



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 169 OF 2016

BETWEEN

HON. FERDINAND NDUNG’U WAITITU.....1ST
PETITIONER

HON. MOSES KURIA.....2ND
PETITIONER

HON. DENNIS WAWERU.....3RD
PETITIONER

HON. KIMANI ICHUNG’WA.....4TH
PETITIONER

HON. ALICE NG’ANG’A.....5TH PETITIONER

AND

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

ODINGA RAILA AMOLO.....2ND RESPONDENT

MUSYOKA KALONZO STEPHEN.....3RD
RESPONDENT

MASIKA MOSES WETANGULA.....4TH RESPONDENT

COALITION FOR REFORMS AND DEMOCRACY.....5TH
RESPONDENT

ORANGE DEMOCRATIC PARTY.....6TH
RESPONDENT

WIPER DEMOCRATIC PARTY.....7TH
RESPONDENT

FORD KENYA PARTY.....8TH
RESPONDENT

INSPECTOR GENERAL OF POLICE.....9TH
RESPONDENT

ORENGO JAMES AGGREY BOB.....10TH
RESPONDENT

AND

THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....1ST INTERESTED
PARTY

THE COMMISSION FOR INTERGRATION & NATIONAL COHESION...2ND INTERESTED
PARTY

THE REGISTRAR OF POLITICAL PARTIES.....3RD INTERESTED
PARTY

RULING

Introduction

1. The Petitioners are all members of the National Assembly. They filed the Petition herein on 28 April 2016 and roped in the 2nd, 3rd and 4th Respondents who are party leaders of the 6th, 7th and 8th Respondents respectively. The 5th Respondent is a coalition of opposition parties in parliament mainly consisting of the 6th, 7th and 8th Respondents.

2. Alongside the Petition, the Petitioners also filed a notice of motion seeking various conservatory orders largely injunctive in nature as against the Respondents. As against the 2nd through 8th Respondents, the Petitioners seek orders to restrain the 2nd through 8th Respondents as well as their members, servants and agents from breaking, storming, possibly opening the doors or blocking access to the 1st Interested Party's premises or offices within Kenya. As against the 9th Respondent, the Petitioners seek a positive injunction to compel the 9th Respondent to ensure security, public safety and observance of the law and order by the other Respondents. The conservatory orders as sought are to last until the determination of the petition.

Background facts

3. The Petition was prompted mainly by a press release issued by the 5th Respondent on 26 April 2016 urging the members of the public 'to assemble at the Anniversary Towers with a date with the IEBC' on Tuesday May 2 2016 at 10:00a.m. and thereafter every Monday. The Anniversary Towers, situate at the heart of the Central Business District of Nairobi, happens to house the head offices of the 1st Interested Party.

4. Similar assemblies were also called for by the 5th Respondent to be held at other IEBC offices all over the country. Part of the statement read as follows:

'...yesterday, a lawful attempt by CORD to have a peaceful engagement with IEBC on the basis of Articles 37 and 38 of the Constitution was violently brought down through police brutality. Many of our people were hurt. Jubilee has brought back the imperial presidency and state terror as a means of control and running an autocratic administration. We are not impressed. We condemn the state for going back to the dark

days of one party state, social injustice and political oppression. We shall not allow it.

All sovereign power belongs to the people of Kenya. We, the people, are sovereign. If the state makes an attempt to establish or run the government otherwise than in compliance with the Constitution, we, the People, shall resist. If the administration chooses not to listen to us and run the government by unconstitutional means, we, the People, shall exercise our sovereign power directly in accordance with the Constitution of Kenya.

On Tuesday, 2nd May 2016 at 10:00 a.m. we call upon all Kenyans to assemble at the Anniversary Towers for a date with IEBC. Subsequently, we shall assemble at the Anniversary Towers every Monday.

The meeting will be replicated in all major towns and centres in the country to tell the IEBC, time is up, time to go. All meetings outside Nairobi will be held at the IEBC offices with emphasis on [sic] Nairobi, Mombasa, Garissa, Machakos, Nakuru, Eldoret, Kakamega, Kisii, Busia, Bungoma, Narok, Lowder, Meru, Isiolo, Nyeri and Kitale. Kenya cannot and will not conduct any other general election under the IEBC as presently constituted....'. [Emphasis in the original]

5. Subsequent to the statement, the 2nd 3rd and 4th Respondents have consistently every Monday organized and led members of the public in demonstrations to the Anniversary Towers. Similar demonstrations have also been witnessed in other parts of the country. It is not in controversy that the demonstrations in certain cases have turned extremely violent, indeed leading to loss of not just property but also of lives.

6. Apart from a sole appearance by Counsel in court on 29 April 2016, the 2nd through 8th Respondents have not reacted to or contested the application by the Petitioners. The 1st Interested Party on the hand, appeared through counsel and filed a replying affidavit.

The Petitioners' case

7. The Petitioners' case can be gathered from the Petition as well the various affidavits filed in support of the application. Additionally, the arguments by Mr. Harrison Kinyanjui expounded the Petitioner case.

8. It is the Petitioners' case that the right to demonstrate and picket as enshrined under Article 37 of the Constitution is not absolute.

9. The Petitioners contended that the 2nd through the 8th Respondents together with their supporters and servants are seeking the removal of commissioners of a constitutionally constituted commission, the Independent Electoral and Boundaries Commission which is the 1st Interested Party herein. The removal, it was stated, is to be effected through demonstrations, threats, slurs and epithets all in total violation of the Constitution. The Petitioners contended that the Respondents' acts of intimidation directed at the 1st Interested Party is contrary to both the provisions of Article 91(2)(b) of the Constitution as well as various provisions of the Elections Act (Cap 7) and the Electoral Code of Conduct to which the Respondents have subscribed. According to the Petitioners, in seeking to remove the commissioners of the 1st Interested Party through demonstrations picketing and intimidation, the Respondents are pursuing an unconstitutional cause and such extra legal means ought not to be allowed.

10. The Petitioners also contended that the 2nd through the 8th Respondents and their supporters or members ought not to be allowed to go to the premises of the 1st Interested Party at all in pursuit of their illegal and unconstitutional acts which are also undertaken whilst the said persons are armed with crude weapons.

11. The Petitioners reiterated that the rights guaranteed by Article 37 of the Constitution are not absolute

and are limited when there is a threat of breach of peace or where the demonstrators and picketers are armed. Additionally, submitted counsel, the rights under Article 37 are limited where the demonstrators violate the rights of others and when the object of the demonstration and picketing is unconstitutional. The Petitioners submitted that in the instant case there is a constant and clear breach of the peace.

12. Additionally, the Petitioners also contended that the demonstrations as organized are not in compliance with the law and were thus illegal. Further, the Petitioners also contended that the issuance of threats to the 1st Interested Party's commissioners and staff was also contrary to Sections 92 and 107 of the Penal Code.

13. Finally, the Petitioners relied on the case of **Harold Hodge vs. Pamela Talkin**, a decision of the United States Court of Appeal (District of Columbia Circuit, 28 August 2015) to advance the argument that even demonstrations have boundary lines which must not be crossed.

The 1st and 9th Respondents' case

14. Ms. Anne Mwangi urged the 1st and 9th Respondents' case.

15. Counsel stated that the 1st and 9th Respondents were not opposed to the application being allowed. Counsel added that the demonstrators and picketers as well as their organizers had not notified the 9th Respondent of the intended demonstrations or picketing.

The 1st Interested Party's case

16. Mr. Malonza appeared for the 1st Interested Party and simply stated that the 1st Interested Party was neither opposing nor supporting the application by the Petitioners but was simply relying on the Replying Affidavit filed in court by the 1st Interested Party.

17. I pause and hasten to state that I have read the Replying Affidavit sworn by Mr. Mahamud Jabane on behalf of the 1st Interested Party and filed herein on 5 May 2016. The Replying Affidavit does not focus on the application save for its paragraph 24 which acknowledges the right to picket and to demonstrate and then also adds the rider that the same is not absolute. I must however acknowledge that the Replying Affidavit could have been filed with the Petition, rather than the application, in mind.

Discussion and determination

18. It is important to point out that I am currently considering only one issue: Are the Petitioners entitled to the conservatory orders sought in the Notice of Motion dated 28 April 2016?

19. It is also important to point out that even though the Respondents, save the 1st and 9th Respondents, did not participate in the proceedings herein; it is still incumbent upon the applicant to meet the criteria for the grant of any conservatory orders sought. It is for the applicant, even where the application appears unopposed, to establish that he has a prima facie case with a likelihood of success and that if the order is not granted then there is a real danger that the applicant will suffer real prejudice and the petition rendered nugatory.

20. Besides, the court is also to consider, even in the absence of the respondent, whether granting the conservatory orders would promote constitutional values as well as principles and that, additionally, the public interest would be better served with either the issuance or denial of the conservatory orders. These principles were well summarized in the case of **Kenya Small Scale Farmers Forum vs Cabinet Secretary, Ministry of Education & 5 Others HCCP No 399 of 2015 [2015]eKLR** where the Supreme Court case of **Gatirau Peter Munya vs Dickson Mwenda Githinji and 2 Others SCK Pet. No 2 of 2013** was cited with approval amongst other decided cases.

21. As well, at this stage of the proceedings, I need not make any definitive or substantive findings of fact or law unless for the very obvious. I must nonetheless consider the totality of the evidence and circumstances of the case.

22. The Petitioners' thematic argument is that the Respondents are engaging in an unconstitutional and illegal demonstration much to the chagrin of the Petitioners and also to the infuriation of the public generally. The Petitioners contend that the right to assemble, demonstrate and picket as guaranteed under Article 37 is not absolute and where it is shown that it has been justifiably limited or ought to be limited, the court has to intervene and stop the enjoyment of such rights. In this regard, it was contended that the 2nd through the 8th Respondents seek to interfere with the workings and operations of an independent commission in the 1st Interested Party. Additionally, the said Respondents seek to remove holders of constitutional offices; to wit, the Commissioners of the 1st Interested Party, through unconstitutional means.

23. For all these, the Petitioners urged the court to stop what they call 'the unruly' demonstrations organized by the 2nd 3rd and 4th Respondents.

24. The evidence thus far availed by the Petitioners appear to support the position that the 2nd through the 8th Respondents have organized demonstrations with the neutral target being the 1st Interested Party. There is also evidence that members of the public have been involved in the demonstrations first called by the 5th Respondent. That position cannot be disputed.

Article 37

25. The constitutional index referred to by the Petitioners to lay a foundational basis for their case is Article 37. Article 37 of the Constitution guarantees the right to assemble, demonstrate, picket and petition in the following terms:

“37. Every person has the right peaceably and unarmed to assemble, to demonstrate, to picket, and to present petitions to public authorities”

26. There is no doubt that the right to assemble, demonstrate, picket and petition as enshrined under Article 37 is not absolute. It is not one of the Article 25 rights. It may be limited by law. In the paragraphs that follow, I will shortly outline the acceptable and known limitations after a brief review of the extent of the right under Article 37.

27. Article 37, besides guaranteeing the right to assemble, demonstrate, picket and petition is itself an imperative rights' article. Its import is in the fact that it brings together other rights critical in any free democratic society. Article 37 inherently invites the freedom of expression and opinion as well as the freedom of association. In the course of their demonstrations, persons are bound to assemble and associate and likewise, in the course of picketing the picketers are simply bound to express themselves, their common views and opinions.

28. It may very well be that the opinion or view is an unpopular one with others but yet again, freedom of assembly merely provides an alternative form of participating in democracy to those who may be disenchanted and uninspired in one way or another. A minority may, for example, feel disappointed by their own failure to convince the majority. The alternative avenue for expressing their view would simply then be through demonstrations and picketing, even though the minority may still not have their way.

29. Demonstrations and picketing, in short, provide an avenue for those who have strong feelings about particular issues to express those feelings. Such expressions may take the form of motionless protests, public meetings, protest marches, press-conferences, sit-ins and even counter-demonstrations.

30. The actions currently complained of by the Petitioners have largely taken the forms noted above. The Petitioners however, whilst acknowledging that the Constitution protects persons who seek to express

their views as provided under Article 37, insist that Article 37 is not absolute.

31. I would agree. The rights under Article 37 are not absolute.

32. Foremost, the Constitution itself has provided claw-backs. Demonstrators, picketers and petition-presenters must do so “*peaceably and unarmed*”. Assemblies, picketing and demonstrations which are not peaceful are excluded from the protection of the Article. If they consist of violence to or intimidation of the public then the assembly or the demonstration ought to be stopped. Likewise participants in assemblies, picketers and demonstrators must not be armed. Weapons as well as defensive or protective contraptions which breed or stimulate aggression ought not to be possessed by the demonstrators or picketers.

33. The spirit of the constitutional claw-back is to ensure that the rights of others within the vicinity of the place of assembly or of the demonstrators or picketers are also not interfered with. Thus in the South African case of **Fourways Mall(Pty) Ltd vs South African Commercial Catering [1999] 3 SA 752** , it was held that the Constitution as well as statute law does not protect picketers who proceed in a manner that interferes with the rights of the public or assault others. The court, in interpreting Section 17 of the South Africa’s Constitution which is *pari materia* with our Constitution at Article 37, was clear that the Constitution does not encourage a volatile environment in a protest march.

34. It certainly would be an antithesis of constitutional values and principles if picketers and demonstrators are allowed to participate in non-peaceful demonstrations or pickets whilst armed with implements set to stimulate aggression. It is therefore no surprise when the Constitution itself limits the right to assemble, to demonstrate, to picket and to present petitions.

35. My preliminary view is also that the Public Order Act (Cap 56) contrary to popular views does not limit the right to demonstrate or to assemble. It instead seeks to preserve and protect the precious right to public assembly and public protest marches or processions by regulating the same with a view to ensuring order. Part III of the Public Order Act seeks to regulate public meetings and processions by providing for the need to notify the police service and also the power of the police service to stop or prevent a public meeting where appropriate and where it is obvious it will not meet the constitutional objectives. Under the same Part III, the Public Order Act also prohibits the possession of “offensive weapons” at public meetings and processions. In my view, it is a small price to pay to ensure that the assembly or demonstration is peaceful by involving a body enjoined to ensure security, safety and order. Both the participants as well as the non-participants are assured of protection through involvement of security officials.

36. It is for this reason, that I have no doubt that since the promulgation of the Constitution 2010 which in certain aspects saw a break from the past, even with the existence of the Public Order Act as amended in 2014, the people of Kenya have not been deterred from public assembly and protest. Rather in the true and now more constitutional democracy, the regularity of protest marches and public assemblies has increased. From school children to working professionals, as distinct from labourers, the protest marches continue to march on.

37. It is however not atypical for the protest processions or marches to turn unruly violent and riotous. However, that does not implicate the right to assemble, demonstrate and picket for the basic reason that the Constitution is supreme. The right to picket and to demonstrate which is an essential feature of any democratic society ought to be protected especially where it is shown that the marches often start as peaceful ones. The focus should not be on the fact that they turn violent but rather on how to ensure that they do not turn violent.

38. As I have already pointed out, public demonstrations and assemblies are regulated in a way by the Public Order Act. The organizers also ought to seek to achieve peaceful demonstrations. The police service has an obligation to assure the public of peace and order. The public in these respects include both the participants in the demonstrations and picketing as well as the non-participants. There is a positive obligation on the State to facilitate and protect a peaceful exercise of the Article 37 rights.

39. Certain basic rules ought to be observed to help achieve order and peace.

40. My preliminary view is that, public assemblies and demonstrations ought not to take place in private property. The place to express the opinion through marches, sit-ins or picketing must be appropriately chosen by the organizers. The time chosen for the picketing, assembly or demonstration ought to be reasonable as well. There is no doubt that statute may occasionally draw picket-lines and designate no go zones for demonstrators and picketers but generally, public streets and areas ought to be open to the public for such demonstrations or picketing and assemblies.

41. In the context of the foregoing, what would be the position in the instant case?

42. The Petitioners' chief complaint is the intended end result of the demonstrations as organized by the 5th Respondent. The result sought to be achieved it is stated the removal of the commissioners of the 1st Interested Party.

43. I have no doubt even at this very interlocutory stage of the proceedings, that Article 251 of the Constitution is clear on the mode and medium of removing any commissioner with any of the independent commissions. The 1st Interested party is an independent commission. Removal of any of its commissioners ought to strictly be done within the confines of the Constitution and the law. That is what constitutionalism is all about.

44. A question will then naturally arise whether the constitutional provisions for the removal of the 1st Interested Party's commissioners prevents the 2nd through the 8th Respondents either individually or collectively with others from expressing their opinions even if they appear not to put up with constitutional provisions? That is a question to be answered at the hearing of the substantive petition herein. At the moment, it will suffice to be noted that the 2nd through the 8th Respondents are within their rights to picket for the removal of the commissioners of the 1st Interested Party as Article 37 does not limit the picket content.

45. The Constitution allows every person to picket, demonstrate, assemble and present petitions. Picketing and demonstrations themselves invite the right to express opinions. The opinions may be controversial. The opinions may appear contrary to the law. The opinions may not find favour with others. Yet the Constitution anticipates and expects that such unpopular opinions howsoever expressed be respected. Even if they invite disagreements and counter-demonstrations. The Constitution thus far declines to stifle even the most unpopular view unless it is intended to incite persons to violence, propagates hate speech, is propaganda for war or advocates hatred through ethnic incitement: See **Article 33(2)** of the Constitution.

46. In the instant case, the 5th Respondent called upon the public to demonstrate and express their dissatisfaction with the 1st Interested Party. I did not hear the Petitioners accuse the Respondents of incitement to violence or hate speech or war propaganda. If such accusations were made then there was not clear enough evidence to help establish a prima facie case. I am not convinced with the argument by the Petitioners that in the Respondents expressing a view that elections cannot be held under the auspices of the 1st Interested Party, such expression constitutes an illegality with the result that the demonstrations are also criminalized. Such a view may be wrong but at this stage of the proceedings, I would state that it ought to be tolerated as wrong views and misguided opinions do not necessarily make protest marches and picketing illegal and unprotected.

47. It brings me to the contention by the Petitioners that the 2nd through the 8th Respondents are causing inconvenience to the general public and to the 1st Interested Party in particular.

48. With regard to the 1st Interested Party, the Replying Affidavit filed on its behalf by one of its managers does not in any way claim or allege any inconveniences and I would leave it at that. With regard to the general public the Petitioners lamented over the blockade occasioned to public roads around

and near the 1st Interested Party's offices.

49. I must first point out that protest marches and picketing ordinarily ought to take place on public streets and not private roads or offices.

50. Secondly, the rule of the thumb is that the court ought not to engage in drawing picket lines for picketers and demonstrators except only in extreme and exceptional circumstances and where it is absolutely necessary. Thus in **Brown vs. Louisiana 383 US 131(1966)** the court held, that a peaceful protest in a library was protected under the right to demonstrate and picket. Likewise in **Boos vs. Barry 485 US 312 (1988)**, the court found a statute forbidding demonstrations and picketing within 500 feet of a foreign governments' embassy unconstitutional.

51. At the moment, I am not convinced that the Petitioners have shown exceptional circumstances to warrant an intervention by the court. Even though I tend to agree with the Petitioners that there may be inconvenience occasioned, the matter would require a deeper interrogation than that expected to be done at this interlocutory stage. In any event, the evidence is currently scanty and much reliance has been placed on newspaper cuttings and which cuttings the court is always reticent in approving of: See Section 35 of the Evidence Act (Cap 80) and also the case of **Wamwere vs Attorney General [2004] 1 KLR 166**.

52. The Petitioners however stand in better stead when they urge that the 9th Respondent be ordered to ensure the security, public safety and observance of the law. There is evidence before me that the protest marches and demonstrations organized by the 5th Respondent always commence peacefully but later become violent and riotous: see the affidavits sworn in support of the motion by the Petitioners.

53. I hold the view that the 9th Respondent pursuant to Article 245 of the Constitution and section 24 of the National Police Service Act (Cap 84), is obligated to ensure that law and order is maintained and additionally that there is a preservation of peace. Besides, I also hold the view that a cursory reading of Article 244(c) of the Constitution, reveals that the 9th Respondent is duty bound to observe comply with and promote constitutional standards of human rights and fundamental freedoms.

54. When therefore it is alleged that the 9th Respondent has abdicated its duty and evidence points to lack of observance of law and order, then it is plausible to conclude that a party has made out a case prima facie with a likelihood of success. It is not the stopping or breaking up of the protest marches and demonstrations which should help in maintaining law and order but rather the involvement of the 9th Respondent from the get go that may assist in the maintenance of law and order. It is then that the picket or demonstration lines may be drawn.

55. In these respects consequently, it would be appropriate for the court to intervene, not to draw any picket lines but to ensure that the 9th Respondent is not derelict in the performance of his duties. It came therefore as no surprise when the said Respondent decided not to contest the application.

56. In the result, I conclude that the Petitioners have not made out a prima facie case with a likelihood of success as far as the 1st to 8th Respondents are concerned. However, with regard to the 9th Respondent a prima facie case has been made out especially when the Petitioners complain that crime has been committed. I find that constitutional values, Kenya being a constitutional democracy, would not favour a grant of the conservatory orders which prohibit the right to picket, to demonstrate and to assemble without a deeper and thorough interrogation of the allegations made in the Petition. Let the 9th Respondent exercise his constitutional compulsion and maintain law and order.

Disposition

57. While I decline to draw any picket or demonstration lines for the Petitioners as well as the Respondents, in the form of prohibiting demonstrations protest marches and assemblies in particular

places, I allow the application in terms only of prayer number 7 and specifically in the following terms only:

- a. That pending the hearing and determination of the Petition herein, a conservatory order do issue by way of a mandatory order compelling the 9th Respondent to ensure security, public safety and observance of the law and order by the 2nd 3rd and 4th Respondents and such of the members of the 5th 6th 7th and 8th Respondents affiliated with them, whenever and wherever the said Respondents and their members picket or demonstrate pursuant to any notification given to the 9th Respondent under the Public Order Act.

58. The other prayers in the application filed on 26 April 2016 are hereby dismissed but with no order as to costs.

Dated, signed and delivered at Nairobi this 6th day June, 2016

J.L.ONGUTO

JUDGE