REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.413 OF 2014

BETWEEN

THE COUNCIL OF GOVERNORS ……..….1ST PETITIONER

DR. ALFRED MUTUA……..….2ND PETITIONER

PATRICK SIMIYU KHAEMBA……3RD PETITIONER

AHMED ABDULLAHI MOHAMED……..4TH PETITIONER

WYCLIFFE OPARANYA…….……5TH PETITIONER

JAMES OMARIBA ONGWAE……..……..6TH PETITIONER

MARTIN NYAGA WAMBORA……..7TH PETITIONER

AND

THE SENATE…….RESPONDENT

RULING

1. On 24th June 2015, we delivered a judgment in this matter and granted certain orders partly in favour of the Petitioners. The main issue in contention in the Petition viz. whether the Senate is entitled to issue summons for Governors to answer queries regarding financial management of their Counties, was however determined in favour of the Senate by an affirmative answer to that question.

2. On the date of judgment, Mr. Nyamu, acting for the 2nd Petitioner, sought conservatory orders to stay the effects of the judgment for thirty days to enable the Petitioners exercise their right of appeal. Odunga, J. who had delivered the judgment declined to grant any orders without this Bench being fully constituted and directed that the matter be placed before Lenaola, J. (the Presiding Judge of the Bench) on 29th June 2015 for directions. Lenaola, J. directed that the matter be placed before this Bench on 1st July 2015 for arguments on the conservatory orders.

3. In his submissions, Mr. Nyamu stated that;

i. The judgment exposed has Governors to summons by the Senate before their intended appeal is heard and determined.

ii. The conservatory orders are therefore necessary to enable the Petitioners invoke **Rule 5(2) (b)** of the **Court of Appeal Rules** for interim reliefs.

iii. The said orders are also necessary to ensure that the intended appeal is not overtaken by events or is rendered nugatory.

iv. No prejudice would be caused to the Senate as the Petitioner had enjoyed conservatory orders prior to the judgment.

4. In addition to the above, he submitted that the Court has discretion to grant the orders sought under **Article 23(3)(c)** of the **Constitution**.
5. In his response, Mr. Kilukumi, for the Respondent, stated that the oral application was misconceived as it ought to have been made immediately after delivery of judgment in view of the express provisions of **Rule 32** of the **Rules** contained in Legal Notice No.117 of 2013. Further, that under **Rule 23** of the same **Rules**, conservatory orders can only be granted if a Petition exists and is pending hearing but in the present circumstance, there is no Petition and therefore there is nothing to conserve.

6. He further submitted that once the Court had upheld the sanctity of summons issued under **Article 125** of the **Constitution** by the judgment aforesaid, it could not now turn round and suspend that provision without being seen to be failing in its obligation to uphold the Constitution.

7. Regarding the issue of prejudice, Mr. Kilukumi, submitted that the Kenyan public would stand to suffer great prejudice if Governors do not account for their actions.

8. Lastly, he urged the Court to dismiss the oral application for being unmeritorious.

9. On our part, first, **Rule 23** of the **Constitution** of Kenya **(Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** apply to proceedings brought under **Article 22(3)** as read with **Article 165(3)(b)** of the **Constitution**. Both those provisions relate to enforcement of rights and fundamental freedoms. It has not been clearly explained to us why they apply to matters brought under **Articles 6(2), 96, 125, 174, 185(3), 189** and **226(2)** of the **Constitution**. (These were the provisions cited in the Petition).

10. Second and as a corollary to the above, the oral application before us is limited in terms of the applicable law, the specific orders sought and the reasons thereof. It is not enough to state that the Applicants are generally seeking conservatory orders and neither is recourse to conservatory orders sought and granted before the Petition was heard, sufficient to answer that question.

11. Third, we made certain categorical findings grounded on the Constitution and detailed arguments supported by relevant authorities would be required for us to determine whether or not to grant interim orders contrary to those findings.

12. Lastly, the wider interests of justice would require that a formal Application for any conservatory or other orders be filed to enable us determine it on its merits. We see no prejudice to be caused to the Petitioners nor hindrance to their making any Application under **Rule 5(2) (b)** of the **Court of Appeal Rules** if we make those orders.

13. In the event, the oral application made on 1st July 2015 is dismissed and the Petitioners are hereby directed to make a formal application for any interim or conservatory orders, if they are minded to do so.

14. No costs were sought and so each Party shall bear its own costs.

15.Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF JULY, 2015

I. LENAOLA	**M. NGUGI**	**G. ODUNGA**
JUDGE	**JUDGE**	**JUDGE**