



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

**PETITION NO. 442 OF 2015**

**KEVIN TURUNGA ITHAGI.....PETITIONER**

**VERSUS**

**HON. JUSTICE FRED OCHIENG**

**HON. LETIZIA WACHIRA**

**HON. BRYAN KHAEMBA**

**HON. RASHID ALI OMAR**

**HON. DERRICK KUTO**

**HON. PETER-MIRIAM MUGURE**

**(being sued as officials of**

**THE KENYA JUDGES AND MAGISTRATES**

**ASSOCIATION).....RESPONDENTS**

**RULING**

On the 26<sup>th</sup> October 2015, following an application for conservatory orders by the Petitioner, I granted orders staying the Annual General Meeting and Annual General Conference of the Association known as the Kenya Magistrates and Judges Association (“the KMJA”) for a period of 120 days. This was to enable and ensure the compliance by KMJA of various statutory requirements especially under the Societies Act (Cap 108). I also then stayed the elections of a Commissioner to the Judicial Service Commission for 120 days. The commissioner was scheduled to be elected at the Annual General Meeting which had been stayed. My decision to stay both the Annual General Meeting as well as the elections was informed by the fact that the Kenya Magistrates and Judges Association was set to honour a Constitutional command under Article 171 of the Constitution yet it was apparent that the responsibility even if honoured was likely to face a rebuke. I did also believe then that a conservatory order though necessary did not need to last until the Petition was heard and disposed of. If anything, there was need to ensure that the membership of the Kenya Magistrates and Judges Association (KMJA) performed its Constitutional compulsion of electing a representative to the Judicial Service Commission sooner than later. I consequently granted the parties the liberty to apply.

The Respondents have taken advantage of the liberty granted. They have now moved the court for a review and variation of the orders of 26<sup>th</sup> October 2015. They want the orders varied to enable the scheduled meetings as well as elections to continue.

The application is straight forward. The Respondents state that they have now complied with the relevant statutory provisions. They say that there is need to have the elections of the Kenya Magistrates and Judges Association (KMJA) officials as well as of a commissioner to the Judicial Service Commission immediately undertaken to satisfy statutory and Constitutional requirements. They say it would only be just and fair to vary the orders of the 26<sup>th</sup> October 2015.

The Petitioner contests the application for review. The Petitioner filed a rather prolix Notice of Grounds of Opposition. It contains some sixteen grounds. The grounds revisit largely what the Petitioner's grievances were originally albeit from a different perspective.

I heard both counsel Mr. Ongoya and Ms. Gachihi urge their respective clients' positions. I have also read the documents filed herein and in particular the affidavit of Daniel Sepu Mayabi sworn on 28<sup>th</sup> October 2015. I have considered both the arguments and the documents.

I must first point out that the application has been made pursuant to the inherent powers of the court. In particular, the third limb of my orders of 26<sup>th</sup> October 2015 prompted the application. The application is not an application under Order 45 of the Civil Procedure Rules. There is consequently no need to look out and ascertain if the requirements under Order 45 of the Civil Procedure Rules have been satisfied as was dictated by the Court of Appeal in **Muyodi –v- Industrial and Commercial Development Corporation & Another [2006] 1EA 243**.

In the instant case it is about bringing into play the court's inherent powers. It is about discretion. A decision to vary or review the Orders of 26<sup>th</sup> October 2015 would be an exercise of discretion. First, the court will only exercise such discretion, if to do so would serve the ends of justice. Secondly, the court must take into account all relevant facts.

A look at the annexures to the affidavit in support of the application, which annexures were not contested by the Petitioner would reveal that the Respondents have addressed their previous remissness in relation to the requirements under the Societies Act (Cap 108). The Respondents have also exhibited to the court the fact that the Independent Electoral and Boundaries Commission (IEBC) will actually be engaged in the elections of the Commissioner to the Judicial Service Commission. This latter fact was indeed the court's main concern as of 26<sup>th</sup> October 2015.

It is also to be noted that as of now there is a commissioner missing from the fold of the Judicial Service Commission, the tenure of one commissioner having lapsed on 21<sup>st</sup> October 2015. It is that slot that the Respondents seek to fill through elections. I need not reiterate the fact that the Judicial Service Commission is an important organ not just to the Respondents but also to the Petitioner and all other Kenyans in so far as the administration of justice is concerned.

I consequently see no reason why the Respondents should not now be allowed to proceed with their business, the court having been assured that the Constitution of Kenya will be adhered to. It is only rational in the circumstances of this case.

The Petitioner's pertinent fears as to the rules to be used during the elections of the Commissioner to the Judicial Service Commission can be easily addressed by the same Constitutional body mandated to oversee the elections, assuming the membership of the Kenya Magistrates and Judges Association (KMJA) does not agree on any election rules.

In the circumstances, I would allow the application. It is allowed.

I vacate my orders of 26<sup>th</sup> October 2015. As the meeting and elections had been stayed through a court

order, I also direct that the same may now be held immediately or at such time as the Respondents deem fit.

I make no order as to the costs of the application.

Orders accordingly.

***J.L.ONGUTO***

***JUDGE***

***2/11/2015***

**Delivered and Signed at Nairobi this 2<sup>nd</sup> day of November, 2015**

***J.L.ONGUTO***

***JUDGE***

***In the presence of:***

***Wambola for the Applicant***

***Njoki Gachihi for the Petitioner***

***J.L.ONGUTO***

***JUDGE***