eventual appointment of persons to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget in a manner that is unconstitutional. They stated that all the persons so nominated are of the male gender. They further stated that the Office of the Prime Minister has claimed that it was not consulted before the said nominations were done. They further stated that the Judicial Service Commission has also claimed that it did not make recommendations for nomination to the Office of the Chief Justice. The petitioners further stated that the aforesaid positions were never advertised in order to give every eligible Kenyan an equal opportunity to apply for consideration. That process of nomination has generated heat, controversy and tension in a manner that threatens national unity, the petitioners added.

Together with the petition, the petitioners filed an application by way of chamber summons brought under **Articles 23 (3) (c) of the Constitution, Section 19 of the Sixth Schedule of the Constitution and Rules 20 and 21 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights of the Individual) High Court Practice and Procedure Rules, 2006.** They sought the following relief:

“That pending the hearing and determination of the substantive Constitutional petition a conservatory order be issued restraining the Respondent and any state officer or organ of State from carrying on with the process of approval and eventual appointment to the offices of Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget on the strength of the nominations made by the Office of the President on 28.01.2011 or other nominations that may be done in disregard of the Constitutional provisions relating to gender, equity and equality, equal opportunities for all, transparency and accountability and consultations.”

The application was supported by an affidavit sworn by **Ann Wairimu Njogu**, the Executive Chairperson of the 1st petitioner. The affidavit reiterates the contents of an affidavit sworn by the same deponent in support of the petition. That affidavit amplifies the issues raised in the petition as summarized hereinabove and refers to the various provisions of the Constitution that were alleged to have been violated in making the four nominations as aforesaid. The application seeking the conservatory orders

was argued this morning. The petitioners were represented by Mrs. Judy Thongori, Mrs. Alice Wahome and Mr. Ongoya. The respondent was represented by Miss Wanjiku Mbiyu, Mr. Antony Ombwayo and Mr. Kefa Onyiso. The Party of National Unity was represented by Mr. C.N. Kihara and Dr. Stephen Njiru.

The main arguments of the petitioners in seeking the conservatory orders may be summarized as hereunder:

- **The averments in the petition and the depositions in the affidavit sworn by Ann Njogu clearly demonstrate that the petitioners have a prima facie case with a likelihood of success.**

- **The manner in which the four nominations were done violate the following Articles of the Constitution:**
 - (i) **Article 27(3) of the Constitution that guarantees the fundamental right and freedom of women and men to equal treatment.**

 - (ii) **Article 27(4) & (5) which prohibits the State and/or person from discriminating directly or indirectly against any person on any ground including sex.**

 - (iii) **Article 3 that obligates every person to respect, uphold and defend the Constitution.**

 - (iv) **Article 10(2) (a) that guarantees the rule of law as one of the national values and principles that bind all State officers, public officers and all persons whenever they apply or interpret the Constitution.**

 - (v) **Article 10(2) (b) that guarantees equity, inclusiveness, equality and non-discrimination as national values that bind all State officers, public officers and all persons whenever they apply or interpret the Constitution.**

 - (vi) **Article 10(2) (c) of the Constitution that guarantees good governance, transparency and accountability as national values and principles that bind all State officers, public officers and all persons whenever they apply or interpret the Constitution.**

- **The nomination for the appointment of the person to the office of the Chief Justice was done without involving the Judicial Service Commission contrary to the provisions of Article 166 of the Constitution. They referred to a statement that was issued by the Judicial Service Commission on 31st January, 2011. The statement was duly signed by the Chief Justice, the Attorney General and other members of the Judicial Service Commission.**

- **The Office of the Prime Minister alleged that it was not consulted before the nominations were announced. The petitioners' Counsel referred to various newspaper cuttings annexed to the petitioners' affidavit.**

In support of the argument that the nominations infringed the right to equality, the petitioners cited a decision of the Constitutional Court of South Africa, **JACQUES CHARL HOFFMANN vs. SOUTH AFRICAN AIRWAYS, CCT 17 OF 2000** where the court stated:

“This court has previously dealt with challenges to statutory provisions and government conduct alleged to infringe the right to equality. Its approach to such matters involves three basic enquiries: first, whether the provision under attack makes a differentiation that bears a rational connection to a legitimate government purpose. If the differentiation bears no such rational connection, there is a violation of Section 9(1). If it bears such a rational connection, the second enquiry arises. That enquiry is whether the differentiation amounts to unfair discrimination. If the differentiation does not amount to unfair discrimination, the enquiry ends there and there is no violation of Section 9(3). If the discrimination is found to be unfair, this will trigger the third enquiry, namely, whether

it can be justified under the limitations provision. Whether the third stage, however, arises will further be dependent on whether the measure complained of is contained in a law of general application.”

The petitioners urged the court to interpret the provisions of the Constitution as required under **Article 259(1)** and grant the orders sought in the application.

Miss Mbiyu for the Attorney General submitted that there is no material evidence, other than media reports, that there was no consultation between the President and the Prime Minister. In the circumstances, she stated, the court cannot determine whether there was consultation or not.

Regarding nomination of a new Chief Justice, she urged the court to apply liberal interpretation of the Constitution. Counsel stated that **Sections 23(1)** and **24(2)** of Schedule Six should be read together with the provisions of **Article 166(1)**. To that extent, she stated, the Attorney General concedes that the Judicial Service Commission was entitled to make a recommendation to the President before he nominated the new Chief Justice, in consultation with the Prime Minister, for approval by the National Assembly.

As to whether the provisions of **Article 27(3)** was violated by virtue of the four nominations aforesaid, all of them being of the male gender, counsel conceded, not without some hesitation, that indeed there was discrimination against women.

Mr. Kihara for the Party of National Unity submitted regarding appointment of the Chief Justice during this transition period, the only applicable provision of the Constitution is **Section 24(2)** of Schedule Six which states as follows:

“A Chief Justice shall be appointed by the President, subject to the National Accord and Reconciliation Act, and after consultation with the Prime Minister and with the approval of the National Assembly.”

Counsel further submitted that **Article 166** is of no relevance to the appointment of the Chief Justice before the first General Elections under this Constitution.

As to whether there were consultations between the President and the Prime Minister, Mr. Kihara submitted that in the absence of any affidavit sworn by the two Principals, there is no sufficient evidence for stating that there were no consultations. He said that the court should not rely on media reports on the issue. Counsel discredited the positions taken by both the Judicial Service Commission and the Commission on the Implementation of the Constitution (CIC) to the effect that the nominations were not done in accordance with the provisions of the Constitution.

Regarding the provisions of **Article 27(3)** of the Constitution, Mr. Kihara’s view was that the fact that the four nominees were all men did not necessarily imply that there was discrimination without taking into consideration the full statistics of personnel in those four public offices.

Counsel urged the court not to grant the conservatory orders as sought because, given the nature of the relief sought, there is likelihood of infringement on the doctrine of separation of powers. By granting the conservatory orders the court will be stopping the National Assembly from performing its statutory duties, counsel submitted. He however, conceded that the court has power to make an appropriate declaratory order.

I have anxiously considered the petition and the affidavit sworn in support thereof and all the submissions made by counsel. My determination of this application for conservatory orders starts with a consideration of **Article 1** of the Constitution which states as hereunder:

“(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 the sovereign power either directly or through their democratically elected representatives.

(3) Sovereign power under this Constitution is delegated to the following state organs, which shall perform their functions in accordance with this Constitution –

- (a) Parliament and the legislative assemblies in the county governments;**
- (b) the national executive and the executive structures in the county governments; and**
- (c) the Judiciary and independent tribunals.”**

The supremacy of the Constitution is expressly declared by **Article 2** which states, *inter alia*, that the Constitution is the supreme law of this Republic and binds all people and all state organs at both levels of government. Every person has an obligation to respect, uphold and defend the Constitution.

Article 10 sets out the national values and principles of governance which bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions. Those national values and principles include:

- “(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.**
- (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;**
- (c) good governance, integrity, transparency and accountability; and**
- (d) sustainable development.”**

In interpreting the Constitution, this court is bound by the provisions of **Section 259** which requires that the Constitution be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law and the human rights and fundamental freedoms in the bill of rights, permits the development of the law and contributes to good governance. **Article 259(3)** states that:

“Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking”

Article 259(11) states that:

“If a function or power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation, with the approval or consent of, or on consultation with, another person, the function may be performed or the power exercised only on that advice, recommendation, with the approval or consent, or after that consultation, except to the extent that this Constitution provides otherwise.”

In interpreting the Constitution, the letter and the spirit of the supreme law must be respected. Various provisions of the Constitution must be read together in order to get a proper interpretation. In the Ugandan case of **TINYEFUZA vs. ATTORNEY GENERAL, CONSTITUTIONAL APPEAL NO. 1 OF 1997**, the court held as follows:

“The entire Constitution has be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountancy of the written Constitution.”

A similar principle was enunciated by the United States Supreme Court in **SMITH DAKOTA vs. NORTH CAROLINA 192 U.S. 268 [1940]**. The court stated:

“It is an elementary rule of Constitutional construction that no one provision of the Constitution is to be segregated from the others and to be considered alone but that all the provisions bearing upon a particular subject are to be brought into view and to be interpreted as to effectuate the great purpose of the instrument.”

In NDYNABO vs. ATTORNEY GENERAL [2001] 2 E.A. 485 the court held as follows:

“The Constitution is a living instrument, having a soul and consciousness of its own it must be construed in line with the lofty purpose for which its makers framed it. A timorous and unimaginative exercise of the judicial power of Constitutional interpretation leaves the Constitution a stale and sterile document.”

It is in the background of the foregoing principle of harmonization that I will interpret the various Articles of the Constitution that were cited before this court.

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 not therefore 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.

What are the major violations of the Constitution complained of by the petitioners?

(i) That the nomination of the Chief Justice was unconstitutional.

I have already highlighted the provisions of **Article 166** of the Constitution as well as **Section 24(2)** of Schedule Six of the Constitution. Although Mr. Kihara for the **Party of National Unity** submitted that the Judicial Service Commission has no role in the nomination of a new Chief Justice before the first General Elections under the new Constitution are held, the position taken by the petitioners and the Attorney General is different. Miss Mbiyu on behalf of the Attorney General conceded that the President ought to have received recommendations from the Judicial Service Commission before he made the aforesaid nomination. It is in the public domain that the Attorney General, who is a member of the Judicial Service Commission, signed a joint statement of the Commission to that effect. That was done just about four days ago. Under **Article 156(1)** of the Constitution, the Attorney General is the principal legal advisor to the government. The qualifications for appointment as an Attorney General, are very high, they are the same as four appointments of a Chief Justice. He is a person who is highly learned and experienced in law. The President is therefore supposed to take his advice seriously.

On the basis of the concession made by the Attorney General, who is the respondent in this petition, it must be accepted that the said nomination did not comply with the constitutional requirements of **Article 166(1) (a)** as read together with **Section 24(2)** of **Schedule Six** of the Constitution. To that extent, the petitioners have proved that the nomination was unconstitutional. The rule of harmony in interpreting the Constitution as earlier stated has to be borne in mind.

The second issue relating to the constitutionality of the nomination to the office of the Chief Justice is whether it was done after consultation between the President and the Prime Minister in accordance with the **National Accord and Reconciliation Act**. The Constitution does not define the word **“consultation”**. Other than media reports that were annexed to the petitioners’ affidavit, there is no other evidence relating to the consultations. What does the word “consultation” therefore mean? The **Shorter Oxford English Dictionary** defines “consult” as, *inter alia*, **“take counsel together, deliberate, confer.** “Consultation” is said to mean, *inter alia*, **“the action of consulting or taking counsel together, deliberation, conference.”** **Websters New Universal Unabridged Dictionary** suggests that it means **“consulting, a meeting of persons to discuss, decide, or plan something”**, while ‘consult’, in the relevant context means **“to ask advice of, to seek the opinion of as a guide to one’s judgment”**. In the **Readers Digest Universal Dictionary**, ‘consult’ is rendered in such context as **“to exchange views,**

confer, and ‘consultation’ as **“the act or procedure of consulting, a conference at which advice is given or views are exchanged.”**

In the South African case of MAQOMA vs. SEBE & ANOTHER 1987 (1) SA 483 the meaning of consultation was considered in the context of the Administrative Authorities Act 37 of 1984, which like our Constitution, does not define ‘consultation’. Pickard J observed:

“It seems that ‘consultation’ in its normal sense without reference to the context in which it is used, denotes a deliberate getting together of more than one person or party in a situation of conferring with each other where minds are applied to weigh and consider together the pros and cons of a matter by discussion or debate. The word “consultation” in itself does not presuppose or suggest a particular forum, procedure or duration for such discussion or debate. Nor does it imply that any particular formalities should be complied with. Nor does it draw any distinction between communications conveyed orally or in writing. What it does suggest is a communication of ideas on a reciprocal basis.”

In AGRICULTURAL, HORTICULTURAL AND FOREST INDUSTRY TRAINING BOARD vs. AYLESBURY MUSHROOMS LTD [1972] 1 All ER 280 at 284 it was held that:

“The essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice. If the invitation is once received, it matters not that it is not accepted and no advice is proffered. Were it otherwise organizations with a right to be consulted could, in effect, veto the making of any order by simply failing to respond to the invitation. But without communication and the consequent opportunity of responding there can be no consultation.”

From the definitions of the word ‘consultation’ as hereinabove stated and from the authorities cited and from the annexures to the petitioner’s affidavit, it appears to me that there was some consultation between the President and the Prime Minister. However, there was no consensus or agreement between the two principals, which I must state, is not a requirement under the provisions of **Section 24(2)** of Schedule Six of the Constitution. That notwithstanding, the values and principles stated under **Article 10** and the spirit of the National Accord and Reconciliation Act ought to have been borne in mind in making the nominations.

(ii) Violation of Article 27(3) regarding equal treatment of men and women.

To the extent that all the nominees to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget were all men, the spirit of equality and freedom from discrimination was not given due consideration. While it may be argued that in future appointments to public offices women were likely to be included as submitted by Mr. Kihara, no reasonable explanation was given by the respondent why none of the four appointees was a woman.

In view of the violations to the letter and spirit of the Constitution as shown hereinabove, even without considering other relevant provisions of the Constitution, like **Article 10**, which spells out national values and principles of governance, I am satisfied that the petitioners have demonstrated that they have a *prima facie* case with a likelihood of success.

Article 22(1) states that:

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed, or is threatened.”

Under **Article 23** the High Court has jurisdiction, in accordance with **Article 165**, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the bill of rights. In proceedings brought under **Article 22**, this court may grant appropriate relief including a declaration of rights, an injunction, or a conservatory order.

Article 165(3) (d) grants this court jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with or in contravention of the Constitution.

Should this court grant the conservatory order as sought by the petitioners? The court acknowledges that the National Assembly represents the people of Kenya and **Article 95(2)** states that:

“The National Assembly deliberates on and resolves issues of concern to the people.”

The National Assembly must also approve the appointment of each of the four nominees to the offices of the Chief Justice, the Attorney General, Director of Public Prosecutions and Controller of Budget. The court cannot restrain the National Assembly from performing its constitutional duty. But where it is demonstrated that in giving its approval, the National Assembly will be perpetuating an unconstitutional act, unless the Speaker of the National Assembly points out the unconstitutionality of the intended action and thus disallows the process of approval, this court is under an obligation to make an appropriate declaration and bring it to the attention of the National Assembly. The oath of office which all judges took on the 27th of August, 2010 was to the effect that they will individually:

“diligently serve the people and the Republic of Kenya and to impartially do justice in accordance with this Constitution as by law established, and the laws and customs of the Republic, without any fear, favour, bias, affection, ill will, prejudice, or any political, religious or other influence.”

We further solemnly swore that:

“In the exercise of the judicial functions entrusted to me, I will at all times, and to the best of my knowledge and ability, protect, administer and defend this Constitution with a view to upholding the dignity and the respect of the Judiciary and the Judicial System of Kenya and promoting fairness, independence, competence and integrity within it.”

In light of that, this court must uphold the twin principles of constitutionalism and the rule of law in its decisions. Consequently, and in view of the court’s findings regarding constitutionality of the manner in which the aforesaid nominations were done, I make a declaration that it will be unconstitutional for any State officer or organ of the State to carry on with the process of approval and eventual appointment to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget based on the nominations made by the President on 28th January, 2011. That will have to await the hearing of the petition or further orders of this court. The petitioners will have the costs of the application.

DATED, SIGNED and DELIVERED at NAIROBI this 3rd day of February, 2011.

D. MUSINGA

JUDGE

In the presence of:

Nazi – court clerk

Mr. Ongoya, Mrs. Judy Thongori, Mrs. Alice Wahome, Mrs. Judith Sijeny, Mr. Chigiti, Miss Victoria Wambua, Mr. Timothy Mwaura - for the petitioners

Miss Wanjiku Mbiyu, Mr. Ombwayo, Mr. Onyiso – for the respondent

Mr. C. Kihara and Dr. Stephen Njiru – for the Party of National Unity.