



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CONSTITUTION PETITION NO. 7 OF 2011**

**LESIT, J**

**IN THE MATTER OF CONTRAVENTION AND THREAT TO, VIOLATION AND BREACH  
FUNDAMENTAL RIGHTS,**

**FREEDOMS OF CONSCIENCE, RELIGION, AND OPINION AND EQUALITY AND  
FREEDOM FROM DISCRIMINATION**

**UNDER ARTICLES 22(1) 23(1), 27, 32(1), 81 AND 258 OF THE CONSTITUTION OF KENYA.**

**BETWEEN**

- 1. COUNCILOR SARAH ABDI MRS.....1<sup>ST</sup>  
PETITIONER
- 2. COUNCILOR ORIETA MARTIPAN(MRS).....2<sup>ND</sup>  
PETITIONER
- 3. COUNCILOR PAUL MERO.....3<sup>RD</sup>  
PETITIONER

**V E R S U S**

- 1. COUNCILOR MOHAMUD NURA HUKA.....1<sup>ST</sup>  
RESPONDENT
- 2. COUNCILOR IBRAHIM HALAKE FAYO.....2<sup>ND</sup>  
RESPONDENT
- 3. COUNCILOR GOLO FUGICHA.....3<sup>RD</sup>  
RESPONDENT
- 4. COUNCILOR HASSAN BALLA.....4<sup>TH</sup>  
RESPONDENT
- 5. COUNCILOR YARROW HASSAN.....5<sup>TH</sup>  
RESPONDENT
- 6. COUNCILOR HASSAN DIBA KUMPA.....6<sup>TH</sup>  
RESPONDENT
- 7. COUNCILOR ISMAILALI GALMA.....7<sup>TH</sup>  
RESPONDENT
- 8. COUNCILOR JARSO CHUCHA HARRO.....8<sup>TH</sup>  
RESPONDENT

9.	COUNCILOR ALI ADI KALA.....	9 <sup>TH</sup>
	RESPONDENT	
10.	COUNCILOR GODANA TACHE.....	10 <sup>TH</sup>
	RESPONDENT	
11.	COUNCILOR ALI DABASO ALI.....	11 <sup>TH</sup>
	RESPONDENT	
12.	COUNCILOR HASSAN HALAKE.....	12 <sup>TH</sup>
	RESPONDENT	
13.	COUNCILOR HUSSEIN SALA.....	13 <sup>TH</sup>
	RESPONDENT	
14.	COUNCILOR MOHAMED BILALI.....	14 <sup>TH</sup>
	RESPONDENT	
15.	COUNCILOR IBRAHIM GABALE.....	15 <sup>TH</sup>
	RESPONDENT	
16.	COUNCILOR ADAN IBRAHIM GEDI.....	16 <sup>TH</sup>
	RESPONDENT	
17.	COUNCILOR SELESIO KIAMBI.....	17 <sup>TH</sup>
	RESPONDENT	
18.	COUNTRY COUNCIL OF ISIOLO.....	18 <sup>TH</sup>
	RESPONDENT	

### RULING

The applicants in this Petition filed a petition invoking article 22(1) 23(1) 27, 32(1) 81 and 258 of the Constitution 2010. Simultaneously with the Petition they file a Chamber summons application dated 12<sup>th</sup> July 2011. They are seeking orders in terms of Order 3 of the application which stipulates:-

**“3. That pending the hearing and determination of the petition herein an injunction be issued restraining the 1<sup>st</sup> to 18<sup>th</sup> Respondents jointly and severally or/and by themselves their servants, agents, employees, or representatives or whomsoever from holding or conducting Council elections or any other election on 14<sup>th</sup> July, 2011 or any other date thereafter unless the constitution is fully complied with or further orders of the court are granted.”**

The grounds of the application are cited on the face of the application as follows:-

- (a) That the Petitioners/Applicants are councilors in the County Council of Isiolo.
- (b) That the 1<sup>st</sup> to 16<sup>th</sup> Respondents have started a movement which is undemocratic, illegal and unconstitutional and are discriminating against minority tribes, people of other faiths and women.
- (c) That they have taken an oath before Imam which is very dangerous.
- (d) That the Respondents actions are making a nonsense of the Constitution.
- (e) That it is only this court that can save the situation.

The application is further supported by an affidavit in support of the application sworn by the three petitioners.

The application was opposed. The 1<sup>st</sup> to the 17<sup>th</sup> Respondents rely on a replying affidavit sworn on their behalf by 1<sup>st</sup> Respondent. The 18<sup>th</sup> Respondent the County Council of Isiolo relies on a Replying Affidavit sworn on its behalf by the clerk to the County Council of Isiolo.

I have carefully considered the application and all the affidavits sworn for and against the Petitioners Chamber Application.

Mr. Rimita urged the application on behalf of the Petitioners. For the 1<sup>st</sup> to 17<sup>th</sup> Respondents Mr. C. Kariuki represented them. For the 18<sup>th</sup> Respondent Mr. Kimabi opposed the application on its behalf.

The application has been brought under Provisions of the Constitution of Kenya 2010. The Petitioners have applied to this court to invoke the provisions of Articles 22 to 23 of the Constitution to stop a threat of a breach of the Constitution. In particular Mr. Rimita urged that there was a threat of violation and breach of fundamental rights, freedoms of conscience, religion, opinion, equality and freedom from discrimination counsel urged that the petitioners have deposed in the supporting affidavit that the 1<sup>st</sup> to 17<sup>th</sup> Respondents had taken an oath before a Muslim Imam not to elect women, minority tribes and non muslims to the various leadership positions of the council. That in the circumstances the said respondents had bound themselves with an oath to breach provisions of our Constitution afore mentioned.

Mr. Rimita urged that if nothing else the Gender Rule of 1/3 has provided under Article 81(b) and other Articles was under threat of being breached.

There are other complaints highlighted by Mr. Rimita in his submissions as deposed to in the supporting affidavit. These include the fact the 1<sup>st</sup> to 17<sup>th</sup> Respondents had travelled to Kitengela to ensure each of them observed their oath.

Mr. C. Kariuki challenged the depositions supporting affidavits for failing to disclose place, date and venue of oath or Imam who administered it, and that the source of the information was also not discussed.

Mr. Kariuki urged that the 1/3 rule on gender provided under Article 81 and Chapter 7 of the Constitution will only be operational upon enactment of Legislation by virtue of Schedule 6(2) (a) there under.

Mr. Kiambi on behalf of the 18<sup>th</sup> Respondent urged that his client was non partisan and was not supporting any party. Counsel urged that the application should be declined so that the elections could be held before August 15<sup>th</sup> as provided under Cap 265 Laws of Kenya. He urged that if elections were not conducted the operations of the council may ground to a halt.

I have considered the oral arguments of the petitioners and Respondents. Having carefully considered these arguments, I have come o a conclusion of the matter.

The petitioners had the burden to establish that there was real threat of violation of the Constitutional provisions cited in their Petition and Chamber Summons application. It is my view that the burden was not discharged for reason there was material non disclosure of important particulars that could have established the alleged threat. The Petitioners have not disclosed how they came by the information that the Respondents had taken an oath to bind themselves to take certain acts, which acts would result in a violation of the Constitution 2010. The petitioners did not disclose the Imam who administered the alleged oath, or the place, date and time of the alleged oath taking.

I also considered the glaring omission by the Petitioners/Applicants to which of the Respondents were present.

In the absence of the said disclosures the threats and or threatened violations have not been sufficiently established. The Petitioners complaints are as of now mere allegation without basis.

I agree with Mr. Kiambi's submissions that every right and freedom under the Constitution gives reciprocal rights. In fact they give reciprocal rights, obligation and freedoms for the enjoyment and benefit of all.

I find that the Petitioners have failed to establish a prima facie case, they are undeserving of the orders sought.

The petitioners should set the Petition for substantive hearing and file further other affidavits in support of their petition.

I decline to confirm the interim injunction granted at the ex-parte stage. I accordingly set aside the interim injunction issued on 13<sup>th</sup> July 2011 with no orders as to costs.

As to the Chamber Summons Application filed by the 1<sup>st</sup> to 17<sup>th</sup> Respondents dated 14<sup>th</sup> July 2011, the same is superfluous. All the prayers sought in the said application have been over taken by events. The same is MOOT. Accordingly I make no orders in its respect.

Those are my orders.

**DATED SIGNED AND DELIVERED AT MERU THIS 28TH DAY OF JULY 2011**

**J. LESIIT**

**JUDGE**