REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
MISC APPLI 22 OF 2004

PETER O. NGOGE …….....…..……APPLICANT

AND

THE HON. FRANCIS OLE KAPARO…….....1ST RESPONDENT

THE CLERK OF THE NATIONAL ASSEMBLY…….....2ND RESPONDENT

THE ELECTORAL COMMISSION OF KENYA.....3RD RESPONDENT

THE HON. THE ATTORNEY GENERAL….....4TH RESPONDENT

THE CONSTITUTION OF KENYA REVIEW COMMISSION…….....5TH RESPONDENT

(CORAM: NYAMU, WENDOH, DULU JJ)

R U L I N G

An application by way of Originating Summons dated 9th January 2004 was filed on 12th January 2004 by PETER O NGOGE advocate in person as the applicant. The respondents were named as Hon Francis Ole Kaparo (1st respondent), The Clerk of the National Assembly (2nd respondent), the Electoral Commission of Kenya (3rd respondent), the Hon Attorney General (4th respondent) and The Constitution of Kenya Review Commission (5th respondent). The application was purported to be brought under sections 1, 3, 30, 31, 37, 39, 40, 44, 46, 49, 56, 57, 59, 63, 74, 82, 84 and 123 (8) (10) of the Constitution, section 3 of the Judicature Act, Rules 9 and 11 of the Kenya Constitution (Protection of the Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2001, Article 21 of the Universal Declaration of Human Rights, and section 3A of the Civil Procedure Act plus all other enabling provisions of the law. The respondents were required to cause an appearance to be entered for each of them within fifteen (15) days after service of the summons. The orders sought in the application are as follows ?

1. A DECLARATION that the 1st respondent and the applicant were at all material times hereto and are still the only candidates nominated for election to the office of the speaker of the National Assembly in terms of section 34, 35 and section 37 of the Constitution of Kenya.

2. A DECLARATION that the National Assembly of the Republic of Kenya created under section 31 of the Constitution of Kenya was not in existence on the 9th day of January 2003 and since then has never participated in electing the 1st respondent to the Office of Speaker of the National Assembly.

3. A DECLARATION that by virtue of the mandatory provisions of section 123 sub-section 10 of the

Constitution of the Republic of Kenya election to the office of the Speaker of the National Assembly cannot take place on the day when Parliament is prorogued in exercise of the powers conferred upon the President (under section) 59(1) of the Constitution of Kenya.

4. A DECLARATION that the decision of the clerk of the National Assembly (a public servant) given on the 9th day of January 2003 declaring the 1st respondent the winner having been elected as the speaker of the National Assembly after garnering 205 votes was and still is ultra vires the mandatory provisions of section 30, 31 and 37 of the Constitution and the standing orders of Parliament and to that effect unconstitutional without jurisdiction and a nullity in law.

5. A DECLARATION that the decision of the clerk of the National Assembly (a public servant) given on the 9th day of January 2003 declaring the applicant the loser after managing to garner only 2 votes was and is still ultra vires the mandatory provisions of section 30, 31 and 37 of the Constitution and the standing orders of Parliament and to that effect unconstitutional without jurisdiction and a nullity in law.

6. A DECLARATION that the 1st respondent was not elected by the National Assembly to the office of the speaker of the National Assembly of the Republic of Kenya on the 9th day of January 2003 in flagrant violation of the mandatory provisions of sections 30, 31 and 37 of the Constitution of Kenya.

7. A DECLARATION that everything said and/or done by the 1st respondent in his unconstitutional or defacto capacity as the speaker of the National Assembly on or subsequent to the 9th day of January 2003 is unconstitutional null and void *ab inotio* and of no consequence.

8. A DECLARATION that the oaths of office taken by elected and nominated members of Parliament on or subsequent to the 9th January 2003 are ultra vires the mandatory provisions of section 49 of the Constitution of Kenya and is a nullity in law.

9. A DECLARATION that the purported committees of Parliament established after the 9th January 2003 are ultra vires the provisions of section 30, 31, 37, 56 and 57 of the Constitution and are nullities in the eyes of the law.

10. A DECLARATION that any Bill passed as an Act of Parliament and or any Act of Parliament repealed or amended and/or any amendment effected on the Constitution while the 1st respondent is unconstitutionally acting as the speaker of the National Assembly is ultra vires the mandatory provisions of section 30, 31 and 37, 46, 56 and 57 of the Constitution thus null and void *ab initio* and of no consequence and should be disregarded as without a speaker elected in accordance with the Constitution there is no Parliament.

11. A DECLARATION that since the 9th January 2003 the Electoral Commission of Kenya has had no jurisdiction to preside over subsequent by-elections without a speaker of the National Assembly elected by the National Assembly in accordance with the mandatory provisions of section 37 of the Constitution.

12. A DECLARATION that all poll results given by the Electoral Commission of Kenya with respect to all by-elections held subsequent to the 9th day of January 2003 are without jurisdiction unconstitutional nullities in the eyes of the law and of no consequence.

13. A DECLARATION that the 1st respondent, a candidate for election to the office of the speaker of the National Assembly, has no statutory or constitutional right to participate in the National Constitutional Conference as a delegate.

14. A DECLARATION that the Constitution of Kenya Review Commission is not constitutionally justified to include (under section 27(2) of the Constitution of Kenya Review Act Cap 3A Laws of Kenya) *inter alia* the 1st respondent as a delegate and accordingly its action has contravened the applicant's right not to be discriminated against within the meaning and intendment of section 82 of the

Constitution of Kenya.

15. A PERMANENT INJUNCTION to issue directed at the Constitution of Kenya Review Commission restraining it from organizing or dealing with the National Constitutional Conference in any manner until the speaker of the National Assembly is elected in accordance with the mandatory provisions of section 37 of the Constitution of the Republic of Kenya by the National Assembly.

16. A DECLARATION that any or all deliberations or resolutions made by the National Constitution Conference without the speaker of the National Assembly elected in accordance with section 37 of the Constitution are nullities and of no consequence as without the speaker elected in accordance with the Constitution there is no Parliament.

17. A PERMANET INJUNCTION to issue directed at the Electoral Commission of Kenya restraining it from presiding over any by-election until the speaker of the National Assembly is elected in accordance with section 37 of the Constitution of the Republic of Kenya.

18. A DECLARATION that the 1st respondent's action of carrying out the duties and enjoying the privileges of the office of the speaker of the National Assembly has contravened the applicant's right not to be discriminated against within the meaning and intendment of section 82 of the Constitution of Kenya.

18A. A PERMANENT INJUNCTION to issue forthwith directed at the 2nd respondent compelling the 2nd respondent to preside over elections to the office of the speaker of the National Assembly in accordance with the mandatory provisions of section 82 of the Constitution of Kenya.

19. AN ORDER that the respondents do pay to the applicant general and or exemplary damages.

20. AN ORDER that the respondents do pay the costs of the suit.

The application has grounds on the face of the Notice of Motion. It is also supported by the affidavit of the applicant sworn on 12th January 2004. Following the filing of the application, Ms Jemimah Keli entered appearance on behalf of the 3rd respondent the Electoral Commission of Kenya on 30th January 2004. The 3rd respondent filed a replying affidavit to the application on 3rd March 2004, and also filed a Notice of Preliminary Objection on the same date. In addition, the 3rd respondent filed Grounds of Objection on 26th June 2007. The Attorney General (4th respondent) entered appearance on 4th May 2004, through D O Rabala a Litigation Counsel. The Clerk of the National Assembly, the 2nd respondent, filed an appearance on 20th August 2004 through M/s Oraro & Company advocates. The 2nd respondent also filed a replying affidavit and a Notice of Preliminary Objection on 7th October 2004. Subsequently, on 9th October 2007, Ms Munyi, the State Counsel who appeared on behalf of the 4th respondent confirmed that the Attorney-General had now come on record for the 1st respondent. The 5th respondent did not enter appearance nor were they represented in court.

When the application came up for hearing, Mr Oraro urged us to hear the 2nd respondent's preliminary objection filed on 7/10/2004. As the issues raised therein were preliminary legal issues, we decided to hear the parties on the said objection. The said preliminary objection dated 5th October 2004 and filed on 7th October 2004 are as hereunder ?

1. The applicant's reference is in breach of the Constitution in that it does not seek the interpretation of the Constitution, but specific reliefs by Way of Declarations.

2. The application is in breach of section 84(1) of the Constitution.

3. In questioning the proceedings of the National Assembly, the application undermines and contravenes the doctrine of separation of powers between the Parliament, the Executive and the Judiciary

as enshrined in the Constitution.

4. The proceedings herein are intended to undermine the immunity granted to the proceedings in Parliament.

5. The reference is a breach of the Constitution.

6. The applicant has filed the application herein, in respect of a matter in which he has no interest whatsoever.

7. The 2nd respondent has neither the common interest nor nexus with the 4th and 5th respondent's and is constitutionally independent of both the 4th and 5th respondents.

8. The application is an abuse of the process of this Honourable Court.

9. The application does not disclose any reasonable cause of action.

In support of the said preliminary objection, learned counsel for the 2nd respondent, Mr Oraro, submitted that the facts given in the application did not disclose a breach of Constitutional provisions. Infact, the facts disclosed show compliance with Constitutional provisions. Counsel submitted that the filing of the application was a breach of the principles of separation of powers as this court did not have powers to intervene in matters that were peculiarly for Parliament which were protected against intervention by both the Constitution and statutes. Counsel argued that the High Court could only intervene if there was a breach of fundamental rights and, in this case, there was no such breach of fundamental rights.

Counsel then went on to submit on the facts relied upon and the contents of the affidavit in support of the application. Counsel submitted that the applicant's position was that he was one of the candidates for the post of Speaker. He lost the election and initially filed judicial review proceedings, which were dismissed by Hon. Justice Rimita. The applicant thereafter filed this application.

Counsel submitted that this application was predicated on section 84 of the Constitution. The only sections which the applicant relied upon for breach of his fundamental rights, were sections 74 and 82 of the Constitution. This, in counsel's submission was borne out by the supporting affidavit and related to the election of the Speaker.

Counsel submitted that section 31 of the Constitution merely provided for the composition of members of the National Assembly but did not state who of those members had to be present to constitute the National Assembly. Counsel submitted that it was erroneous to say that unless all elected and nominated members and the President are present then there is no National Assembly. Counsel contended that the Constitution infact provided otherwise. Counsel further submitted that the prorogation of Parliament on 9th January 2003, had nothing to do with the election of Speaker since under section 59 of the Constitution, the President had power to prorogue Parliament at any time. In this particular case, Parliament was convened by a notice issued by the President on 31st December, 2002 and the notice to prorogue Parliament was dated 9th January 2003. Counsel also submitted that it was not correct to state that Parliament is not constituted without a Speaker as Standing Order number 4 provided for the election of Speaker. Counsel further argued that the Constitution of Kenya Review Commission was wrongly joined as a party. Counsel also argued that there was no breach of Article 21 of the Universal Declaration of Human Rights.

Counsel submitted that section 56(2) of the Constitution provided that the National Assembly exists as such even if some vacancies had not been filled. The same section also provided that the proceedings shall not be invalid because of vacancies. Therefore unfilled vacancies could not invalidate proceedings.

Counsel submitted that the allegation that the Clerk of the National Assembly could not swear the elected Speaker because there was no National Assembly was not a breach of fundamental rights. Under

Standing Order number 3 once the speaker was elected he was sworn by the Clerk. Counsel also argued that there was no basis in law to join the Electoral Commission of Kenya in the proceedings.

Counsel argued that the applicant was challenging the very existence of Parliament, on which this court did not have jurisdiction. He sought to rely on the case of ***KENYA BUS SERVICES LIMITED & OTHERS v THE Attorney General & 220 OTHERS [2005]1 EA 111*** and submitted that in order to invoke jurisdiction of the court, one had to fall within the Constitution.

Counsel submitted that the immunity of Parliament was absolute in matters peculiarly within the internal procedure of Parliament. That absolute immunity applied to matters with regard to nomination of members and election of officers of Parliament.

Counsel submitted that the court was not being asked to balance between the fundamental rights of an individual and Parliament. The court was also not being asked to decide whether an Act of Parliament did not comply with the provisions of the Constitution. Instead, the court was being asked to go into the debating Chamber and determine the procedure. Therefore the court did not have jurisdiction to hear and determine the application. Counsel sought to rely on the National Assembly (Powers and Privileges) Act (Cap 6) Section 6 and also the case of ***ROST v EDWARDS & OTHERS (1990) 2 ALL ER 641.***

Counsel contended that courts in the common law jurisdictions refraine from interfering with privileged matters of Parliament. That in any case, the allegations of the Applicant contradicted the grand norm of the doctrine of separation of powers. Counsel asked that the application be dismissed with costs. Counsel contended that, in determining costs, the court should serve a warning to parties against bringing such causes to court without basis. Counsel lastly, submitted that there was no allegation of discrimination against the Applicant in the application, as defined under Section 82 of the Constitution.

Ms Keli, learned Counsel for Electoral Commission of Kenya, the 3rd Respondent, associated herself with the submissions of Mr Oraro. Counsel submitted that there was no nexus between the complaints in the application and the 3rd Respondent. Counsel contended that the court did not have jurisdiction to hear and determine issues with regard to an election, unless there was an election petition as provided for under Section 44 of the Constitution, as well as Section 19 and Section 20 of the National Assembly and Presidential Elections Act (Cap 7). This application, which was not an election petition, was incompetent and the court did not have jurisdiction to entertain the same as the proper jurisdiction of the court had not been invoked and the respective Members of Parliament were not before the court. Counsel sought to rely on the case of ***KIMANI WANYOIKE v ELECTORAL COMMISSION AND OTHERS CA at Nairobi Civil Application No. 213 of 1997***; the case of the Speaker of the ***NATIONAL ASSEMBLY v HON. JAMES NJENGA KARUME – Civil Application No. Nairobi 92 of 1992***; and the case of ***KIPKALYA KONES AND REPUBLIC AND ANOTHER – EX PARTE KIMANI WANYOIKE & OTHERS – CA at Nairobi Civil Appeal No. 94 of 2005.***

Ms Munyi, Learned State Counsel, for the 1st and 4th respondents submitted that this court had no jurisdiction to entertain the application as it ran contrary to the doctrine of separation of powers. Counsel submitted that Parliament had powers to make its own rules and procedures, which could not be subject to scrutiny by court. In Kenya, the doctrine of separation of powers was written in the Constitutional framework. Counsel associated herself with the submissions of Mr Oraro and Ms Keli.

In response to the objections, Mr Ngoge (the applicant) submitted that section 40 of the Evidence Act (Cap 80) provided that all statements of law in Acts were admissible in court. He submitted that vide Gazette No 8411 of 30th December 2002, President Kibaki was declared President by the Chairman Electoral Commission of Kenya. He submitted that the President exercised his first powers under Section 33 of the Constitution on 22nd January 2003 vide Gazette Notice No 379 published on 24th January 2003. He therefore submitted that the 9th Parliament was constituted on 22nd January 2003, and therefore there were no proceedings of the National Assembly on 9th January 2003 and that the Applicant did not participate on that date in an election of the speaker.

The applicant submitted that he had served the 1st Respondent in his personal capacity because he did not recognize him as Speaker. He submitted that though the President had a prerogative under Section 58 (1) of the Constitution to summon Parliament, those powers could only be exercised after compliance with section 31 of the Constitution. Therefore, the powers under Section 58 of the Constitution could only be exercised after 22nd January 2003 when the National Assembly was constituted.

The applicant submitted that a vacancy of the National Assembly could only be declared by the Speaker. As there was no notice of declaration of such vacancy, the issue of existence or otherwise of a vacancy was a matter that could not be determined through a preliminary objection. Secondly, no vacancy could occur before the President exercised his prerogative under Section 33 of the Constitution. Again, the issue of the exercise of the Presidential prerogative was not a point that could be dealt with through preliminary objection. The applicant also argued that because of Legal Notice No 1 of 9th January 2003 and Section 123 (10) of the Constitution, the National Assembly could not have had proceedings on 9th January 2003 as it was prorogued on that date.

The applicant argued that the circumstances of this case were unique and different from those in the case of ***RAILA ODINGA v FRANCIS OLE KAPARO – Nairobi HCC Suit No. 394 of 1993***. In that case the proceedings in question were proceedings of the House and the Plaintiff came to court through a Plaint.

The applicant submitted that the violations of Section 84 of the Constitution had been disclosed. Therefore this court had jurisdiction to entertain this action irrespective of its merits. He cited the case of ***THE OWNERS AND MASTER OF THE MOTOR VESSEL "JOEY" v THE OWNERS AND MASTER OF THE MOTOR TUGS "BARBARA AND STEVE B" – Nairobi Civil Appeal No 286 of 2000***. He submitted that the objections raised were belated, as the same should have been raised during directions before the Chief Justice. He sought to rely on the case of ***NJOYA & 6 OTHERS v ATTORNEY GENERAL & ANOTHER – Nairobi High Court Misc. Civil Application No 82 of 2004*** (OS) IKLR 233. He also sought to rely on the case of ***ALBERT RUTURI v MINISTER FOR FINANCE - Nairobi High Court Misc Civil Application No 908 of 2001***.

On the issue of the doctrine of separation of powers, the applicant submitted that the doctrine did not take away the court's powers to enquire whether there was a Constitutional violation. He sought to rely on the case of ***DR CHRISTOPHER MURUNGARU v KENYA ANTI CORRUPTION COMMISSION –Civil Application No – Nairobi 43 of 2006 (24/2006)***, among others.

The applicant contended that he did not need to come to court by way of petition as this was not a matter relating to the election or nomination of a Member of Parliament, but of election of the Speaker. He submitted that there was currently no Speaker validly elected. He also submitted that the 1st and 4th respondents had not complied with Rule 36 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2006 as they had failed to file a reply to the application. They are therefore presumed to have conceded to the application. The applicant also argued that the National Assembly, not being a party, could not raise a preliminary objection. He asked the court to allow him to prosecute the application, which he contended, was a matter of manifest public interest.

Mr Oraro responded by submitting that his client's preliminary objection was filed on 7th October 2004. There was also an affidavit filed by the Clerk of his client. Therefore the objection was raised very early. He submitted that he had no issue with the ratio decidendi of the court cases cited by the applicant. However, the issues in the present application did not disclose a violation of Constitutional fundamental rights as envisaged under section 84 of the Constitution. In addition, the issues herein related to protected powers of the National Assembly by virtue of section 56 of the Constitution. Further to that, the 9th Parliament in which the application arose, had now already been dissolved. He submitted that this cause cannot survive the dissolution of Parliament. The reliefs sought were also predicated on the existence of Parliament.

Ms Keli in response, submitted that if there was no issue relating to the election or nomination of

Members of Parliament then the 3rd Respondent should never have been made a party. It all meant that there was no cause of action against the 3rd Respondent.

Ms Munyi, in response, submitted that it was clear that what was before court was an issue of procedure in Parliament. She submitted that her clients filed grounds of opposition in June 2007, though they might not have been served after filing. She contented that the Applicant had failed to disclose a cause of action against her clients. She urged the court to uphold the doctrine of separation of powers.

FINDINGS

We uphold the preliminary objection on the following broad grounds upon which we shall elaborate hereinafter:-

1) Under the provisions of the Constitution and in particular section 37 and the Standing orders of the National Assembly the first business of the National Assembly is the election of Speaker. The composition of the National Assembly as defined in section 31 is subject to other provisions of the constitution and this includes sections 37, 56, 57 and 58 which incorporates the standing orders concerning the election of the Speaker.

The argument that at the time of the election of the Speaker, the National Assembly was not properly constituted fails on these very clear provisions of the constitution.

Section 56(2) of the Constitution reads:

"**Subject to this Constitution, the National Assembly may act notwithstanding a vacancy in its membership (including a vacancy not filled when the Assembly first meets after a general election) ...**"

The fact that the nominated members were gazetted after the election of Speaker does not invalidate the election of Speaker, on the very clear wording of the above section. The vacancy occasioned by the absence of the nominated members cannot and does not invalidate any business conducted at the first sitting after dissolution of Parliament or at all.

In addition, S 58(4) of the Constitution provides that a session of Parliament shall be held at such place within Kenya and shall commence at such time as the President may appoint. The President has the discretion to appoint a date for the first sitting subject to the twelve (12) months limitation between the dissolution and the first sitting.

Finally the place of the Standing Orders in the conduct of the sittings of the National Assembly has clearly been given by S 58(4) as follows:-

"**Subject to this section the sittings of the National Assembly in a session of Parliament shall be held at such time and on such days as may be determined in accordance with the Standing orders of the Assembly.**"

Standing Order No.3 on the election of the Speaker states:

"**On the Assembly of a new house pursuant to the President's proclamation, the list of the names of the members of the House shall be laid on the table by the Clerk and the House shall thereafter proceed to the election of a Speaker. Immediately following the election, the Clerk shall administer the Oath or Affirmation of Allegiance to the new Speaker in the presence of the assembled house.**"

It is therefore manifest from the provisions of the Constitution and the Standing orders that the fact that the nominated members had not been gazetted on 24th January 2003 cannot invalidate the election of the Speaker or invalidate the proceedings of the assembled house.

2) As regards election the applicant did participate as per the Hansard Report and received 2 votes only. The Hansard also attests to the Oath of Allegiance having been administered to the elected Speaker. Purely on the basis of the annextures to the affidavit of the Clerk to the National Assembly Mr Ndindiri, we find there cannot be any valid constitutional challenge to the convening of the new session of Parliament for the election of the Speaker as proclaimed by a Special issue of the Kenya gazette Notice No 387 of 31st December 2002. Having participated in the election it is against good constitutional order and it is frivolous and an abuse of the court process for the applicant to file the challenge on 12th January 2004 over one year after the event.

3) The applicant having sought the office of the Speaker pursuant to the provisions outlined in (1) above, cannot validly convert the non election to a breach of fundamental rights under S 84 or any of the provisions of Chapter 5 of the Constitution of Kenya. There is plainly no nexus between the two.

We find that the making of an allegation of contravention of chapter 5 provisions per se, without particulars of the contravention and how that contravention was perpetrated would not justify the court's intervention by way of an inquiry where the particulars of contravention and how the contravention took place are plainly lacking in the pleadings. Indeed there is a wealth of authorities on the point. Suffice it to quote the cases of:-

(1) MARTHA KARUA v RADIO AFRICA LTD t/a KISS F M STATION AND TWO OTHERS 2006 e KLR 1.

(2) PETER NGANGA MUIRURI v CREDIT BANK LTD CHARLES AYAKO NYACHAE t/a NYACHAE AND COMPANY ADVOCATES HC Misc 1382 of 2003 (os).

Any such inclination to demand an inquiry every time there is a bare allegation of a constitutional violation would clog the Court with unmeritorious constitutional references which would in turn triviliase the constitutional jurisdiction and further erode the proper administration of justice by allowing what is plainly an abuse of the court process. Where the facts as pleaded in this case, do not plainly disclose any breach of fundamental rights or the Constitution there cannot **be any basis for an inquiry.**

4) The invitation to the Court to intervene in the matter of the election of a Speaker which is clearly regulated by the Standing orders and which is required to be the first item of the agenda of a new session would in itself be a clear breach of the Constitution in that it is not the function of this court to interfere with the internal arrangements of Parliament unless they violate the Constitution. The doctrine of separation of powers as regards the internal arrangements of Parliament demands that we do not interfere with any such internal arrangements. The internal arrangements are those normally regulated by the Standing Orders of the House. There cannot therefore be a valid cause of action based on what would clearly be a violation of the Constitution by the court if it was to intervene. The declarations and orders sought in this regard would be plainly in contravention of the Constitution. Moreover, it would result in the court interfering with the immunity granted to Parliament on such internal matters which have nothing to do with any violation of the Constitution. The powers, privileges and immunities of Parliament are provided for by the National assembly (Powers and Privileges and Immunities Act Cap 6 Laws of Kenya). Our view is that the court would only be entitled to intervene to uphold the provisions of the Constitution. An application which in substance invites the court to violate a constitutional provision or doctrine of separation of powers is itself an abuse of the court process, and is also incompetent and ought to be dealt with summarily see *KENYA BUS SERVICE LTD AND OTHERS v ATTORNEY GENERAL & OTHERS (2005) I EALR IIII at page 15(1)(J) and 116(a) to h.*

The administration of Oath of Allegiance after the election and the fact that Parliament was prorogued after the 9th of January 2003 and the claim that the Electoral Commission of Kenya had no jurisdiction to preside over a by election after 9th January, 2003 has nothing to do with the applicant's rights. These claims are plainly irrelevant and speculative and in this regard the joinder of the Electoral Commission of Kenya and the Constitution of Kenya Review is frivolous

and vexatious.

5) All the contentions of the applicant in our view challenge the internal arrangements of Parliament including the election of its Speaker and this has nothing to do with the applicants personal or fundamental rights. All the challenges in the application are within the preserve of Parliament as per the Constitution and the Standing Orders and that preserve of Parliament is protected by Parliamentary privileges as set out in section 12 of the National assembly (Powers and Privileges) Act and also demands deference by this court, of the powers, immunities and privileges. Having said so the provisions of Section 12 cannot oust the jurisdiction of the High Court if it were to find (and we have not) that Parliament has violated a fundamental right in this case.

6) Before the applicant's final reply to the preliminary objection the court drew the applicant's attention to the dissolution of the challenged Parliament on 22nd October, 2007 and asked the applicant if his case if any, had not been overtaken by the dissolution. His answer was it had not been overtaken. However it is the view of this court that the matter was rendered academic and speculative by the dissolution and the court has no business giving declarations and orders in a vacuum. A constitutional court has no business giving orders or declarations in academic or in speculative matters. The dissolution of Parliament did bring to an end the substance if any of his claim and therefore this petition fails on this ground as well. Dissolution of Parliament would not have affected any breach of a fundamental right if one were demonstrated. In this regard we adopt and reiterate the reasoning of the Constitutional Court in the Referendum Case 2005 concerning the need to avoid giving rulings on speculative, unripe, moot or giving advisory opinions. We must however strongly recommend that a future Constitutional dispensation should give both Parliament and the President the right to seek from the advisory opinions on certain defined matters from the High Court or the Supreme Court (if and when established). This has worked fairly well in other jurisdictions including South Africa. Advisory Opinion do entrench the rule of law and constitutionality.

We must however not miss the chance to state that all organs of state namely the Legislative, Executive and the Judiciary are all subject to the Constitution. The High Court has the power to strike out a law or legislation passed by Parliament which is in conflict with the Constitution. The same applies to any privileges, immunities or powers claimed by Parliament which are in conflict with the Constitution. Nothing is immune from the courts scrutiny, if in conflict with the Constitution. In this narrow sence, Mulwa J in the case of ***R v KENYA ROADS BOARD EXPARTE JOHN HARUN MWAU H C Misc Civil Application 1372 of 2000*** did bring out the broad constitutional principle well in these words:-

"**Once a constitution is written it is supreme. I am concerned beyond paradventure that when the makers of our Constitution decided to put it in writing and by its provisions thereof created the three arms of Government namely the Executive, the Legislature and the Judiciary, they intended that the Constitution shall be supreme and all those organs created under the Constitution are subordinate and subject to the Constitution."**

If Parliament were to purport to for example exercise judicial power (except over contempt in the House) this Court would be entitled to intervene appropriately under S 3 S 60 and S 84 of the Constitution. In Kenya it is the courts that are the protectors of the supremacy of the Constitution. The courts also act as interpreters of the Constitution and all legislation.

In this regard it is our view that Kenya's position in terms of the Court's scope to intervene and grant orders of Constitutionally invalidity against Parliament are much wider than the English position. For example our courts are constitutionally entitled to intervene with Parliamentary procedures, powers and privileges under S 2A of the Constitution in order to ensure constitutional compliance with the democratic values including ensuring and safeguarding participatory democracy ... see the South African case of ***DOCTORS FOR LIFE INTERNATIONAL v SPEAKER OF THE NATIONAL ASSEMBLY AND OTHERS CCT 12 OF 2005***. However on the facts of this case we find nothing on the facts which violates the Constitution even on the pleadings as drawn.

The other illustrations of situations or circumstances where the Courts would be entitled to intervene with Parliamentary process is in situations of any threat by Parliament to take away or interfere with the basic structures of the Constitution including fundamental rights. In this regard Parliamentary democracies without written Constitutions are distinct from democracies with written Constitutions, namely Constitutional democracies. In our view the position of our law as regards the relationship between this Court and Parliament including its privileges, powers and immunities is as expressed in the Indian case of ***SPECIAL REFERENCE NO. 1 of 1964 1 SCR 413 at 445*** and in the ground breaking Zimbabwan case of ***SMITH v MUTASA & ANOTHER [1990] LRC 87*** see holdings 1,2, and 3 and in the equally persuasive Zambian case of ***M'MEMBE AND ANOTHER v SPEAKER OF THE NATIONAL ASSEMBLY & OTHERS [1996]I LRC 584*** – holding 1 and 2

In our view, it cannot be correct to suggest that a constitutional matter cannot be dealt with in a summary manner in deserving cases. There are in fact many instances where the court must for example move first to prevent abuse of its process and to safeguard the dignity of the court. Abuse of process includes using the court process for a purpose or in a significantly different way from its ordinary and proper use. Chief Justice Apaloo in the case of ***ODHIAMBO OLEL v REPUBLIC*** (Civil Appeal No 54 of 1989) encountered, one such instance where he had to act summarily. He held:

"**My own conception of a constitutional issue when it relates to the interpretation of a provision of Constitution is that there are posed to the court, two or more conflicting interpretation of the Constitution and the constitutional court is asked to pronounce on which is the correct one."**

He did not find any constitutional issue in the matter. The Privy Council in construing the West Indies case and in particular S 14 identical to our S 84 in the case of ***THAKUR PERSAD JAROO v ATTORNEY GENERAL (2002) 5RC 258 at pg 273*** did approve of summary disposal in the face of abuse of process in constitutional matters.

Still on the same path and thought, Chief Justice Cockar in the case of ***STEPHEN WAMWEA KABUE & 4 OTHERS v REPUBLIC HC Misc Cr A No. 294 of 1996*** held in holding 4 in a summary manner:

"**Since the application for reference is merely frivolous and vexatious, I decline to constitute a three bench constitutional court. No good reasons exist for establishing of a constitutional court."**

The applicant's contention that in this matter a full inquiry should be undertaken does not have the support of the day to day realities and seems aimed at engaging the courts in fruitless inquiries even when their fate is apparent in the face of the record before the court. Any such inquiry would defy the dictates of practical common sense. No court would agree to tie its hands in all situations as suggested.

Finally across the Atlantic In the Canadian case of ***IN REFERENCE Re PUBLIC SERVICE EMPLOYEE RELATIONS ACT, LABOUR RELATIONS ACT AND POLICE OF FILERS COLLECTIVE BARGAINING ACT (1987) 38 DLR 4th 161*** a case our courts have used in the past in interpreting our Constitution, Justice McIntyre warned:-

"**While a liberal and not an orderly legalistic approach should be taken to constitutional interpretation the Charter should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time. The interpretation of the Charter, as of all constitutional documents is constrained by the language structure and the history of the constitutional text, by constitutional traditions and by the history, traditions and underlying, philosophers of our society."**

Similarly in ***HARRIKSSON v ATTORNEY GENERAL OF TRINIDAD AND TOBAGO [1980] AC 265, LORD DIPLOCK*** stated:-

"**The notion that whenever there is failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by the chapters of the Constitution is**

fallacious ... the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom."

The above explains why this court must refuse to be bogged down by a matter which is so plainly provided for both under the Standing orders of the House and the Constitution and its definition of the composition of the House when carrying out the elections of Speaker. Having so ruled it is important to emphasize as we have done elsewhere that this court has in upholding the Constitution in the past stopped Parliament from causing arrest of a lawyer pending full hearing of a pending Constitutional Petition which raised serious Constitutional issues against a Select Committee of the House. The reasoning which went into the grant of a preservatory order was prima facie that Parliament did not have judicial powers to cause the arrest in the circumstances.

It is also clear to us that it has not been demonstrated how the applicant's fundamental rights have been infringed following his non election as Speaker in a contest he took part in. The alleged allegation cannot plainly constitute discrimination as defined in S 82 of the Constitution.

We find no basis for having joined the Electoral Commission of Kenya in these proceedings, there is clearly no logical linkage between the applicant's alleged rights and the Electoral Commission of Kenya's constitutional mandate on elections and the applicant has in the circumstances no standing to join the Electoral body.

We therefore uphold the preliminary objection on the grounds set out above and in this regard the Petition is struck out with costs to the respondents but no costs have been availed in favour of the Constitution of Kenya Review Commission which body is non existent and which did not also participate in these proceedings.

The upshot is that the Petition is dismissed with costs.

DATED and delivered at Nairobi this 7th day of December, 2007.

J G NYAMU

JUDGE

R WENDO

JUDGE

G A DULU

JUDGE

ADVOCATES

Mr Ngoge, the applicant in person

Mr Oraro for the 2nd respondent

Miss Munyi for the Attorney General for the 4th respondent

Miss Kelli for the ECK for the 3rd respondent