



**Muslim for Human Rights (Muhuri) v Independent Electoral and Boundaries Commission
& 2 others (Petition E001 of 2021) [2021] KEHC 9358 (KLR) (2 February 2021) (Ruling)**

*Muslim for Human Rights (Muhuri) v Independent Electoral
and Boundaries Commission & 2 others [2021] eKLR*

Neutral citation: [2021] KEHC 9358 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION E001 OF 2021
EKO OGOLA, J
FEBRUARY 2, 2021**

BETWEEN

MUSLIM FOR HUMAN RIGHTS (MUHURI) PETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

SPEAKER OF THE SENATE 2ND RESPONDENT

SPEAKER OF THE NATIONAL ASSEMBLY 3RD RESPONDENT

The instant petition to be consolidated and/or heard back-to-back with the Building Bridges Initiative (BBI) petitions.

Reported by Flora Weru

***Constitutional Law** - consolidation of constitutional petitions - empaneling of a bench of five judges to hear petitions - where several suits touching on one constitutional amendment process (Building Bridges Initiative) were pending in the High Court and a five-judge bench had been appointed by the Chief Justice to hear and determine a related matter - whether it was appropriate for court orders for the consolidation of the petitions for hearing before a five-judge bench to be granted.*

Brief facts

The petitioner had filed an application seeking conservatory orders on December 31, 2020. Further, he filed the instant petition on January 4, 2021. The conservatory orders sought by the petitioner were overtaken by events when the respondent concluded the signature verification exercise and, on January 26, 2021, forwarded the BBI Constitutional Bill to the County Assemblies for consideration. Pursuant to the foregoing, the petitioner applied to have the aforesaid application withdrawn and directions on the hearing of the petition. While stating



that they had no objection to the withdrawal of the notice of motion, counsel for the interested party submitted that the petition should be transferred to Nairobi to be consolidated with other related petitions.

Issues

- i. Whether the instant petition should be heard by the five-judge bench with the other Building Bridges Initiative (BBI) petitions.

Held

1. It was not in doubt that, looking at the prayers in the instant petition, one easily found several similarities with orders sought in previous petitions before the five-judge bench in Nairobi. It must be noted that judges and magistrates were also members of the society. They read newspapers and watched the news on television. They also took notice of the general condition of life in society.
2. A judge in Kenya, especially in the Judicial Review and Constitutional divisions, must keep watch, especially when topical suits arrive before them. In Kenya, any suit involving the Judicial Service Commission (JSC), the Independent Electoral Board and Commission (IEBC), the Building Bridge Initiative (BBI), and the like was most likely to have been, or was being, litigated in one court or the other in the country. Where that was ascertained to be the case, then, prudence demands that such suits should be heard back-to-back, if not consolidated, for the multiple purposes of saving the very scarce judicial time, avoiding conflicting decisions, and creating jurisprudential consistency.
3. No court needed to be persuaded to do the right thing. Even if the issues in those petitions were not exactly similar, there was no loss or prejudice to be suffered if the same team of five judges who were hearing the matters said to be related also heard the instant petition.
4. Justice would still be done to the petitioner regardless of where the petition was heard. But there were serious gains of a common nature should the instant matter be heard back-to-back with those currently being heard by the five-judge bench. However, because the five-judge bench was constituted by the Chief Justice under the Constitution, the court had no power to directly transfer the instant matter to be heard by the said five-judge bench. Instead, the instant court forwarded the file to the Chief Justice to either constitute a five-judge bench to hear it or to have it consolidated with the matters being heard by the five-judge bench.

Orders

- i. *The petition was transferred to Nairobi High Court Constitutional and Human Rights Division to be consolidated and/or heard back-to-back with the following petitions namely –*
 1. *Nairobi High Court Petition No E282 of 2020, David Ndi and others v Attorney General and others;*
 2. *Nairobi High Court Petition No E400 of 2020; Thirdway Alliance and others v The Steering Committee on The Implementation of the building bridges to a United Kenya Taskforce and others;*
 3. *Nairobi High Court Petition No E401 of 2020; 254 Hope Versus the National Executive of the Republic of Kenya;*
 4. *Nairobi High Court Petition No E397 of 2020; The Kenya National Union of Nurses v The Steering Committee on the Implementation of The Building Bridges to a United Kenya Task Force and others.*
- ii. *Costs shall be in the cause.*

Citations

Cases

None referred to

Statutes

Kenya

1. Constitution of Kenya articles 94; 257 (4)(5) — (Interpreted)



2. Statutory Instruments Act (cap 2A) sections 5, 6, 11 — (Interpreted)

Advocates

Ms. Kituku for the petitioner

Mr. Munyithya, Mr. Mokuu & Mr. Ochieng for the 1st respondent

Mr. Paul Mwangi & Mr. Arnold Ochieng for the 1st interested party

RULING

1. The petition herein was filed in this court on January 4, 2021. At the same time the petitioner filed a notice of motion dated December 31, 2020 praying for conservatory orders as follows:
 - (i) That the honourable court be pleased to certify this matter as urgent and admitted to be heard during the court's December vacation.
 - (ii) That pending the inter-partes hearing of the notice of motion and pending the hearing of the petition a conservatory order issue restraining the 1st respondent, the Independent Electoral and Boundaries Commission (IEBC) from undertaking or continuing with the verification required under article 257(4) on whether the Constitution of Kenya (Amendment) Bill 2020 presented to it by the Building Bridges Initiative (BBI) on December 10, 2020 is supported by at least one million registered voters.
 - (iii) That pending the inter-partes hearing of the notice of motion and pending the hearing of the petition a conservatory order issue restraining the IEBC, its chairperson or any of its officers or agents from certifying that the Constitution of Kenya (Amendment) Bill 2020 presented to it by the Building Bridges Initiative (BBI) on December 1, 2020 meets the requirements of article 257(4) of the Constitution.
 - (iv) That in the alternative to orders 2 and 3 above, that pending and following the inter-partes hearing of the notice of motion a conservatory order issue restraining the IEBC, its chairperson or any of its officers or agents from verification and or certifying that the Constitution of Kenya (Amendment) Bill 2020 presented to it by the Building Bridges Initiative (BBI) on December 10, 2020 meets the requirement of article 257(4) of the Constitution until a comprehensive legal framework (including enabling regulations) to guide the verification and certification of the processes contemplated in Article 257(4) and (5) are duly passed and in force.
2. In the cause of time however, and for the reasons contained in the proceedings herein, the conservatory orders sought by the petitioner were overtaken by events when the respondent concluded the signature verification exercise, and on January 26, 2021 forwarded the BBI Constitutional Bill to the County Assemblies for consideration. Pursuant to the foregoing, the petitioner's counsel Ms Kituku on February 1, 2021 orally applied to have the aforesaid application withdrawn following the Notice of Withdrawal dated and filed herein on January 28, 2021. Counsel at the same time sought this court's directions on the hearing of the petition.
3. The application to withdraw the notice of motion dated December 31, 2020 was not opposed. Mr Justus Munyithya, learned and lead counsel for the respondent did not oppose the application for withdrawal. On the issue of directions on the petition, counsel submitted that the petition raises substantially similar issues with other petitions currently being heard by a five judge bench in Nairobi, and that this petition should be transferred to Nairobi to be heard alongside the aforesaid others. Counsel, however, added that the court was free to give directions as it pleased.



4. Mr Paul Mwangi, the learned and lead counsel for the interested party submitted that while they have no objection to the withdrawal of the notice of motion dated December 31, 2020, the petition should be transferred to Nairobi to be consolidated with the aforesaid petitions before the five judge bench.
5. Mr Mwangi referred the court to the interested party's application notice of motion filed herein dated 8/1/2021 which was partly heard on 14/1/2021, and in which prayer No 2 of joinder of the interested party was granted. The remaining prayer No 3, which sought to transfer this matter to Nairobi, read as follows:
 - “3. That the petition herein be transferred to Nairobi High Court, Constitutional and Human Rights Division and consolidated with the following petitions namely:
 - (a) Nairobi High Court Petition No E282 of 2020, *David Ndi and others v Attorney General and others*;
 - (b) Nairobi High Court Petition No E400 of 2020; *Thirdway Alliance and others v The Steering Committee On The Implementation of The Building Bridges to a United Kenya Taskforce and others*;
 - (c) Nairobi High Court Petition No E401 of 2020; *254 Hope versus The National Executive of the Republic of Kenya*; and
 - (d) Nairobi High Court Petition No E397 of 2020; *The Kenya National Union of Nurses v The Steering Committee on the Implementation of the Building Bridges to a United Kenya Task Force and others.*”
6. Mr Mwangi submitted that this court should grant that prayer No 3 above. Counsel further submitted that this court has unlimited jurisdiction to transfer this matter to Nairobi, to be consolidated with above matters to save judicial time and in the interest of substantive justice and jurisprudential consistency.

Determination

7. The prayers sought in this petition are as follows:
 - (i) That a declaration be issued that IEBC cannot undertake the verification process of signatures and registered voters supporting a popular initiative without a legal/regulatory framework or adequate legal/regulatory framework to regulate the verification and other processes required under article 257(4) and (5) of the *Constitution*.
 - (ii) That a declaration be issued that any process undertaken by IEBC purportedly under article 257(4) and (5) in regard to Constitution of Kenya (Amendment) Bill 2020 promoted by the Building Bridges Initiative violates the rule of law principle under Article 10 for lack of an enabling and guiding legal/regulatory framework and or adequate enabling and guiding legal/regulatory framework and is therefore invalid.
 - (iii) That a declaration issue that Administrative Procedures for the Verification of Signatures in Support of Constitutional Amendment Referendum are illegal because they are made without legal authority and in violation of article 94 of the *Constitution* and sections 5, 6 and 11 of the *Statutory Instruments Act, 2013*.



- (iv) That an Order issue quashing the Administrative Procedures for the Verification of Signatures in Support of Constitutional Amendment Referendum.
- (v) That an Order issue quashing all the processes and decisions made by the IEBC purportedly under article 257(4) and (5) and concerning the Constitution of Kenya (Amendment) Bill, 2020 promoted by the Building Bridges Initiative.
- (vi) That a permanent order of injunction do issue permanently restraining IEBC, its Commissioners, staff or agents from forwarding the Constitution of Kenya (Amendment) Bill, 2020 promoted by the Building Bridges Initiative to the County Assemblies.
- (vii) That a permanent order of injunction do issue restraining the IEBC from undertaking any processes required under article 257(4) and (5) in respect of the Constitution of Kenya (Amendment) Bill 2020 or any other Bill presented to it under article 257(4) until the 2nd respondent therein enacts a comprehensive legal and regulatory framework to regulate and guide the constitutional processes mandated under article 257(4) and (5) of the Constitution.
- (viii) That in the alternative, this honourable court be pleased to suspend the verification process of signatures and registered voters supporting a popular initiative by IEBC and other processes required under article 257(4) and (5) of the Constitution until the 1st and 2nd respondent enacts an adequate statutory and regulatory framework to regulate the verification of signatures and other processes required under article 257(4) and (5) of the Constitution.
- (ix) That the respondent file in court an affidavit detailing the steps they have undertaken in enacting the requisite statutory and regulatory framework regulating the verification of signatures and other processes required under article 257(4) and (5) of the Constitution within 30 days of enacting the aforesaid regulatory framework.
- (x) That this honourable court be pleased to grant such further Order or Orders as may be just and appropriate.

8. It is not in doubt that looking at the prayers in this petition one easily finds several similarities with orders sought in above petitions before the 5 judge bench in Nairobi. It must be noted that judges and magistrates are also members of the society. They read newspapers and watch news on television. They also take notice of the general condition of life in society. A judge in Kenya today, especially in the Judicial Review and Constitutional divisions, must keep watch especially when topical suits arrive before them. In Kenya today, any suit involving JSC, IEBC, BBI and the like is most likely to have been, or is being, litigated in one court or the other in the country. Where that is ascertained to be the case, then, prudence demands that such suits should be heard back to back, if not to be consolidated, for the multiple purposes of saving the very scarce judicial time, avoiding conflicting decisions, and creating jurisprudential consistency. No court needs to be persuaded to do the right thing. Even if the issues in these petitions are not exactly similar, there is no loss or prejudice to be suffered if the same team of 5 judges who are hearing the matters said to be related, also hear this one.

9. Mr Mwangi had submitted that the matter of this petition was raised before the said five judge bench, which was of the opinion that this matter should be forwarded to them to be determined along with the said others. I think that is what should be done. Justice will still be done to the petitioner regardless of where the petition is heard. But there are serious gains of common nature should this matter be heard back to back with those currently being heard by the aforesaid five judge bench. However, because the aforesaid 5 judge bench was constituted by the Chief Justice under the constitution, I have no powers to directly transfer this matter to be heard by the said 5 judge bench. Instead I forward this file to the



Chief Justice to either constitute a 5 judge bench to hear it, or to have it consolidated with the matters being heard by the 5 judge bench.

10. For the foregoing reasons his petition is hereby transferred to Nairobi High Court Constitutional and Human Rights Division to be consolidated and/or heard back to back with the following petitions namely –

- (1) Nairobi High Court Petition No E282 of 2020, *David Ndi and others v Attorney General and others*;
- (2) Nairobi High Court Petition No E400 of 2020; *Thirdway Alliance and others v The Steering Committee On The Implementation of the building bridges to a United Kenya Taskforce and others*;
- (3) Nairobi High Court Petition No E401 of 2020; *254 Hope versus The National Executive of the Republic of Kenya*;
- (4) Nairobi High Court Petition No E397 of 2020; *The Kenya National Union of Nurses v The Steering Committee on the Implementation of The Building Bridges to a United Kenya Task Force and others*.

11. Costs shall be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 2ND DAY OF FEBRUARY, 2021.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Ms Kituku for Petitioner

Mr Munyithya, Mr Mokua & Mr Ochieng for 1st Respondent

Mr Paul Mwangi & Mr Arnold Ochieng for 1st Interested Party

Ms Peris Court Assistant

