



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Petition 689 of 2008

**IN THE MATTER OF SECTIONS 1, 1A,1030,41,42(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 SECTIONS 70(A),75,77 AND 82 OF THE
CONSTITUTION**

AND

**IN THE MATTER OF THE THREAS TO DISBAND/ABOLISH THE ELECTORAL
COMMISSION OF KENYA AND REMOVAL OF ITS MEMBERS THROUGH LEGISLATIVE
FIAT AND/OR CONSTITUTIONAL AMENDMENT BY PARLIAMENT**

AND

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

RULING

I have had the advantage of reading the Petition and the reliefs sought by the Applicants.

I have also considered on a strictly prima facie basis the grounds in support of the chamber summons which seeks conservatory orders.

Without in any way delving into the merits of the application the application raises:

- (a) Can a constitutional body be disbanded by another body - outside a new constitution order or

dispensation?

- (b) Is the Legislature or the Executive entitled under the Constitution to usurp the constitutional mandate of the High Court or any of the constitutional tribunals through an executive or legislative process which overlooks where judicial power is vested and overlooks the principle of security of tenure.
- (c) Can Parliament purport to remove basic structures of the Constitution and is it so empowered under s 47 of the Constitution?
- (d) Is the proposed Constitutional amendment aimed at circumventing the current provisions of s 41 of the Constitution valid under the Constitution.

To my mind the application before me raises some of the greatest constitutional questions ever raised in the history of our Courts. As an individual I have no immediate answer to the aforesaid questions. All I can observe at this stage is that the answer to the questions when ultimately given will touch on the principle of the supremacy of the Constitution, its sanctity and, its effectiveness.

In addition the questions raised touch on the role of all the organs of the Government namely the Executive, the Legislative and the Judiciary and whether or not one of the organs or two of the organs can jointly usurp the role of the third organ.

The application further touches on whether the principle of deference as pertains to the three organs, and for example as contemplated under s 12 of the privileges Act as regards the Legislature, can restrain the High Court from dealing with such great issues as the limits of power of the three organs.

I find and hold that the Applicants have on a prima facie basis established a strong case for the High Court as constituted to undertake one of its greatest function ie to interpret and uphold the Constitution.

I am relieved to learn that the petitioners understand that the issues of the ECK is one of the greatest importance to this Country both now and in the future and that the handling and the determination of the issues raised will be a matter of great importance to this Country, all constitutional jobholders and any future constitutional job holders.

This matter in my ruling calls for the appointment of a panel of judges which can only be constituted by the Honourable the Chief Justice - to hear both the chamber application on merit and interparties and the petition itself at the earliest opportunity.

Pending the appointment of the panel or as the Chief Justice may direct, I consider it my constitutional duty to:

- (a) certify the application as urgent.
- (b) To grant conservatory orders in order to ensure that the subject matter of the petition is not rendered nugatory pending the hearing inter parties. In the result, I do certify the application as urgent. I further grant conservatory orders as sought in prayer 3 only of the Chamber application dated 10th November, 2008. The orders have been granted for an initial period of 14 days only. Application to be heard interparties on 24th November, 2008 at 9 00 am.

In the meantime I order that this file be immediately transmitted to the Honourable the Chief Justice for appropriate orders.

It is ordered that the application together with the Petition be served before the close of the day.

DATED and delivered at Nairobi this 11th day of November, 2008.

J G NYAMU

JUDGE