



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

PETITION NO. 7 Of 2020

(Previously Nairobi HC Petition No. 116 of 2020)

REVEREND HUMPHREY GOREN AND 19 OTHERS.....PETITIONERS

VERSUS

REVEREND NATHAN ONDEGOAND 8 OTHERS.....RESPONDENTS

AND

THE CABINET SECRETARY,

MINISTRY OF INTERIOR AND 4 OTHERS.....INTERESTED PARTIES

RULING

1. The application for determination is brought at the instance of the petitioners, and it is premised on Rules 23, 24 and 32 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, which provide as follows:

“23. Conservatory or interim orders

(1) Despite any provision to the contrary, a Judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim orders.

(2) Service of the application in sub rule (1) may be dispensed with, with leave of the Court ...

24. Application under rule 21

(1) An application under rule 23 may be made by way of notice of motion or by informal documentation...

25. Setting aside, varying or discharge

An order issued under rule 22 may be discharged, varied or set aside by the Court either on its own motion or on application by a party dissatisfied with the order ...

32. Stay pending appeal

(1) An appeal or a second appeal shall not operate as a stay of execution or proceedings under a decree or order appealed.

(2) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling and the court may issue such orders as it deems fit and just.

(3) A formal application for stay may be filed within 14 days of the decision appealed from or within such time as the court may direct.”

2. The applicants are aggrieved by an order that the court made, on 29th May 2020, transferring the matter from Nairobi to Kakamega. Their case is that Rule 8 is subordinate to the Constitution, which does not limit the jurisdiction of the High Court to a geographical locality. They would like the said transfer order stayed pending appeal, and that the same be set aside.

3. Article 165(6) of the Constitution states in plain language that this court has supervisory jurisdiction over subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial junction but not over a superior court. Superior courts, in terms of Article 162 (1) of the Constitution, are the Supreme Court, the Court of Appeal, the High Court and the courts of equal status, namely the Employment and Labour Relations Court and the Environment and Land Court. The edict in Article 165(6) is in form of a constitutional limitation imposed on this court not to do anything that would amount to supervising or superintending over other superior courts. (See *Kenya Hotel Properties Limited vs. Attorney General & 5 others* [2018] eKLR)

4. With respect to the above, it was said in *Stephen Mwaura Njuguna vs Douglas Kamau Ngotho* Civil Appeal No. 90 of 2005 (consolidated with Civil Appeal No. 247 of 2007):

“... the learned Judge had no jurisdiction to determine a matter that was decided by a fellow Judge of concurrent jurisdiction. He could not for instance set aside a judgment of Muga Apondi J, a Judge who has the same jurisdiction as himself. Such setting aside could only be by an appellate court but not by a Judge of the High Court as the appellant sought.”

5. The application principally seeks stay of the transfer order. I doubt whether there is anything to stay. The order was carried to effect when the court file was transferred to the High Court at Kakamega. Secondly, it is my finding that I cannot vary or set aside the orders of 29th May 2020, because the same were made by a court of concurrent jurisdiction, and, as such, they can only be varied or set aside by a superior court or appellate court, in this case the Court of Appeal. Alternatively, the High Court can set them aside, but only where it is demonstrated that improprieties attended its making, which, in this case, have not been established.

6. I find no merit whatsoever in the application dated 2nd June 2020, and I hereby dismiss the same. Costs shall be in the cause.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 4TH DAY OF DECEMBER, 2020

W MUSYOKA

JUDGE