REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 88 OF 2015

BETWEEN

DAVID NYEKORACH MATSANGA.....1ST PETITIONER

JOHN MUIRURI KIMANI .....2ND PETITIONER

VERSUS

THE HON. MR. JUSTICE PHILIP WAKI……1ST RESPONDENT

THE OFFICE OF THE PROSECUTOR OF I.C.C…….2ND RESPONDENT

THE ATTORNEY GENERAL….....3RD RESPONDENT

AND

MYOT WELFARE ASSOCIATION

KALENJIN COUNCIL OF ELDERS) .....INTERESTED PARTY

RULING

Introduction

1. The Petition herein was filed on 10th March 2015. Promptly, the 1st Respondent reacted upon service and filed a notice generally objecting to the propriety and merit of the Petition. The Notice of Preliminary Objection was filed on 18th March 2015. It was prolix. It delimited some thirteen grounds, focusing on both the Petition and the Notice of Motion application which had been simultaneously filed with the Petition. The grounds are reprised variously in the following paragraphs.

2. The Petition itself, though brief, was embellished with innumerable annexes and attachments to the supporting affidavits. The Petitioners now seek to amend the Petition and have accordingly sought our permission. The application for leave to amend was itself filed on 16th June 2016 and there is a temptation to suppose that the Notice of Preliminary Objection prompted the application.

3. We will consider both the Notice of Preliminary objection as well as the interlocutory application for leave to amend.

Factual matrix

4. The background facts are not in contest and may be retrieved (largely but not wholly) from the Petition itself. The facts may be stated in summary as follows.

5. In December 2007 our country held the general elections. The presidential results were disputed. Post electoral violence ("PEV") erupted on or about 29 December 2007 once the results were announced. The whole world wondered. Africa reacted and assembled a team of eminent persons. A panel of eminent African personalities chaired by Dr. Kofi Annan was appointed to intercede and mediate, and help return the country to normalcy. Assisted by Mr. Benjamin Mkapa and Mrs. Graca Machel, a retired President of Tanzania and former first lady of South Africa respectively, Dr. Annan as Chairman of the Panel quickly brought the lead protagonists in the conflict to a round table.

6. After nearly two months of dialogue, an accord was struck. Violence ceased. A coalition government was to be formed. Four main agenda were formulated to be addressed with a view to averting any future PEV. Various institutions and commissions were to tackle agenda Item no. 4. A Commission of Inquiry into Post Election Violence (CIPEV) was constituted having been so recommended by the panel. The CIPEV was constituted under the Commissions of Inquiry Act (Cap 102) ("The Act"). The gazette Notice No. 4473 of 2008 formally established the CIPEV. The 1st Respondent herein was appointed the chairman assisted by two other commissioners. The CIPEV's terms of reference were clear: investigate the PEV, investigate actions or omissions of state security agencies and perform any other task deemed necessary to fulfil the two core terms of reference.

7. The Act guided the CIPEV.

8. Sworn in on 3rd June 2008, the CIPEV embarked on the journey and completed its work in October 2008. The CIPEV then handed over a report to the then President and Prime Minister of the Republic of Kenya. The CIPEV also presented a sealed envelope containing names of people suspected to have chaperoned the 2007/8 PEV to Dr. Koffi Annan. Six Kenyans were later indicted and arraigned before the International Criminal Court. All were ultimately on diverse dates acquitted of the crimes they were charged with.

9. It is the envelope, the secret envelope, that prompted the filing of the Petition. The Petitioners basically seek to enforce the right to information, the right to know, and have sued not just the 1st Respondent in his capacity as chair of CIPEV but also the office of the Prosecutor, International Crimes Court and the Attorney General.

Leave to amend

10. We will first deal with the application for leave to amend the Petition.

11. The application for leave to amend formally seeks to enjoin and reflect the 2nd petitioner and also to add an additional prayer.

12. Rule 18 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 grants the court an unlimited discretion to consider and if necessary grant permission to any party wishing to amend its pleadings. The amendment may be allowed at any stage of the proceedings.

13. We have looked at the intended amendments and we see no real prejudice that may be occasioned to the Respondents if the permission to amend is granted. We do not deem it that the nature of the claim will be substantially altered. Even though the application was lodged only after the preliminary objection had been filed, we did not hear the Respondents to strongly oppose the application or even suggest mala fides on the part of the Petitioners to suggest warrant a second thought. Amendments ought to be freely allowed if they tend to assist in resolving the issues in dispute . In the instant case, we hold the view that

the permission to amend ought to be allowed and we do so.

The Preliminary Objection

14. Though wordy, we understood the preliminary objection majorly to be of the following effect:

a. That the Petition herein is an abuse of the process of the court as there is pending a similar court action filed in the High Court at Mombasa. The pending cause is Misc. Civil Application No. 368 of 2010 **Kepha Mwebi –v- Hon. Justice Philip Waki & Others.**

b. That the 1st Petitioner has no *locus standi* to bring and maintain the Petition as he is not a citizen of Kenya.

c. That the CIPEV as established under the Act was only duty bound to submit its report to the President and Panel of eminent African personalities and having done so and the report having also been placed and adopted by both the Cabinet and the National Assembly, the report is a property of those institutions, namely the Presidency, the Cabinet and the National Assembly and no person can compel the production of documents held by the said institutions through an action against other persons.

d. That the CIPEV is defunct and no orders may issue against it or any of its former commissioners and that Section 14 of the Act (Cap 102) insulates commissioners from civil action or suits.

e. Finally, that the Petitioners have not stated the rights or fundamental rights which they seek to protect and that in any event the report by the CIPEV which the Petitioners seek was submitted prior to the promulgation of the Constitution 2010 and the provisions of the Constitution 2010 would not apply retrospectively in the instant case.

Arguments in Court

15. Mr. D. Okoth urged the 1st Respondents' case while the Petitioners were represented by Mr. Waithaka and the 3rd Respondent by Mr. Mwangi Njoroge. Mr. William Arusei argued the Interested Party's case. All the parties filed written submissions.

1st Respondent's submissions

16. Mr. Okoth submitted that the 1st Respondent who is a sitting judge of the Court of Appeal of Kenya had wrongly been sued and that only one, of the twelve reliefs sought by the Petitioners, concerned and touched on the 1st Respondent. To this, counsel added that the reliefs sought were basically Article 35 reliefs as to the right to information yet the 1st Petitioner was not a Kenyan citizen to be able to enforce any right under Article 35. Additionally Article 35 could not be applied retrospectively as the CIPEV completed and discharged its mandate prior to the promulgation of the Constitution 2010.

17. Mr. Okoth then submitted that the 1st Respondent was not the commission and as a commissioner the 1st Respondent was shielded from any civil action in his capacity as chairman of the commission or as commissioner.

18. To further his argument that the Petition was an abuse of process in so far as it was pegged on Article 35 and brought by the Petitioners without disclosing the interest or right sought to be protected, counsel referred to the two cases of **Famy Care Ltd *v* Public Procurement Administrative Review Board & Another [2012]eKLR** and the **Nairobi Law Monthly Company Ltd *v* Kenya Electricity Generating Co & 2 Others [2013]eKLR** where the court held that the right to freedom of information is limited, under Article 35, to Kenyan citizens only and not even to juridical persons.

19. Mr. Okoth also referred the court to the case of **Duncan Otieno Waga *v* Attorney General**

[2012]eKLR for the proposition that the rights and freedoms guaranteed and protected by the Constitution could not be applied retrospectively. And, with regard to the 1st Respondent's immunity, counsel referred to Section 14 of the Act and submitted that the Petitioners had not illustrated any bad faith on the part of the 1st Respondent.

20. Finally, on the issue of *sub judice*, Counsel relied on the case of **Manfred Walter Schmitt & Another *v* Attorney General & 3 Others** for the proposition that where a suit was already existing and pending resolution by the High Court, a party could not on the basis of the same facts move the court through a constitutional petition.

21. Mr. Okoth concluded by submitting that the Preliminary Objection was rightfully and correctly before the court as it met the threshold set in the oft-cited case of **Mukisa Biscuit Manufacturing Co. Ltd –v- West End Distributors Ltd [1969] EA 696** and echoed in various cases including the decision by the Supreme Court of Kenya in **Hon. Lady Justice Kalpana Rawal –v- The Judicial Service Commission & 5 Others SCK Civil Application No. 11 of 2016 (unreported)**.

Petitioners' submissions

22. Mr. Waithaka while opposing the Preliminary Objection commenced his submissions from where Mr. Okoth had stopped. Mr. Waithaka contended that the Preliminary Objection was not a Preliminary Objection *stricto senso* as it was pegged on various facts which were not agreed upon. Firstly, counsel contended that there was no agreement on whether there was one or two reports by the CIPEV or even what was 'the Report' for purposes of the CIPEV.

23. Counsel additionally contended that the 1st Respondent was not before the court in his private capacity but rather as the chairperson of the now defunct CIPEV and action could only be commenced after the report had been handed over to the appointing authority. Counsel stated that the immunity of the commissioners of any commission constituted under the Act was not absolute but limited to actions undertaken in good faith.

24. Mr. Waithaka asked the court to avail substantive justice and "not limit the parties right to access justice" especially in view of the fact that the Petition raised weighty issues of public importance .Then, referring to Rule 5(b) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, counsel urged the court not to dismiss the Petition merely because there was non-joinder of some parties.

25. On the issue as to what report was submitted to the President by the CIPEV and subsequently approved by both the Cabinet and the National Assembly, Counsel stated that there were certain disputed facts as what was submitted was only a portion of the report, which fact the Respondents contest. As to whether the CIPEV was now defunct, Mr. Waithaka while conceding that it was defunct contended that the commissioners of the CIPEV were however recognizable persons who could be held responsible and accountable in law. The Petitioners' counsel however submitted, while referring to the case **Jersey Evening Post Ltd *v* Al Thai [2002] JLR 542** that the CIPEV was however not *functus officio*.

26. Counsel wound up his submissions by contending that the suit pending before the Mombasa High Court was not *sub judice* and that in any event the two suits could always be consolidated.

Interested Party's Submissions

27. Mr. Arusei for the Interested Party held the view that the Petition raised substantive and weighty issues which ought to be dealt with substantively and on merit rather than by way of a Preliminary Objection.

28. Counsel also submitted that the instant Preliminary Objection failed to meet the test of Preliminary Objections as it did "not amount to a pure point of law" and various facts were in issue. Counsel cited the cases of **Mukisa Biscuit Manufacturing Co. Ltd *v* West End Distributors Ltd [1969] EA 696** and also

Nitin Properties Ltd *v* Singh Kalsi & Another CA Civil Appeal No. 132 of 1989 [1995] eKLR. According to Mr. Arusei most of the facts were beings contested and had to be first ascertained and determined by court.

29. Counsel further submitted that the 1st Respondent or any Commissioner acting under a commission appointed pursuant to the provisions of the Act, did not enjoy an absolute immunity. The exception was well founded where a commissioner acted in bad faith and this was a matter of evidence. Secondly, in Mr. Arusei's view, there was also the issue of public interest. In this respect, counsel stated that the 1st Respondent was not immune to constitutional litigation.

30. Finally, it was submitted by Counsel for the Interested Party that the enforcement of the Bill of rights could take a retroactive approach. For this proposition, Mr Arusei relied on the cases of **Maisha Nishike Ltd *v* The Permanent Secretary Ministry of Lands & 5 Others [2013] eKLR** and also on the Supreme Court of Kenya's decision in **Samuel Kamau Macharia & another –v- Kenya Commercial Bank Ltd & 2 Others SCK Appl. No. 2 of 2011.** Counsel also urged the court not to take the drastic step of striking out the Petition when it could well be fully revived through amendments.

Discussion and Determination

31. The 1st Respondent has asked us to strike out the Petition *in limine* for an array of reasons.

32. It is stated that the Petitioners do not have a right to the reliefs sought. It is also stated that there exists a similar suit before the High Court in Mombasa. It is further stated that the Report of the CIPEV was to be handed over to the President and nobody else, so the 1st Respondent having handed over the report to the President cannot be compelled to hand over another report or the same report. It is stated that the report was made by the Commission and not the 1st Respondent. It is additionally stated that the report is now in the custody of the President and the Panel of eminent African personalities and not the 1st Respondent. It is stated that a report held by the President cannot be compelled to be handed over by another person. It is stated that the CIPEV is defunct and further that its commissioners are immune from any suits or cases. It is also stated that the Constitution cannot be applied retrospectively. It is also stated that the 1st Petitioner has no locus standi to bring the instant Petition. Finally, it is stated that the Petitioners have failed to disclose the rights or freedoms they seek to enforce or protect by the information they seek.

33. The Petitioners and the Interested Party have foremost contested the objections raised. Both the Petitioners and the Interested Party contend that the objections cannot stand as objections *in limine* in view of the very clear guidelines on what constitutes a preliminary objection.

34. We quickly turn to the question whether we have before us a preliminary objection proper.

Of preliminary objections

35. Traditionally, the case of **Mukisa Biscuit Manufacturing Co Ltd *v* West End Distributors Ltd [1969] EA 696** has been the watershed as to what constitutes preliminary objections. The Court of Appeal in **Nitin Properties Ltd *v* Singh Kalsi & another [1995]eKLR** also pellucidly captured the legal principle when it stated as follows:

> ***"...A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion..."***

This statement of the law has been echoed time and again by the courts: see for example, **Oraro –v- Mbaja [2007] KLR 141.**

36. In **Hassan Ali Joho & another -v- Suleiman Said Shabal & 2 Others SCK Petition No. 10 of**

2013 [2014] eKLR the Supreme Court stated that

> ***"....a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit".***[emphasis ours]

37. Much more recently, the Supreme Court again reconsidered the position of parties resorting to the use of preliminary objections and pronounced itself as follows in the case of **Independent Electoral & Boundaries Commission –v- Jane Cheperenger & 2 Others [2015] eKLR.**

> ***"[21] The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection— against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits."*** [emphasis ours]

38. The Supreme Court thus laid it clear that the focus ought to be both the purpose as well as the nature of the preliminary objection. If it will serve the public purpose of sparing the sparse judicial time and also militate against profligate deployment of time and other resources then the court ought to entertain the preliminary objection. Of course, there is also the rider and caution that disputes are better off being resolved judicially, than summarily.

39. The same theme seems to run through subsequent Supreme Court decisions. The strict approach in ***Mukisa Biscuits'*** case seems therefore to have been given less prominence. In the recent case of **Kalpana Rawal & 2 Others *v* Judicial Service Commission & 6 Others [2016] eKLR** the Supreme Court stated that the examples of jurisdiction and limitation given by law J.A in the ***Mukisa Biscuits'*** case were but only examples of two grounds worthy of preliminary hearing and that a checklist approach to the test as to whether a matter merited and fell under the *Mukisa Biscuit*s case was not in consonant with the spirit and letter of the Constitution. The court then proceeded to state that where the preliminary objection raised a "fundamental issue" (per Mutunga CJ) then as a matter of good order it was appropriate to have the issue settled first even if there were apparent factual conflicts.

40. Pursuant to Article 163(7) of the Constitution and with the requisite deference, we are obliged to adopt the more liberal approach by the Supreme Court.

41. We hold the view that when the 1st Respondent questions the 1st Petitioner's locus standing, it is a matter which ought to be resolved at a preliminary stage. Likewise, when the Respondents state that the 1st Respondent is immune from suits and further that the CIPEV is defunct and no suit against it may stand, then these are matters to be determined at a preliminary stage. Likewise, questions of *res judicata* or *sub judice* are best resolved at the very inception of any suit and by way of preliminary objection, to avoid profligate litigation and save the scarce judicial time.

42. As to whether a report or reports in the custody of the President or panel of eminent personalities ought to be released by another person, such are matters which ought not to be dealt with in a preliminary and summary manner.

Some undisputed facts

43. The nub of the Petition is basically an envelop ("the Envelope") handed over to the chair of the panel of eminent African Personalities by the 1st Respondent.

44. It is common cause that the 1st Respondent was the Chairman of the CIPEV. He was not alone. He

had company in two other commissioners. They worked under clear terms of reference. They had time-lines. When the time-lines were not met, they were extended. A report was compiled by the CIPEV. It was exhaustive. It was handed over to the President of the Republic of Kenya. The report referred to the Envelope. The Envelope was handed over to the chair of the panel of eminent African personalities who apparently handed it over to the 2nd Respondent. The Petitioners want to access the Envelope or its contents. Their Petition is about the right of access to information as enshrined under Article 35 of the Constitution.

45. The right of access to information is one crucial right. Article 35 of the Constitution guarantees it. The Article reads:

> ***35. (1) Every citizen has the right of access to—***
>
> > ***(a) information held by the State; and***
> >
> > ***(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.***
>
> ***(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.***
>
> ***(3) The State shall publish and publicise any important information affecting the nation.*** [emphasis added]

46. The right of access to information is now additionally promoted by the Access to Information Act 2016.International treaties and conventions have also always promoted the right of access to information.

47. Local jurisprudence on Article 35 and the enforcement thereof is clear and settled. In **Famy Care Limited v Public Procurement Administrative Review Board and Others [2013] e KLR** the court stated thus.

> ***The right of access to information is one of the rights that underpin the values of good governance, integrity, transparency and accountability and the other values set out in Article 10 of the Constitution. It is based on the understanding that without access to information, the achievement of the higher values of democracy, rule of law, social justice set out in the preamble to the Constitution and Article 10 cannot be achieved unless the citizen has access to information."***

48.The Court went on to state that;

> ***The right of access to information is also recognized in international instruments to which Kenya is party. The Declaration of Principles of Freedom of Expression in Africa adopted by the African Commission on Human and Peoples' Rights (32nd Session, 17 – 23 October, 2002: Banjul, The Gambia) gave an authoritative statement on the scope of Article 9 of the African Charter on Human and Peoples' Rights which provides, "Every individual shall have the right to receive information." The Commission noted that right of access to information held by public bodies and companies will lead to greater public transparency and accountability as well as to good governance and the strengthening of democracy."***

49. Then in **Nairobi Law Monthly Company Ltd v Kenya Electricity Generating Company & 2 others [2013] eKLR**, the court made it clear that;

> ***"… in order to facilitate the right to access to information, there must be a clear process for accessing information, with requests for information being processed rapidly and fairly, and the costs for accessing information should not be so high as to deter citizens from making requests.***

However, this petition succeeds to the extent that I have found that the 1st respondent (Kenya Electricity Generating Company) has an obligation, on the request of a citizen, to provide access to information under Article 35(1)(a) of the Constitution. A natural person who is a citizen of Kenya is entitled to seek information under Article 35(1)(a) from the Respondent and the Respondent, unless it can show reasons related to a legitimate aim for not disclosing such information, is under a Constitutional obligation to provide the information sought." (Emphasis added)

50. Enforcement of the right under Article 35, unlike other Bill of Rights Articles is limited to citizens. Only citizens have the locus, and not even juridical persons domiciled and incorporated in Kenya can claim or enforce this right.

51. In the context of the current case, it is not disputed that the 1st Petitioner is not a citizen of the Republic of Kenya. He is though a resident of East Africa. In our view, his claim cannot stand in view of the various decisions by the local courts and the rather stable jurisprudence they have established. As a non-citizen, the 1st Petitioner could not commence and sustain the instant Petition. We so hold.

52. We now come to the question of the 1st Respondent's immunity.

53. It is true that the 1st Respondent's immunity is only sustainable where the 1st Respondent was acting in good faith. That however is a matter, which in the circumstances of this case , would not be appropriately determined in limine by way of a preliminary objection.

54. With respect to the issue whether or not the CIPEV no longer exists, we only wish to refer to the decision by the Court of Appeal in **David Mugo T/A Manyatta Auctioneers vs. Republic Civil Appeal No. 265 of 1997** in which the Court held that where the body has ceased to exist but its decision is still enforceable, certiorari must issue to quash or nullify it. Accordingly the mere fact that CIPEV no longer exists does not necessarily bar the Court from quashing or nullifying its decision as long as it is shown that its decision is still capable of being implemented.

55. The issue that has bogged our mind is the applicability of Article 35 to the report of CIPEV. It is clear that prior to 2010, there was no equivalent of Article 35 in the retired Constitution. Dealing with a similar matter **Majanja J** in **Duncan Otieno Waga vs Attorney General Petition No 94 of 2012** expressed himself as hereunder:

"I do not read the provision of the sixth schedule as entitling the court to retrospectively apply the constitution. The rights and obligations referred to are preserved to the extent that they can be enforced but determination of the nature and extent of those rights and obligations are determined in accordance with the legal regime existing at the time the right or obligation accrued. The acts of the respondent in relation to the petitioner must therefore be construed by reference to the former constitution particularly section 82 which prohibits discrimination.

Counsel for the petitioner has also referred to the provisions of Article 23(1) and 165 which read together entitle any person to apply to the court for redress where his or her fundamental rights and freedoms are threatened, violated or infringed. These provisions entitle this court to adjudicate violation of the constitution but they do not empower the court to apply the constitution retrospectively."

(See also **B.A & Another V Standard Group Limited & 2 Others [2012] eKLR**)

56. Apart from that it is clear from Article 35 of the Constitution that it applies to information held by the State or if held by an individual, must be shown to be required for the exercise or protection of any right or fundamental freedom. From the material placed before us it is clear that what is sought from the 1st Respondent is not information held by the State. It is also not alleged that the Petitioners require the information sought for the purposes of the exercise or protection of any right or fundamental freedom. In

other words, there is no cause of action disclosed against the 1st Respondent. As stated in **Sebaggala vs. Attorney General and Others [1995-1998] EA 295** it was held that:

> ***"A "cause of action" means every fact, which, if traversed, it would be necessary for the plaintiff, to prove in order to support his right to a judgement of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can probably accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove the facts but every fact necessary for the plaintiff to prove to enable him to obtain decree. Everything, which is not proved, would give the defendant a right to an immediate judgement must be part of the cause of action. It is, in other words, a bundle of facts, which it is necessary for the plaintiff to prove in order to succeed in the suit. But it has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It is a media upon which the plaintiff asks the court to arrive at a conclusion in his favour. The cause of action must be antecedent to the institution of the suit."***

57. Taking cue from Mutunga, CJ's legal opinion in ***Kalpana Rawal's*** case that that where the preliminary objection raised a "fundamental issue" then as a matter of good order it is appropriate to have the issue settled first even if there were apparent factual conflicts, we also share the view of **Omolo, JA in J P Machira *v* Wangethi Mwangi & Another Civil Appeal No 179 of 1997** that although disputes ought to be heard by oral evidence in court, there is no magic in holding a trial and receiving oral evidence merely because it is normal and usual to do so. The reasoning squarely applies to the present matter.

58. Before we conclude this ruling, we must express our regret in the delay in delivering this ruling which was occasioned by the appointment of one of the judges to the Supreme Court and the transfer of another Judge to another Division of the High Court.

Findings

59. Having considered the issues raised herein we are of the view and hold that the Petition may be amended as requested. We also hold 1st Petitioner has no locus standi to seek the prayers he is seeking in this petition. We also hold that the Petition, even as amended, does not disclose any cause of action against the 1st Respondent.

<u>Disposition</u>

60. In the result we allow the Petition to be amended, filed and served within the next ten days. We also strike out both the 1st Petitioner and the 1st Respondent from this Petition.

61. We however make no order as to costs.

62. In the meantime, we also direct that upon expiry of fourteen days (period within which the amendment ought to be occasioned) this file be placed before the honourable the Chief Justice to reconstitute another bench under Article 165(4) of the Constitution in view of the appointment of Hon Justice Isaac Lenaola as a judge of the Supreme Court of Kenya.

63. It is so ordered.

SIGNED AND DATED THIS 12TH DAY OF MAY 2017

ISAAC LENAOLA G V ODUNGA J L ONGUTO

JUDGE JUDGE JUDGE

READ AND DELIVERED IN OPEN COURT ON 9TH JUNE 2017

JLONGUTO

JUDGE