



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL CASE NO. 689 OF 2008

**IN THE MATTER OF SECTIONS 1, 1A, 10, 30, 41, 42 (A), 44, 47, 84, 104 & 123 (8) OF THE
CONSTITUTION**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS SECURED AND**

GUARANTEED UNDER SECTION 70(A), 75, 77 AND 82 OF THE CONSTITUTION

AND

**IN THE MATTER OF THE THREATS TO DISBAND/ABOLISH THE ELECTORAL
COMMISSION OF KENYA AND REMOVAL OF ITS**

**MEMBERS THROUGH LEGISLATIVE FLAT AND/OR CONSTITUTIONAL AMENDMENT
BY PARLIAMENT**

AND

**IN THE MATTER OF THE ROLE OF ELECTORAL COMMISSION AND THE REPORT OF
THE INDEPENDENT REVIEW**

**COMMISSION OF THE GENERAL ELECTIONS HELD IN KENYA ON 27TH DECEMBER,
2007**

AND

IN THE MATTER OF THE RULE OF LAW, THE EXCLUSIVE JURISDICTION AND SOVEREIGNTY OF KENYAN COURTS,

THE ELECTORAL COMMISSION OF KENYA AND OTHER INSTITUTIONS OF THE SOVEREIGN

REPUBLIC OF KENYA VIS-À-VIS THE GENERAL ELECTION HELD ON 27TH DECEMBER, 2007

BETWEEN

SAMUEL MUTUAL KIVUITU & 21
OTHERS.....PETITIONERS

AND

THE HON. THE ATTORNEY GENERAL.....1ST
RESPONDENT
SPEAKER OF THE NATIONAL ASSEMBLY.....2ND
RESPONDENT
INTERIM INDEPENDENT ELECTORAL COMMISSION.....3RD
RESPONDENT

RULING

Before us is the 2nd Respondent's Notice of Motion dated 20th May, 2011 filed on 23rd May, 2011.

The application was heard interparte on 23rd May, 2011.

As prayers no. 1, 3 and 4 were overtaken by the interparte hearing of the said application, the only prayers which were left for determination of the court were:-

“2. THAT this Honourable Court be pleased to grant leave to the 2nd Respondent to appeal against the ruling and order made by this Honourable Court on the 21st day of March 2011.

5. THAT this Honourable Court do order a stay of proceedings pending the hearing and final determination of the 2nd Respondent's intended appeal against the ruling and order of 21st March, 2011.

6. THAT the costs of this application be provided for.”

The application is supported by the grounds set forth on the face thereof and the supporting affidavit sworn on 20th May, 2011 by Jeremiah Nyegenye, the Head of Office of Legal Counsel of Kenya National Assembly.

The application, as is apparent from the perusal of grounds and supporting affidavit, arises from the ruling of this court made on 21st March, 2011.

It is our considered view that it may be appropriate to give a brief background of the facts leading to the joinder of 2nd Respondent as a party to this Petition.

In the proceedings of 24th March, 2009, the court found and held that ***“the newly constituted electoral body and the Speaker of National Assembly must be made parties to these proceedings”***.

The Petitioners thereupon filed Re-amended Petition on 27th July, 2009 enjoining 2nd and 3rd Respondents as parties to the Petition.

In the said petition, it is averred *inter alia* that the Constitution of Kenya Amendment Bill, 2008 is unconstitutional and hence the removal of the Petitioners as members of the Electoral Commission of Kenya vide the Constitution of Kenya (Amendment) Act, 2008 is unconstitutional.

The Petitioner further prays for declaration that the 2nd Respondent acted in contempt of court in allowing debate and passage of Constitution of Kenya (Amendment) Bill 2008 by the National Assembly.

The Petitioners then filed an application by way of Chamber Summons dated 21st October, 2009 for leave of the court to use substituted service by advertisement to effect service upon the 2nd Respondent who is the Speaker of National Assembly. The leave sought was granted by the court vide its Ruling of 22nd October, 2009.

Earlier, on 18th March, 2010, the previous Bench of the High Court, hearing the Petition did rule that the joinder of the Speaker of the National Assembly as a party to the Petition was under the direction of the court and further directed that the Respondents file Replying Affidavit and that substantive Petition shall proceed for hearing.

The 2nd Respondent appeared accordingly and filed Replying Affidavit sworn on 11th May, 2010.

In the Replying Affidavit so filed, the 2nd Respondent has defended his ruling, which we shall not dwell on at this juncture, Suffice it shall be to note that the privilege of the Member of National Assembly provided under the Constitution (now repealed) and National Assembly (Powers and Privileges) Act (Cap 6) also have been specified and relied upon in the said affidavit.

We may only note at this stage that, neither the finding of the court that the 2nd Respondent is a necessary party to this petition which was made on 24th March, 2009, nor the order that the court shall not hear preliminary objections on the validity of joinder of 2nd Respondent has been challenged either by appeal or application of review.

On 31st January, 2011, the Hon. Ex-Chief Justice constituted the present Bench.

The 2nd Respondent then filed Notice of Motion dated 11th February, 2011 seeking the order *inter alia* that the petition against him be struck out. One of the 15 grounds in support of that application stipulates that the 2nd Respondent is immune from legal proceedings such as the present petition by virtue of the provisions of sections 4 and 29 of the National Assembly (Powers and Privileges) Act. We may reiterate that the said issue of joinder of 2nd Respondent as a party had been ruled upon by the Court.

It is on record, as per proceedings of 2nd March, 2011, that by consent it was agreed that the said application of 11th February, 2011 be heard *inter parte* on 21st March, 2011.

On the said day, Mr. Ondieki, the learned counsel for the 3rd Respondent raised a Preliminary Objection

on competence of the Re-amended Petition.

While overruling the Preliminary Objection raised by Mr. Ondieki, the court further observed –

“Having perused this Petition once again and the 2nd Respondent’s application dated 11th February, 2011, we direct that the 2nd Respondent do raise the issues in that application in opposition to the petition. We should also decide those issues along with the Petition itself. Needless to say that if we find merit in the 2nd Respondent’s said application, we shall strike out the petition and the matter at that stage.” (emphasis ours)

The said Ruling was delivered on 21st March, 2011. The dates for further hearing were given which was to proceed as from on 23rd May, 2011.

The 2nd Respondent filed the application on our hands on the said date.

The 2nd Respondent, through his counsel, did apply for certified copies of Proceedings and Ruling vide letter of 30th March, 2011 filed on 31st March, 2011. The court is also told that the Notice of Appeal is accordingly filed by the 2nd Respondent.

Be that as it may, till the new Rules of Procedure are formed under Article 22 (3) of the Constitution of Kenya, (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual), High Court Practice and Procedure Rules, 2006 and popularly known as “*Gicheru Rules*” are applicable. (See clause 19 of 6th Schedule).

Rule 34 of the said Rules stipulates that an appeal from the decision of the High Court to the Court of Appeal under Sec. 84 (7) of the Constitution shall be governed by Court of Appeal Rules.

Similarly, all laws in force before effective date, continues in force (see Clause 6 of 6th Schedule).

Obviously thus the mention of Civil Procedure Rules in the application may not be appropriate.

However, in abundant caution, we do grant leave to file an appeal.

The issue to be determined then remains as regards prayer for stay of proceedings of this Petition

The court had found as from 24th March, 2009 that the Speaker of the National Assembly must be made a party to these proceedings and accordingly the Speaker is a party to these proceedings.

The intended Appeal is based on the Court’s Ruling dated 21st March, 2011 directing that the Notice of Motion dated 11th February, 2011 be heard along with the Petition and not at an interlocutory stage. We have specified the relevant portion of our Ruling hereinbefore.

We may at this stage only reiterate that the application has also raised several substantial issues apart from the issue of immunity of the 2nd Respondent as a Speaker of the National Assembly.

The submissions by Mrs. L. Kimbuni, on behalf of the 2nd Respondent, to the effect that the 2nd Respondent does not want to be seen to be participating in the process as well as that the submissions on principles of separation and immunity of the 2nd Respondent had to be heard before the hearing of the Petition are very carefully considered by us.

With due respect to those submissions, in our view, the continuation of the 2nd Respondent in these

proceedings cannot be considered as derogatory to his position. The earlier finding of the court that the 2nd Respondent is a necessary party to these proceedings has not been challenged by way of an appeal or even a review.

We have not been shown sufficient grounds to prove either that the 2nd Respondent shall suffer irreparable damage or that the intended appeal shall be rendered nugatory if the stay of proceedings is not granted and we do find so.

In the premises, except that the court grants leave to file the intended appeal against our Ruling of 21st March, 2011, we refuse to grant any other reliefs prayed in application dated 23rd May, 2011.

Costs of these proceedings in the cause.

Dated, signed and delivered at Nairobi this 16th day of **June, 2011**

K. H. RAWAL
JUDGE
16.06.2011