



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURT AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 401 OF 2017

FEDERATION OF WOMEN LAWYERS IN KENYA.....PETITIONER

VERSUS

THE SPEAKER THE NATIONAL ASSEMBLY.....1ST RESPONDENT

SPEAKER OF THE SENATE2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....4TH RESPONDENT

AND

NATIONAL GENDER AND

EQUALITY COMMISSION.....INTERESTED PARTY

RULING

1. By a Notice of Motion dated 24th October 2017, and filed in Court on 30th November 2017, the 1st respondent, **The Speaker of the National Assembly**, moved this Court for two principal orders, namely; an order consolidating this petition with **Petition No 397 of 2017, Centre for Rights, Education and Awareness (CREW) & Another V the Speaker of the National Assembly and 2 Others**. He also sought an order staying these petitions pending the hearing and determination of **Civil Appeal No 148 of 2017, The speaker of the National Assembly v Centre for Rights Education Awareness and 2 others**, pending before the Court of Appeal

2. The application is supported by an affidavit sworn by **Michael Sialai**, the Clerk to the National Assembly and grounds on the face of the motion. The main grounds upon which the motion is based are, that the two petitions **Nos. 397 and 401** both of 2017, are similar in all respects, that the two petitions challenge the constitutionality of Parliament for failing to meet the **two – third gender** requirement in its composition, and that consolidation will enable the Court effectively and completely adjudicate upon all matters arising in both petitions.

3. On stay, the applicant stated that the questions the two petitions seek to canvas overlap with some aspects which the Court of appeal is handling in **Civil Appeal No 148 of 2017**; hence the outcome of that appeal will have some considerable effect on these petitions. The applicant is of the view that for proper administration of justice, it would be better if these petitions were consolidated and then stayed to await the determination of the appeal.

4. The petitioner filed grounds of opposition to the motion, dated 5th December 2017 and a replying affidavit sworn on the same day and both filed in court on 5th December 2017. The petitioner contended in the grounds of opposition that the application is misconceived, frivolous, and vexatious, lacks merit, and is a diversionary tactic and a waste of court's time. In the replying affidavit, **Teresa Carlo Omondi** deposed that the two petitions are not similar in that the issues therein are far apart hence there is no reason why they should be consolidated. Regarding **Civil Appeal No. 148 of 2017**, she stated that the petitioner is not a party in that appeal.

5. During the hearing of the application, **Mr. Njoroge**, learned counsel for the applicant, relied on the depositions in the affidavit in support and the grounds on the face of the motion. Learned counsel contended that the petitions raise similar issues and it will save judicial time and resources if they are heard together. Regarding stay, learned counsel argued that the petitions arise from the decision in **Petition No 137 of 2016** which decision is the subject of **Civil Appeal No 148 of 2017** which is also dealing with the two third gender rule. In **Mr. Njoroge's** view if the appeal succeeds, it will substantially change the character of the two petitions hence the need to stay them.

6. **Miss Otieno**, learned counsel for the 2nd respondent, **Mr. Ogosso** for 3rd respondent, and **Miss Lukoye** for 4th respondent all supported consolidation and stay of proceedings in the petitions. They agreed with **Mr. Njoroge's** submissions in all respects. **Mr. Mbithi**, who appeared for the Interested Party and held brief for **Mr. Ogolla** for the petitioner in **Petition No 397 of 2017**, did not oppose consolidation. Learned counsel told the court that **Mr. Ogolla** too did not oppose consolidation. In their view, the matters raise similar issues hence consolidation is appropriate.

7. Regarding stay of proceedings in the two petitions, **Mr. Mbithi** disagreed with his counterparts in support. Learned counsel contended that the issue before Court in the present petitions is on the failure by Parliament to meet the **two third gender rule** which is not the same with the matter on appeal.

8. **M/s Majiwa**, learned counsel for the petitioner, opposed both consolidation and stay of the petitions. Regarding consolidation, learned counsel contended that this petition (401) is more comprehensive than **Petition No 397 of 2017** in terms of both the content and prayers sought hence it should be heard independent of petition No. 397 of 2017. On stay, learned counsel was in agreement with **Mr. Mbithi** that issues raised in these petitions are different from those in the appeal. Learned Counsel contended that the decision in the appeal will not affect these petitions hence there is no justification for staying them.

9. I have considered the application, supporting affidavit, grounds in opposition to the motion and submissions in support as well as the arguments raised in opposition. There is consensus among majority of counsel though, that the two petitions should be consolidated. Only **Ms. Majiwa** and her colleagues, **Ms. Odede** and **Ms. Lumallas** opposed consolidation.

10. Consolidation arises where two or more suits or petitions under consideration raise similar issues, are against same parties, and are before the same Court or different courts but of concurrent jurisdiction hence the same Court or one Court can hear and determine the issues raised in the matters at the same time. Consolidation is also aimed at saving the Court's time and resources in hearing and determining the suits or petitions.

11. I have perused the two **Petitions Nos 397 and 401 both of 2017**. The petitioners may be different but the respondents are largely the same. The two Petitions also seek 'largely similar reliefs. They question the constitutionality of the composition of Parliament with regard to the two- third gender rule. Moreover, the petitions are before the same Court and counsel for the parties in the twin petitions are the same.

12. Rule 17 of the **Mutungu Rules** gives the Court discretion to consolidate several petitions on its own motion or on application by a party or parties. Looking at the petitions, and considering the issues raised therein, I am of the considered view that they favour consolidation. This will save the Court's time in that it will hear the two petitions and make a single determination on the issues they raise thus save valuable judicial time.

13. Regarding stay, the applicant's argument is that the decision of the Court of Appeal in **Civil Appeal No. 148 of 2017**, were that appeal to succeed, will affect these petitions. **Mr. Njoroge** contended that these petitions arise from the decision in **High Court Petition No 371 of 2016** hence they should be stayed awaiting the decision of the Court of Appeal. The petitioners and interested party disagree. In their view, these petitions are different from **Petition No 371 of 2016**; hence they need not be stayed.

14. I have read the prayers in the twin petitions and those in **Petition No 371 of 2016**. I have also seen the Judgment of the Court in that petition, the subject of the appeal in **Civil Appeal No 148 of 2017**. I note that the matter on appeal deals with the 11th Parliament and its failure to enact legislation as required by the Constitution.

15. In the present petitions, however, the principle reliefs sought are on the constitutionality of the composition of the 12th Parliament with regard to the two-third gender principle. That, to my mind, is a different and distinct issue that the Court can proceed to determine without awaiting the decision of the Court of Appeal because the issue relates to a different Parliament and some parties including **Independent Electoral Boundaries Commission (IEBC)** and **Federation of Women Lawyers in Kenya (FIDA-KENYA)** were not parties in **Petition No 371 of 2016** and the subsequent Appeal.

16. For the above reasons, I allow the application partly as follows;

1. Petition Numbers 397 and 401 both of 2017 be and are hereby consolidated to be heard together with Petition No. 401 as the lead file.

2. Federation of Women Lawyers in Kenya (FIDA-KENYA) and Centre for Rights, Education and Awareness (CREW) be the 1st and 2nd petitioners respectively.

3. The respondents and interested party do maintain the order in which they appear.

4. The prayer for stay is declined and dismissed.

5. Costs in the cause.

Dated, Signed and Delivered at Nairobi this 6th Day of February 2018

E C MWITA

JUDGE