



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
PETITION NO. 669 OF 2009

IN THE MATTER OF: SECTION 84(1) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTION 70,72,75 & 78 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE CONSTITUTIONAL REVIEW AMENDMENT ACT, 2008 AND

IN THE MATTER OF: THE HARMONIZED DRAFT CONSTITUTION OF KENYA

BETWEEN

- 1. BISHOP JOSEPH KIMANI**
- 2. REV. MUSYOKA NZUI**
- 3. AGNES MBINYA (also known as MUMU NGUMBI)**

(Suing as officials of MOMBASA PASTORS FELLOWSHIP)PETITIONERS AND

THE HON. ATTORNEY GENERAL1ST RESPONDENT
THE COMMITTEE OF EXPERTS2ND RESPONDENT
THE CHAIRMAN, PARLIAMENTARY SELECT COMMITTEE3RD RESPONDENT

RULING

The Petitioners lodged their petition under the provisions of Section 84(1) of the constitution of Kenya and seek inter alia a declaration that Section 2,23,24,30,31,32 and 33 of the Constitution of Kenya Review A 2008 Act (Act No. 9 of 2008) to be unconstitutional, null and void. In the alternative, there are several substitutive reliefs being sought.

Simultaneously, the Petitions filed on application under certificate of urgency for the following interim orders:-

- That pending the hearing and determination of the summons inter partes the court be pleased to issue conservatory orders in the following terms.

a) *suspend the operations of Section 36, 31, 32, 33 and 34 of the Constitution of Kenya Review Act 2008.*

b) *Direct that the application and the Petition be served, heard and disposed within 21 days.*

- That sections 30,31,32,33 and 34 of the constitution of Kenya Review Act 2008 be suspended pending the hearing and determination of the Petition.

On 18.12.09, the Hon. Justice Odera certified the application as urgent and directed that the matter comes for directions before the duty judge on 23.12.2009. On the said date, the duty Judge gave directions for service of the Petition by way of substituted service through the print media and the application was fixed for hearing today.

On this day, the only Respondent who made an appearance is the 1st Respondent, the Attorney General who has filed a Notice of Preliminary Objection raising jurisdictional issues.

Mr. Njoroge then made an application for adjournment on two main grounds:-

1. That he had not had enough time to prepare for his Preliminary Objection and that he needed time to prepare and file his authorities and to serve the same on the applicant.
2. Secondly that this 2nd and 3rd Respondents are crucial parties whose involvement and participation in these proceedings are necessary. He said that in fact that they were the principal Respondents in this matter.

Mr. Gikandi opposes the application and stated that in the event of any time being given to Mr. Njoroge then he ought to be given up to 2.30 p.m. today or up to tomorrow morning. Mr. Gikandi argued that any adjournment beyond that would render his clients application nugatory. He said that the application must be heard and a ruling given before 7.01.10 since the CoE must present their report to the 3rd Respondent by 7.01.2010 under the provisions of Section 32 of the constitution Review Amendment Act 2008.

Under the Constitution of Kenya (Supervisory jurisdiction and Protection of Fundamental Rights and Freedom of the Individual) High Court Practice and Procedure Rule, 2006 directions have been given as to the hearing of a petition which contravention of any fundamental rights and freedoms of an individual under Section 70 to 83 inclusive) of the Constitution is alleged or is apprehended.

Under Rule 16 if the Attorney General is a Respondent then he is given 14 days to Respond to the Petition by way of Replying Affidavit once the Replying affidavit is served the Petitioners has right to serve a counter affidavit within 7 days of service. Thereafter the court may set down the Petition for hearing.

Under Rule 20 a judge before whom the Petition is presented may hear and determine an application for conservatory or Interim Orders.

The Petitioners herein have made an application for conservatory orders or stay orders of operation of Sections of the Review Act. The Interim Orders being sought are quite serious and would have legal and Constitutional ramifications if granted and so it must be considered carefully with judicious and prudence.

Under Section 32 of the Constitution of Kenya Review Act, No. 9 of 2008, the Committee of Experts were required to publish the draft Constitution for a period of 30 days. This they duly did. Upon expiry of the 30 days they are to review the draft Constitution and incorporate the views of the Public and within 21 days of the expiry of the period of the earlier 30 days present the draft constitution and their report to the 3rd Respondent, the Parliamentary Select Committee for deliberations and consensus building on the Contentious issues on the basis of the recommendation of the Committee of Experts.

The process would continue thereafter as preview for under Section 33 i.e. debate of draft by the

National Assembly, Section 34 Publication of the final proposed Constitution. S.35 Civic Education and finally to the Referendum under S.37,38,39,40,41,42 and 43.

The entire process is regulated by Constitutional provisions which have strict legislative time-lines and deadlines.

Mr. Gikandi argues that he is able to show that it is jurisdictionally possible for conservatory orders to be granted despite the envisaged time-lines in Section 32 of the Act. This is the very subject of his application.

In view of the restricted time in Section 32, the application by the Petitioners is made even more urgent. Once more urgent a person alleges contravention of his fundamental rights and freedoms under Section 70 – 83 of the Constitution this court as a Constitutional court must stop in its tracks and investigate the matter.

The Petitioners have come to court and made serious allegations of contravention of their rights and apprehend furthest violations. Despite the constraint of time and complexity of the matter and the fact that the other Respondents are crucial parties, this court is under an obligation to hear the Petitioner with urgency and utmost speed.

If the Petitioners are not heard on merit before 7.01.2010 and rendered then their entire application and possibly petition will be rendered nugatory. This court would have denied them their Constitutional rights. This court as the ultimate defender and enforcer of the Constitution of Kenya cannot allow that to happen. It would be an erosion and undermining of the very legal fabric of this Nation. The court will be the last to undermine the Constitution of Kenya while despite all shortcomings has been the Saviour of the Nation to date. The hope is that we have a better and enhanced, verified and herculean Constitution that shall protect the lives, rights and posterity of the people of this great country.

I do hereby order that the application be heard on 31.12.09 at 10.a.m. Mr. Njoroge having filed his Preliminary Objection is granted time until then to prepare and file and serve his authorities by the close of business today.

Dated and delivered at Mombasa this 30th day of December 2009.

M. K. IBRAHIM
J U D G E