REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 385 OF 2018

OKIYA OMTATAH OKOITI.....PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE NATIONAL ASSEMBLY.....2ND RESPONDENT

RULING

1. The petitioner herein, who describes himself as a law abiding citizen of Kenya, a public spirited individual and a human rights defender filed the instant petition against the respondents herein on 7th November 2018 seeking the following declaratory orders:

> ***i. A declaration that section 17 (1) (a) and (b) of the National Cohesion and Integration Act No. 12 of 2008 and the procedure for nominating commissioners of the National Cohesion and Integration Commission by the National Assembly under the First Schedule to the Act is unconstitutional and, therefore, invalid, null and void.***
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> ***ii. A declaration that any appointments made pursuant to Section 17(1) (a) and (b) of National Cohesion and Integration Act, No. 12 of 2008 and the procedure for nominating commissioners of the National Cohesion and Integration Commission by the National Assembly under the First Schedule to the Act is unconstitutional and, therefore , invalid, null and void ab initio.***
>
> ***iii. An order quashing Section 17(1)(a) and (b) of the National Cohesion and Integration Act, No. 12 of 2008 and the procedure for nominating commissioners of the National Cohesion and Integration Commission by the National Assembly under the First Schedule to the Act is unconstitutional and therefore null and void ab initio.***
>
> ***iv. An order quashing any appointments made pursuant to Section 17(1)(a) and (b) of the of the National Cohesion and Integration Act, No. 12 of 2008 and the procedure for nominating commissioners of the National Cohesion and Integration Commission by the National Assembly under the First Schedule to the Act***
>
> ***v. An order that the costs of this suit be provided for.***
>
> ***vi. Any other relief the court may deem just to grant.***

2. Concurrently with the petition the petitioner also filed the application that is the subject of this ruling being application dated 7th November 2018 seeking orders:

> ***1. Spent***
>
> ***2. That pending the inter- partes hearing and determination of this application and/or the petition herein he Honourable court be pleased to issue a conservatory order suspending the scheduled interviews of candidates shortlisted for appointment as commissioners of the National Cohesion and Integration Commission as advertised by the 2nd respondent in the Press on 2nd November 2018.***
>
> ***3. That pending the inter-partes hearing and determination of this application and/or the petition herein the Honourable court be pleased to issue a temporary order of prohibition prohibiting the interviews of shortlisted candidates for appointments as Commissioners of the National Cohesion and Integration Commission as advertised by the 2nd respondent in the Press on***

2nd November 2018.

4. That consequent to the grant of prayers above the Honourable court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.

5. That the costs of this application be provided for.

3. The application is premised on the grounds on the face of the application and the petitioner's affidavit sworn on 7th November 2018.

4. A summary of the applicants case is that on 2nd November 2018, he read an advertisement posted in the press to the effect that the 2nd respondent had embarked on the process of recruiting persons for appointment as Commissioners of the National Cohesion and Integration Commission and that the interviews are slated for 12th to 14th November, 2018.

5. According to the petitioner the said recruitment by the 2nd respondent contravenes the constitutional principle of separation of powers. The petitioner's case is that both 17(1)(a) and (b) of National Cohesion and Integration Act, No. 12 of 2008 (hereinafter " **the Act**") and the First Schedule of the Act are unconstitutional since recruitment of persons to be appointed to public office is the preserve of the Public Service Commission (PSC) and the executive, and not of Parliament.

6. The petitioner contends that Section 17(1) (a) and (b) of the Act and the procedure for nominating commissioners by the National Assembly under the First Schedule of the Act are both unconstitutional and therefore, invalid, null and void ab initio. He contends that the Act predates the Constitution and that pursuant to Section 7(1) of the Sixth Schedule of the Constitution, must ***'be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.'***

7. At the hearing of the application the petitioner, who appeared in person, submitted that the legal framework on which the recruitment is based is illegitimate and urged the court to arrest it as the purpose of the petition is to prevent the violation of the Constitution. The petitioner argued that if the recruitment process is not suspended/arrested, the short listed candidates will be interviewed and appointed thereby defeating the main prayers sought in the petition.

8. The petitioner maintained that the balance of convenience tilts in favour of granting of the conservatory orders sought as the said orders are not final since the recruitment process will be allowed to proceed should the petition be disallowed.

The 1st respondent's case

9. The 1st respondent opposed the application through the grounds of opposition filed on 8th November 2018 in which the following grounds were listed:

1. This being a recruitment process that leads to the occupation of an office, the same is an employment and labour relations issue. Consequently, this Honourable court lacks the requisite jurisdiction to entertain the same on account of Article 162(2)(a) and 165(5) (b) of the Constitution.

2. The applicant is guilty of laches by filing the instant application for the reason that he has been aware there were intended recruitments to the National Cohesion and Integration Commission as was advertised in the local dailies of 5th October, 2018.

3. The main petition will not be rendered nugatory should the sought conservatory orders be denied for the reasons that:

i. The issue raised therein will still present live controversies for the court to consider and determine on their merits;

ii. This Honourable court still has the power to remedy any unconstitutionality that it may find with the impugned Section 17(1) (b) of the National Cohesion and Integration Act, 2018.

4. The public interest favours a denial of the conservatory orders sought. This is so because;

i. Public funds have already been expended in the intended recruitment exercise that is set to begin on Monday 12th November, 2018.

ii. Those candidates who have been shortlisted to take part in the said interviews have already made arrangements to attend the said interview;

iii. The interview process is not the end result of the entire process since there will be deliberations and considerations to be done thereafter for suitable persons to be identified from the list of the persons who shall have attended the interviews;

iv. It would be prudent to allow the interview process to proceed as scheduled since the court is capable of intervening before the actual recruitment is done.

5. The petitioner has failed to sufficiently demonstrate, with concrete evidence, that this court is incapable of remedying a purported constitutional violation should there be a finding to that effect.

6. The notice of motion application is unmeritorious; as such it otherwise forms a classical description of an abuse of the due process of this Honourable court.

10. At the hearing of the application, **Mr. Ogosso**, learned counsel for the 1st respondent, expounded on the grounds of opposition listed hereinabove and argued that this court lacks in jurisdiction to entertain the case as it relates to recruitment of commissioners which falls under the docket of the Employment and Labour Relations Court (ELRC).

11. Counsel submitted that the applicant is guilty of laches in view of the fact that the recruitment process began on 5 th October 2018 and the applicant filed the case one month later on 7th October, 2018.

12. Counsel submitted that the issues raised in the petition will still be live even if the recruitment goes on as scheduled as the court will still be able to determine the merits of the petition and remedy any violation of the Constitution.

13. According to Mr Ogosso, public interest favours the denial of the orders sought because public funds have already been spent in the recruitment process.

2nd respondent's case

14. The 2nd respondent filed grounds of opposition dated 8th October 2018 in which it states that recruitment of state officers is not within the scope of the Public Service Commission as alleged by the petitioner and further, that National Cohesion integration Commission is not a Chapter 15 commission under Article 248 of the Constitution.

15. The 2nd respondent further states that the recruitment of state officers is not an exclusive function of the executive and that it is trite law that there is presumption of constitutionality of the statutes until the contrary is proved.

16. It is the 2nd respondent's case that the petitioner has not stated the particular provision of the Constitution that has been contravened by the impugned legislation. The 2nd respondent maintains it is trite law that every application that is likely to affect any party in a matter cannot be canvassed in the absence of a party that it seeks to affect.

17. At the hearing of the application, **Mr. Mwendwa**, learned counsel for the 2nd respondent, reiterated the 1st respondent's argument that this court has no jurisdiction to entertain the petition and application as it falls in the jurisdiction of the Employment and Labour Relations Court.

18. Counsel submitted that pursuant to Article 234 (b) of the Constitution, the recruitment process in the government of Kenya is not a preserve of the Public Service Commission. Counsel submitted that the applicant has not made out a prima facie case so as to warrant the issuance of the conservatory orders sought. It was submitted that for purposes of the doctrine of separation of powers, the function of recruitment is not an exclusive mandate of the executive.

19. Counsel further argued that on the basis of the doctrine of presumption of constitutionality of statutes the court should find that as long as the impugned Section of the Act has not been declared unconstitutional, then the recruitment process should not be declared unconstitutional. Counsel reiterated that the petitioner has not established the provision of the constitution that has been violated. He further argued that the 54 candidates shortlisted for the interviews have not been notified of this case yet the orders sought will affect them. For this argument counsel cited the case of **Judicial Service Commission vs Mbalu Mutava [2015] e KLR** wherein it was held that it is not only prejudicial but also injurious to the administration of justice to condemn persons who are not parties to the case. Counsel also referred to the case of Peter **Munya vs Mwenda Kithinji [2014[e KLR** in which the grounds on which conservatory orders may be issued was discussed. Reliance was also placed on the decision in the case of **Mwangi Wairia vs Speaker of Muranga County Assembly [2015] e KLR**

20. On separation of powers, counsel cited the case of **Justice Kariuki Mate & Another vs Martin Nyaga Wambora[2017] eKLR** wherein it was observed that where a law requires a state organ to undertake a special mandate, the court should exercise restraint when considering an application that may curtail an ongoing process.

Determination

21. I have considered the instant application, the grounds of opposition filed by the respondents and the rival submissions made by the petitioner and the respondents counsel together with the authorities that they cited. The main issues that fall for the determination by this court are whether the applicant has made out a case to warrant the issuance of the conservatory orders sought pending the hearing and determination of the petition and whether this court has jurisdiction to entertain this matter.

22. On jurisdiction, the respondents argued that since the case relates to recruitment of commissioners, it is an employment matter that should be handled by the Employment and Labour Relations Court in line with the provisions of Article 162 (2)(a) of the Constitution. The applicant, on the other hand, argued that the petition challenges the constitutionality of the provisions of Section 17 of the Act and the First Schedule thereof and is therefore a matter falling under the purview of this court. Jurisdiction is the authority granted to a court of law to administer justice and has been likened to an engine that enables the court to take cognizance of matters presented before it for determination as without jurisdiction, the court's decisions will be in vain. As was aptly stated by **Nyarangi JA** in the case of **Owners of Motor Vessel Lillian"S" v Caltex Oil (Kenya) Limited [1989] 1 KLR 1**:-

"Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there

would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction…."

23. The Supreme Court expressed itself in support of the issue in **RE: The matter of Interim Independent Electoral and Boundaries Commission [2011] eKLR** as follows:-

"The Lilian "S" established that jurisdiction flows from the law and the recipient court is to apply the same with any limitation embodied therein; such a court may not arrogate itself jurisdiction through a craft of interpretation, or by way of endevours to discern or interpret intentions of parliament, where the wording of the legislation is clear and their respective jurisdictions are donated by the constitution."

24. In the case of **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others [2012] eKLR,** the Supreme Court once again stated–

"A court's jurisdiction flows from either the constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the constitution or the other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law… where the constitution exhaustively provides for jurisdiction of a court of law, the court must operate within the constitutional limit."

25. The above cited decisions illustrate the fact that a court of law must first have jurisdiction before it can proceed to hear a matter presented before it and must exercise that jurisdiction in accordance with the law. Article 165(3) of the Constitution is clear in its provisions and needs no explanation. The said Article bestows jurisdiction on this Court as follows:-

(3) Subject to clause (5), the High Court shall have—

(b) jurisdiction to determine the question whether a right or fundamental right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-

i. the question whether any law is inconsistent with or in contravention of this Constitution;

ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.

26. **Article 23 (1)** reiterates the fact that the High court has jurisdiction in accordance with **Article 165**, to hear and determine applications to redress denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights. At the center of the instant petition, as can be discerned from the orders sought in the petition, is the claim that section 17 (1) (a) and (b) of the Act and the First Schedule thereof, on which the impugned recruitment is anchored is unconstitutional and should be declared as such. To my mind, the main issue for determination is not the recruitment *per se*, but the validity of the law on which it is founded. I therefore find that it goes without saying that this court has jurisdiction to deal with the instant petition as it raises questions of violation/ threat of violation of the Constitution and the constitutionality of the impugned Act.

Conservatory orders

27. Turning to the issue of conservatory orders, the law is now settled on the conditions to be met before the said orders can be granted. Courts have severally held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a *prima facie* case with a likelihood of success. Accordingly, in determining this application, this Court is not required, and is indeed it is forbidden from making definite and conclusive findings on either fact or law.

28. For the above reasons, I find that even though the issues raised by the respondents in their grounds of opposition to the application such as the non-joinder of some parties, the alleged delay in filing the petition and the doctrine of constitutionality of statutes among others, are valid points of law and fact, this court cannot make conclusive determination on the said issues at this interlocutory as they are issues that will be determined by the court that will eventually hear the petition. I will therefore not venture into the forbidden path of making any determinations whose effect would have the impact of prejudicing the hearing of the main Petition.

29. Apart from establishing a *prima facie* case, the applicant must further demonstrate that unless the conservatory order is granted he or she stands suffer real danger which may be prejudicial to him or her. See **Centre for Rights, Education and Awareness (CREAW) & 7 others vs. The Hon. Attorney General**, Nairobi HC Pet. No 16/2011, **Muslims for Human Rights (MUHURI) & 2 others vs. The Attorney General & Judicial Service Commission,** Mombasa HC Pet. No. 7 of 2011

30. In the case of **Centre for Rights Education and Awareness (CREAW) & 7 Others Nairobi** Petition No. 16 of 2011 **Musinga, J** (*as he then was*) stated that:

"...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to

demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."

31. In a majority decision in the case of **The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012**, it was held as follows:

> ***"In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission."***

32. Similarly, in **Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR** this Court expressed itself as follows in regard to Conservatory orders:

> ***"Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person."***

33. This position was adopted by the Supreme Court in **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others, S.C. Application No. 5 of 2014**, the Court held as follows at paragraph 86 and 87:

> ***"Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes..."***

34. On the question of whether the applicants have established a *prima facie* case I find that it has been held that a *prima facie* case is not a case which must succeed at the hearing of the main case but is rather a case which is not frivolous. In other words the applicant must demonstrate that his case discloses arguable issues and in this case arguable Constitutional issues. As I have already stated in this ruling, the applicant's case is that the law upon which the recruitment is anchored, being section 17 (1) (a) and (b) of the Act together with its First Schedule is unconstitutional, for violating the constitutional principle of separation of powers among other violations. My take is that having considered the totality of the issues raised in this petition, this Court cannot say that the Petitioner's case is frivolous as it raises fundamental questions about the constitutionality of the provisions of an Act of parliament which questions this court cannot ignore. I therefore find that the petitioner has satisfied the requirement of establishing that he has a prima facie case and that under Article 23(3) (c) this court has powers to grant an appropriate relief including a conservatory order.

35. Turning to the issue of the irreparable loss to be suffered in the event that the conservatory orders sought are not granted, the applicant contended that failure to secure the conservatory orders may result in the recruitment of commissioners under a law that does not meet the constitutional test of validity thereby rendering his petition a non-starter. The respondents, on the other hand, were of the view that the court can still make a pronouncement on the constitutionality of the impugned sections of the Act even after the recruitment process has been undertaken. My finding is that while both arguments are valid, in this case, the court is faced with a scenario where a party has raised a red flag on the validity of a process that is on course but is yet to be finalized. I note that the main prayer sought in the instant application is not an order to quash or declare recruitment process unconstitutional but rather, to suspend the process, albeit temporarily, as the court interrogates the constitutional questions that have been raised by the applicant over the said process.

36. My finding on the issue of irreparable loss is that the substratum of the petition stands to be rendered nugatory if the orders sought are not granted as the subsequent determination on the validity of a recruitment process that has already been executed will be akin to locking the stable after the horses have bolted. Even though it is true that the court can still pronounce itself on the constitutionality of the impugned sections of the Act at any time even after the recruitment has taken place, I find that the justice of this case will require this court preserves the subject matter of the petition. My take is that should the court, after hearing the petition, find that it is unmerited, the recruitment will proceed as planned and from where it had reached while on the flipside, should the court decline to grant the orders sought only to eventually find that the petition has merit, then the applicant and indeed the respondents may be forced to embark on a tedious and costly process of undoing the recruitment process and starting the same all over again. In this case, the respondent did not state that it stands to suffer any prejudice if the recruitment process is put on hold pending the determination of this petition save for the claim that a lot of resources had already been spent in the recruitment process. According to the applicant he seeks the suspension of the recruitment process so as to prevent the threat to the violation of the Constitution and preserve the subject matter of the petition. He contended that further spending of public funds is stopped where the process has been contested for being unconstitutional.

37. I find that having regard to the findings and observations that I have made in this ruling, the balance of convenience and indeed the wider public interest tilts in favour of suspending the recruitment process pending the hearing of the petition. I hasten to add that it will also be in the interest of the shortlisted candidates for the advertised positions to await the outcome of the petition before embarking on the interview so as not to be subjected to a recruitment process that is marred with claims of unconstitutionality and possible nullification or quashing of their appointments in the event that the petition succeeds.

38. For the above reasons, I reiterate that the justice of this case requires that this court preserves the subject matter of the petition and I therefore allow the instant application dated 7th November 2018, but with a rider that the petition be heard in an expeditious manner so that the public, which includes the applicant herein, the shortlisted candidates and the respondents can know the fate of the recruitment of commissioners of NCIC.

39. Consequently, I issue directions that the respondents file and serve their respective responses to the petition within 7 days from today's date and the petitioner is at liberty to file a further affidavit, should he deem it necessary, within 3 days from the date of service with the responses. Parties may thereafter file and exchange written submissions to the petition before the hearing date. Hearing on 26th November 2018 to highlight the submissions.

Dated, signed and delivered in open court at Nairobi this 9th day of November 2018.

W. A. OKWANY

JUDGE

In the presence of:

Petitioner

Mr. Angaya for the 2nd respondent

Court Assistant- Kombo