



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**ELECTION PETITION NO. 35 OF 2008**

**IN THE MATTER OF: THE NATIONAL ASSEMBLY AND PRESIDENTIAL  
ELECTIONS ACT CAP 7 PARLIAMENTARY AND  
PRESIDENTIAL ELECTIONS REGULATIONS AND THE  
NATIONAL ASSEMBLY ELECTIONS (ELECTION  
PETITION) RULES**

**AND**

**IN THE MATTER OF: THE ELECTION PETITION FOR KAMUKUNJI CONSTITUENCY**

**BETWEEN**

**IBRAHIM AHMED.....PETITIONER**

**AND**

**SIMON MBUGUA.....1<sup>ST</sup> RESPONDENT**

**PRISCYLLAR A. WAWIRU (RETURNING  
OFFICER KAMUKUNJI CONSTITUENCY).....2<sup>ND</sup> RESPONDENT**

**THE ELECTORAL COMMISSION OF KENYA.....3<sup>RD</sup> RESPONDENT**

**RULING**

The Election Petition was scheduled for further hearing as from 4<sup>th</sup> October 2010.

However, on that date, the court was informed that the 1<sup>st</sup> Respondent had a Preliminary objection. The said objection had six limbs.

Because the Attorney General had only been served with the Notice of the Preliminary Objection on the morning of 4<sup>th</sup> October 2010, the court adjourned the case to 6<sup>th</sup> October 2010.

Immediately after all the parties had concluded their respective submissions, I did direct that the hearing of the election petition would proceed from 7<sup>th</sup> October 2010. In other words, I declined to grant the 1<sup>st</sup> Respondent's prayer, for a stay of the proceedings. However, I did not give my detailed reasons for the directions I had given. At that moment, I did indicate that the reasons would be made available in due course. I do now endeavour to give the reasons for my said directions.

First, it is evident that the Notice of the Preliminary Objection is in the following terms;

**“1. The Honourable Court has no jurisdiction to hear and determine the Petition herein so long as sections 20 and 23 of the Sixth Schedule to the Constitution of Kenya, 2010 remain in force and/or undischarged.**

**2. The jurisdiction of this Court to hear and determine this Petition arising from Section 44 of the former Constitution has been ousted by Sections 20 and 23 of the Sixth Schedule to the Constitution of Kenya, 2010, which have stripped all superior court Judges in office on 27<sup>th</sup> August, 2010, of their independence and security of tenure.**

**3. These proceedings are being presided over by the Hon. Mr. Justice Fred Ochieng who was in office on 27<sup>th</sup> August 2010, and therefore subject to the loss of independence and security of tenure pursuant to Sections 20 and 23 of the Sixth Schedule.**

**4. Under Articles 27, 28, 47 and 50 of the Constitution, the Applicants right to human dignity, protection of law and fair hearing requires that any legal dispute involving him must be decided in a fair and public hearing before an independent and impartial court presided over by a judicial officer whose character, honour, integrity and competence is or has not been impeached, impaired, doubted or questioned. In the premises the impeachment, impairment, doubt and question upon the character, honour, integrity and competence of the Hon. Mr. Justice Fred Ochieng, alongside other judges in office on 27<sup>th</sup> August, 2010, is an absolute disqualification against him to preside over these proceedings.**

**5. The Applicant has filed a constitutional application, namely NAIROBI HIGH COURT PETITION NO. 57 of 2010, HON. SIMON NGANGA MBUGUA Vs HON. ATTORNEY GENERAL, in which the constitutionality of Sections 20 and 22 of the Sixth Schedule, as well as these proceedings are among the matters in issue. In the premises unless and until the said Petition has been heard and determined, the election petition hearing cannot proceed under the Constitution of Kenya, 2010.**

**6. Unless and Until NAIROBI HIGH COURT PETITION NO. 57 of 2010, HON. SIMON NGANGA MBUGUA Vs HON. ATTORNEY GENERAL is heard and determined, the constitutionality of the right of any Judge and Magistrate in office on 27<sup>th</sup> August 2010, to preside over any legal proceedings in Kenya is compromised and illegitimate under Articles 10, 50 and 159 of the Constitution of Kenya, 2010.**

**REASONS WHEREFORE the Applicant prays that further hearing in election Petition No. 35 of 2008 be stayed pending hearing and determination of NAIROBI HIGH COURT PETITION NO. 57 of 2010, HON. SIMON NGANGA MBUGUA Vs HON. ATTORNEY GENERAL.”**

It is evident that the Preliminary Objection is founded upon the 1<sup>st</sup> Respondent’s understanding of the specified provisions of the Constitution.

His said understanding is the foundation for the Constitutional Petition he has lodged before the High Court.

The said understanding is not shared by the Petitioner or even by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

To my mind, that gives rise to the first hurdle on the path of the Preliminary Objection herein. Why do I say so?

In the well respected decision of **MUKISA BISCUIT MANUFACTURING CO. LIMITED VS. WEST END DISTRIBUTORS LIMITED [1969] E.A. 696**, the Court of Appeal defined a preliminary objection.

First, Law J.A stated as follows, at page 700;

**“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”**

Thereafter, at page 701, Sir Charles Newhold P. expressed himself in the manner following;

**“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of**

**law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”**

In this instance, the basis of the preliminary objection raised is not the pleadings before this Election Court. Neither does the said preliminary objection arise by any clear implication out of the pleadings.

Furthermore, even if the said preliminary objection was upheld by the court, it would not determine the issues in dispute in the Election Petition. Indeed, the 1<sup>st</sup> Respondent is only asking that these proceedings be stayed until Petition No. 57 of 2010 is heard and determined. By so doing, he is making it abundantly clear that the said preliminary objection is nothing more than an application for stay of further proceedings herein.

Furthermore, the said preliminary objection has not been argued on the assumption that the facts pleaded by the Petitioner were correct. At no time did the 1<sup>st</sup> Respondent inform this court that he was conceding any of the facts pleaded in the Election Petition. Therefore, he did not bring himself within the scope and meaning of a preliminary objection.

On that ground alone, the said preliminary objection cannot be sustained.

The other point is that whereas the issues raised by the 1<sup>st</sup> Respondent in Petition No. 57 of 2010 appear to me to be of a very serious nature, the same are yet to be canvassed.

If that petition was successful, it is possible that the whole process of the vetting of magistrates and judges may be declared unconstitutional.

On the other hand, the petition may fail, and the result may be that the vetting process should proceed as is provided for currently.

Notwithstanding those two possibilities, the 1<sup>st</sup> Respondent has invited me to stay the further hearing of this Election Petition until Petition No. 57 of 2010 is heard and determined.

If I were to accede to the said plea, I may be deemed to have pre-judged the Constitutional petition which is pending before another bench, in the High Court. I say so because the premise upon which the 1<sup>st</sup> Respondent has founded that specific plea is as follows;

**“Unless and until Nairobi High Court Petition No. 57 of 2010 Hon. Simon Ng’ang’a Mbugua Vs Hon. Attorney General is heard and determined, the constitutionality of the right of any judge and magistrate in office on 27<sup>th</sup> August, 2010, to preside over any proceedings in Kenya is compromised and illegitimate under Articles 10, 50 and 159 of the Constitution of Kenya, 2010.”**

From that perspective, it is evident that the 1<sup>st</sup> Respondent is well aware that the impact of his arguments is far-reaching. He knows that the said arguments touch on all the judges and magistrates who were in office as at 27<sup>th</sup> August, 2010.

Therefore, on account of the doctrine of precedent, if this court were to down its pen, to await the verdict in Petition No. 57 of 2010, it is most probable that the courts subordinate to the High Court, and which are presided over by magistrates who were in office as at 27<sup>th</sup> August 2010, would be expected to follow suit.

In the event, although the 1<sup>st</sup> Respondent has not expressly sought an order to stay proceedings before the courts subordinate to the High Court, a stay of this election Petition, on the grounds put forth by the 1<sup>st</sup> Respondent would nonetheless have that impact.

It was the contention of the 1<sup>st</sup> Respondent that he is entitled to a fair hearing, before a judge who is not

only independent but also one who enjoys a security of tenure.

It is his further contention that provided section 23 of the Sixth Schedule remains in place, judges and magistrates stood the risk of being removed unconstitutionally, because their removal would be overseen by a body other than that mandated by the Constitution.

The 1<sup>st</sup> Respondent submitted that provided the vetting was continuing to hang over the heads of judges and magistrates, the said judicial officers cannot be deemed to be validly in office. And, so long as the judge was not validly in office he would have no jurisdiction to perform judicial functions in Kenya.

Furthermore, for as long as the issue of vetting was outstanding, the 1<sup>st</sup> Respondent believes that the character, honour, integrity and competence of judges and magistrates who were in office on 27<sup>th</sup> August 2010, were being put to question. And, for as long as the legal presumption remained, it did not matter that any particular judge or magistrate has character, integrity and honour. The 1<sup>st</sup> Respondent believes that the status of the judge or magistrate was impaired until and unless either the vetting process is set aside or until the judge or magistrate was vetted and cleared.

However, the 1<sup>st</sup> Respondent also holds the view that pursuant **section 13 of the Sixth Schedule:**  
**“When all the judges took an oath of allegiance to the Constitution on 27<sup>th</sup> August 2010, that oath was taken on the premise that they are judges under the Constitution.”**

As far as the Constitution goes, the judges and magistrates are proper judges under the Constitution.

That submission prompted the Petitioner to state that the 1<sup>st</sup> Respondent was taking positions that were inconsistent.

However, the 1<sup>st</sup> Respondent did explain that whereas his view was that the judges and magistrates were properly in office, the provisions of section 23 of the Sixth Schedule purported to take away the independence and security of tenure due to judges. He therefore said that there remains an unresolved conflict between the Constitution and the Sixth Schedule thereto.

For as long as the said conflict was unresolved, the 1<sup>st</sup> Respondent says that the hearing of this Election Petition should be stopped.

To my mind, it is the Constitutional Division of the High Court which will be called upon to determine the issues being canvassed by the 1<sup>st</sup> Respondent. Therefore, I find that it would be improper for me to say anything which may be construed as pre-empting the intended determination.

Suffice it to say that because the 1<sup>st</sup> Respondent appreciates the fact that the said Constitutional Division of the High Court may well conclude that all the judges who were in office on 27<sup>th</sup> August 2010, were properly in office: and that the requirement for vetting was unconstitutional, it would defy judicial logic for me to put these proceedings on hold. I so find because the law requires Election Petitions to be heard and determined expeditiously.

If one was to accept the 1<sup>st</sup> Respondent's submissions that all magistrates and judges were currently of doubtful or questionable character, integrity and competence, that would imply that the said judges and magistrate had already been condemned before any of them was given a hearing.

And if any judge or magistrate was presumed to be of questionable integrity, character, and competence, even though he or she had integrity, good character and competence, that would imply that the truth and facts about him or her were of no consequence.

I do not think that the vetting exercise is premised on the notion that all the judges and magistrates who were in office as at 27<sup>th</sup> August 2010 were unfit to hold office. Had that been the presumption, there would have been no hope of finding anyone amongst them who would qualify to continue to serve as a judicial officer after the vetting was done. In effect, the whole vetting process would be a waste of time, effort and other resources.

Yet, the wording of **section 23 (1) of the Sixth Schedule** clearly anticipates that there will be judges and magistrates who would be found suitable to continue serving.

I would like to believe that the Constitution of the Republic of Kenya has not condemned me before giving me an opportunity to be heard on any issue which somebody may raise concerning my suitability to continue to serve as a judge.

I do not therefore find any legal justification for me to put down my pen and stop discharging my judicial responsibilities.

The 1<sup>st</sup> Respondent did tell me that he was well aware that if the Preliminary objections herein were upheld that would have a;

**“considerable impact on pending legal proceedings before other judges and magistrates in office on 27/8/10.**

**As long as Section 20 and Section 24 of the Sixth Schedule remain in force, it is not possible for any other judges and magistrates to be appointed under the new Constitution.**

**The 1<sup>st</sup> Respondent is telling the country to face up to the impact of the Sixth Schedule”**

Notwithstanding that appreciation, the 1<sup>st</sup> Respondent told me that it is none of my business to take into account the consequences of upholding his Preliminary Objection.

As far as this court is concerned, it would be completely reckless of me to disregard the impact that my decision herein would have on the country. In other words, I do not share the views of the 1<sup>st</sup> Respondent that even if there should arise a crisis in the justice system, arising from my decision herein, I should assume that the Committee of Experts, who drafted the Sixth Schedule knew what they were doing.

Kenya is greater than any judge; it is greater than the Committee of Experts; it is greater than the Judiciary. It is for that reason that I decline to be party to orders which could result in a crisis that would envelope the country.

It is for that, and the other reasons already stated herein that I decline the 1<sup>st</sup> Respondent’s invitation to stay these proceedings.

Although what was before me was labeled a Preliminary Objection, it was, for all intents and purposes, an application for stay of proceedings. The 1<sup>st</sup> Respondent has not satisfied me that there is any sound reason to warrant a stay. Also, because the grant or refusal of an order of stay of proceedings is an exercise of the court’s discretion, that confirms to me that the issue before me did not qualify to be a Preliminary Objection.

In any event, pursuant to **Section 22 of the Sixth Schedule:**

**“All judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under this Constitution or as directed by the Chief Justice or the Registrar of the High Court. “**

The Preliminary Objection dated 1<sup>st</sup> October 2010 is overruled. The costs thereof shall be paid by the 1<sup>st</sup> Respondent to the Petitioner and also to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

**Dated, Signed and Delivered at Nairobi, this 18<sup>TH</sup> day of October, 2010**

.....  
**FRED A. OCHIENG**  
**JUDGE**