REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO. 481 OF 2012

IN THE MATTER OF ARTICLE 19, 20, 21, OF LEGAL NOTICE NO. 6 OF 2006

AND

IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 21, 22, 25, 47 OF THE CONSTITUTION

IN THE MATTER OF ARTICLE 2(5) (6) OF THE CONSTITUTION AND INTERNATIONAL CONVENTIONS AND TREATIES

IN THE MATTER OF THE INHERENT POWER OF THE COURT TO ACT IN THE INTEREST OF JUSTICE

LINET KEMUNTO NYAKERIGA.....1ST
PETITIONER

HAROLD KIMUNGE KIPCHUMBA.....2ND
PETITIONER

VERSUS

BEN NJOROGE.....1ST
RESPONDENT

GODLIVER NANJIRA OMONDI.....2ND
RESPONDENT

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC).....3RD
RESPONDENT

THE ATTORNEY GENERAL.....4TH
RESPONDENT

RULING

1. By a Notice of Motion dated 4th October 2013, the Petitioners/Applicants seek the following Orders:

1. **THAT the Honourable Court be pleased to certify this application as extremely urgent and hear it ex-parte at the first instance.**

2. **THAT the Honourable Court be pleased to grant a temporary injunction, stay of execution and/or conservatory orders to remedy the consequential orders arising from the judgement of the High Court of Kenya at Nairobi delivered in Nairobi on the 27th day of September 2013 in High Court Petition No.14 of 2013 by restraining the Respondents by themselves or their agents, servants or whosoever from gazetting and/or swearing in 1st and 2nd Respondents and/or dong anything prejudicial pending hearing and determination of the Applicant's application inter-partes.**

3. **THAT the Honourable Court be pleased to grant an injunction, stay of execution and/or conservatory orders to remedy the consequential orders arising from the Judgment of the High Court of Kenya at Nairobi delivered in Nairobi on the 27th day of September 2013 in High Court Petition No. 14 of 2013 by restraining the Respondents by themselves or their agents, servants or whosoever from gazetting and/or swearing in 1st and 2nd Respondent and/or doing anything prejudicial pending the hearing and determination of the appeal.**

4. **THAT the Honourable court do issue such further Orders as it may deem convenient in the circumstances of this case.**

5. **THAT cost of this application be in the cause.**

2. The said Motion is supported by the affidavits sworn by the applicants/petitioners herein on 4th October 2013 and based on the following grounds:

1. **The Applicants being dissatisfied with the Judgement of the High Court of Kenya at Nairobi delivered in Nairobi on the 27th day of July 2013 in Petition No. 14 of 2013 has preferred an appeal against the entire Judgment.**

2. **The Applicants have appealed to the Court of Appeal but the Appeal is coming up for hearing on 15th October 2013.**

3. **The High Court has directed that the Respondents be gazetted immediately.**

4. **The appeal if successful may be rendered nugatory as the gazettement of the 1st and 2nd Respondents may be effected any time now unless the Respondents are restrained through conservatory orders the Applicants will suffer irreparable prejudice.**

5. **The Judgement is against public policy and offends the principles and values of Constitutionalism.**

6. **The Judgement made against the Applicants was discriminatory.**

7. **The appeal is arguable and raises substantial points of law and the Constitution.**

8. **That the applicants have an arguable appeal with overwhelming chances of success and it is**

just and equitable in the peculiar circumstances of this case that this Honourable Court be pleased to grant a stay as prayed.

9. **That unless the stay herein is granted, the appeal by the applicants would be rendered nugatory.**

10. **The Applicant's appeal raises substantial legal and constitutional for determination issues with overwhelming chances of success.**

11. **The appeal will take time and it may be rendered nugatory unless the Respondents are restrained.**

12. **If a stay of execution and/or injunction is not granted, the Applicants may suffer irreparable damage as the 1st and 2nd Respondents would be gazzeted and sworn in.**

13. **The Applicants will suffer irreparable damage as they have lost their Senatorial seats unless stay orders and/or injunction is issued.**

14. **It is in the interest of justice that a stay of execution be allowed.**

3. In opposition to the application, the 1st and 2nd respondents raised the following preliminary objections:

1. **THAT the both the Petitioner's Petition and Application are Defective, incompetent, misconceived and lack merit thus the same should be dismissed in *Limine*.**

2. **THAT both the Petition and Application constitute an abuse of Court process.**

3. **THAT the Petitioners are seeking to appeal from one High Court judge to another High Court Judge.**

4. **THAT the Honourable Court has no jurisdiction to entertain this matter.**

5. **THAT the High Court sitting as a Constitutional Court pursuant to Article 23 of the Constitution cannot exercise appellate jurisdiction over the same High Court sitting as an Election Court under Article 105 of the Constitution.**

6. **THAT decisions made by the Constitutional Court cannot override decisions made by the Election Court.**

7. **THAT the said application is Res Judicata owing to the Fact that the Petitioners made the same application in the Election Court.**

8. **THAT the Application is an abuse of the process of court as the Petitioners have sought same orders before the Court of Appeal in Civil Appeal No.266 f 2013 currently pending for hearing.**

9. **THAT the Subjudice rule prohibits any person (including a Court of Law) from commenting on the merits of a matter pending before court therefore accordingly this court cannot comment on tan application pending before the Court of Appeal without affecting the Subjudice rule.**

10. **THAT the Application herein contravenes provisions of section 6 of the Civil Procedure Act owing to the fact that the crux of this Application is the subject of Appeal No.266 of 2013 currently pending for hearing.**

11. **THAT there is no known cause of Action as against the Respondents as none of them is responsible for the alleged contravention of fundamental rights and freedoms of the Petitioners or writing the judgment of the Elections Court.**

12. **THAT both the Petition and Application are fatally defective and should be dismissed in Limine because of wilful suppression of material facts or deliberate misrepresentation.**

13. **THAT it cannot be procedural for a party who has lost in the High Court to move to another judge of the High Court to seek similar orders as this might lead to perpetual litigation over the same matter.**

3. In response to the said objections, the 1st applicant filed a replying affidavit sworn on 10th October 2013 in which she deposed that the Petitioner (sic) is not defective and/or incompetent as it premised on sound legal foundations envisaged by article 19 as read with article 22, 23, 25, 27, 47, 50, 159 of the Constitution. According to her the Petition and/or application are not an abuse of the process of the Court since they raise valid and genuine grievances against the Respondents which can be adjudicated within the meaning of article 50(1) of the Constitution. She contended that the application and Petition herein is not an appeal per se, it is an application that raises several constitutional questions, challenges and dilemma that the Court has jurisdiction to adjudicate this matter since is a separate transaction and has to be adjudicated separately and has nothing to do with an appeal. To her, the Court has jurisdiction including Implied Jurisdiction under the Preamble, article 10, 159 of the Constitution since the courts have no right to violate the right to fair trial, protection of the law and inhuman and degrading treatment and when any allegation is made about violations, then the Court has jurisdiction under Article 23(1) of the Constitution. She clarified that the Petitioners never made an application for conservatory orders and they are entitled to this remedy as respondents have misapprehended the doctrine of *sub-judice* which does not affect adjudication of issues before a competent Court of Law. It was her view based on legal advice that the provisions of article 19, 22, 23 of the Constitution override Section 6 of the ***Civil Procedure Act*** and that the law does not contemplate every scenario of life and the Constitution is a living document with a capacity to address new and emerging issues that were never contemplated by the drafters of the Constitution. She denied that there was any material non-disclosure of the facts in this case.

4. In support of the preliminary objection, **Mr Arua** learned counsel for the 1st and 2nd respondents submitted that the Court lacks jurisdiction to entertain this matter. He informed the Court that when the parties appeared before **Hon. Lady Justice Ougo** on 27th September 2013 an oral application seeking stay was made which application was opposed and in a ruling made thereon the application was rejected. Thereafter the applicants went to the Court of Appeal seeking an order for stay vide an application which was filed on 2nd October 2013. However the stay sought was not granted but the application was fixed for hearing on 15th October 2013. The applicants however came back on 4th October 2013 seeking the same orders. According to learned counsel the orders sought in both instances are the same save for the title of the proceedings. According to **Mr Arua** this amounts to an abuse of the Court process. The orders of stay having been sought and rejected this Court, learned counsel contended lacks jurisdiction as the matter is *res judicata*.
5. Since the matter is pending in the Court of Appeal, it was further submitted that under section 6 of the Civil Procedure Act this application ought to be stayed on the principle *of sub judice*. It was submitted that this Court cannot comment on the merits of the matter pending in the Court of Appeal. Learned Counsel was of the view that this matter is an attempt by the petitioners to appeal from the decision of one High Court Judge to another High Court Judge and in support of this submission reliance was placed on **Kombo vs. Attorney General [1995-1998] EA 153**. He submitted that there was non-disclosure by the applicants that the same application was made and rejected and relied on **Re Rainbow Manufacturers Ltd [2003] 1 EA 249** and urged the Court to dismiss both the application and the petition.
6. On behalf of the petitioners **Mr Ondieki** submitted that the objection is a misapprehension of the structure, purport and objects of our constitutional principles and values. He submitted that this

Court has the powers under Articles 1 and 159 from the people of Kenya which empowers the Court to see that the spirit and letter of the Constitution are realised as reflected in the Preamble to the Constitution. According to him Article 19 is where the Court derives its jurisdiction and makes the Bill of Rights an integral part whose purpose is to preserve human dignity. It was submitted that the language used by the court was derogatory and had nothing to do with the petition and was contrary to Article 54(1) which is the Petitioners' complaint. Citing Articles 20 and 25(1) of the Constitution learned counsel submitted that the Bill of Rights applies to all and binds State organs. According to him under Article 22(1) the Court while observing the rules of natural justice is not obligated to technicalities. **Mr Ondieki** submitted that since what is being sought herein are conservatory orders the prayers cannot be said to be the same as the ones that were being sought by the petitioner. In his view the fact that the petitioner has exhibited the proceedings that gave rise to these proceedings is a disclosure of the existence of the said proceedings hence the petitioners cannot be said to have approached the Court with unclean hands. This being a Constitutional petition learned counsel submitted that the issue of an appeal from one High Court to another High Court does not arise since there is no nexus between this matter and the Election Petition hence the doctrine of *sub judice* does not arise. In his view the Court ought to look at the broader picture and develop the law as mandated under Article 259(1)(a)(b) and (c) of the Constitution. In distinguishing **Kombo vs. Attorney General** (supra) it was submitted that the same has no place since it was dealing with section 77 of the former Constitution and in the context of the new Constitution it is inapplicable. Learned Counsel stated that the Petitioners seek only two days hence there are exceptional circumstances and that no prejudice would be occasioned if the conservatory orders sought are granted.

7. On his part **Mr Odhiambo** learned counsel for 3rd respondent associated himself with the position taken by **Mr Ondieki**.
8. In response **Mr Arua** submitted that none of the Respondents committed the alleged breaches and that it is incorrect that the orders sought are conservatory orders but are the same orders which were sought earlier. With respect to the issue of prejudice, it was submitted that any order that keeps the representatives out cannot be said to be un-prejudicial.
9. I have considered the record and the submissions made by Counsel. It is clear from prayer 3 of the Notice of Motion herein that the orders sought seek to stop the implementation of the orders made in Nairobi High Court Election Petition No. 14 of 2013.
10. The question that arises is whether this Court can in separate proceedings stay the implementation of an order made by another High Court Judge.
11. In **Peter Nganga Muiruri vs. Credit Bank Limited & Another Civil Appeal No. 203 of 2006** where the Court expressed itself thus:

"The part of the Constitution which deals with the establishment and jurisdiction of courts in Kenya is headed "The Judicature" and section 60 of the Constitution establishes the High Court with "unlimited original jurisdiction in Civil and Criminal matters and such other jurisdiction and powers as may be conferred on it by the Constitution or any other law". Although the Constitution stipulates that the jurisdiction of the High court in criminal and civil matters is unlimited, it is circumscribed by rules of practice and procedure to enable the court to function side by side with courts and tribunals subordinate to it and to guide it in the manner of exercising its jurisdiction and powers...Section 64 of the Constitution establishes the Court of Appeal with such "…jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law". On the basis of this provision the Court of Appeal cannot directly entertain an appeal from any other Court other than the High Court...Sections 65 and 66 of the Constitution establish courts subordinate to the High Court which are Magistrate's Courts and Kadhis' Courts, and also Court Martial. Each of these courts exercises such jurisdiction and powers as "may be conferred on it by law"...There is no provision in the Constitution, which establishes what, is referred to as Constitutional Court. In Kenya we have a division of the High Court at Nairobi referred to as "Constitutional and Judicial Review" Division which is not an independent Court by merely a division of the High Court. The wording of section 67 of the Constitution which donates the power to the High Court to deal with questions of interpretation of sections of the Constitution or parts thereof does not talk about a Constitutional Court but talks about

the High Court...With regard to the protective provisions section 84 of the Constitution, it does not in any of its sub-sections talk about the Constitutional Court but instead talks about an application being made to the High Court...The Hon. The Chief Justice must have been aware that no such Court is established under the Constitution and that would explain why he created a Constitutional Division and not a Constitutional Court. The creation of the Constitutional and Judicial Review Division was an administrative act with the sole object of managing the cause list. The Chief Justice would have no jurisdiction to create a constitutional court as opposed to creating a division of the High Court...Any single Judge of the High Court in this Country has the jurisdiction and power to handle a constitutional question. The fact that a Constitutional Division was established did not by such establishment create a court superior to a single Judge of the High Court sitting alone. It would be a usurpation of power to push forward such an approach and whatever decision, emanates from a court regarding itself as a Constitutional Court with powers of review over decisions of Judges of concurrent or superior jurisdiction such decision, is at best a nullity. Jurisdiction is everything and without it, a court has no power to make one more step...courts must follow the law as it is currently...The appellant by filing the Originating Summons which was referred to the Chief Justice and also the motion before Nyamu J. was challenging the doctrine of finality. There is neither Constitutional nor Statutory authority to support that approach. Therefore, neither the Chief Justice, nor Nyamu J. had the jurisdiction to entertain the appellant's application to the extent that he was seeking to challenge a decision of a court of competent jurisdiction against which no Constitutional or Statutory right of appeal or review was available. This matter had been concluded a long time back and attempts to revive it can only have one outcome – failure".

12. I would with due respect, refer to the dissenting decision of **Ibrahim, J** (as he then was) in **Kinyanjui vs.Attorney General [2005] 2 KLR 454**, in which he expressed himself *inter alia* as follows:

"In the absence of any other provisions under the Constitution other than section 65(2) and (3) which empowers the High Court to supervise civil and criminal proceedings before a subordinate court or Court Martial, there is only one High Court of Kenya which is constituted and manned by the Honourable Chief Justice and other judges (not less than 11) as may be prescribed by Parliament. There are no two or more High Courts and we can only have judgements, rulings, orders and other decisions given by a specific judge, or specific judges (Bench or Benches) if empanelled in accordance with the law. The High Court as an institution in an inanimate body that must be run, and activated, managed and controlled by animate organs authorised by law. These are judges who must of essence be human beings and according to the Constitution, the judges of the High court as must of necessity in law be of equal rank and standing. This is because the jurisdiction, authority and powers are conferred on the High Court as a Constitutional institution or body and not on the individual judge. It follows that when exercising and invoking the jurisdiction of the High Court under say section 60 of the Constitution or any other part or provisions of the Constitution or statute, all judges are of equal ranking and standing. Each decision under any provision of the Constitution, statute or other law have the same effect and force of law as it is not the personality, age, excellence or seniority in being appointed to the Bench or the number of judges sitting in a particular case that gives the decision the force of law but the jurisdiction of the High Court given under section 60 which establishes it in the first place. Section 60 is the mother of the High Court of Kenya..... It follows that it does not matter in what "type" of High Court, a judge is sitting when hearing a particular case, be it a (Constitutional Court" under section 84, a "civil" or "criminal court" under section 60 or specific statutes (other law), or even an "Election Court" under section 44. It is the jurisdiction of the court as an institution under the Constitution or any other law that is paramount and not the attributes of the judge or judges constituting such a Court or type or nature of proceedings or case at hand at any given time. There is only one High Court under the Constitution with specific jurisdiction conferred on it by section 60(1) of the Constitution. There is no "other or another Court of co-ordinate jurisdiction". There are no

two, three or more High Courts. There is only "a High Court" as singularly created and established by the said provision."

13. It is my view and I so hold that this Court cannot under the guise of exercising powers conferred upon it under the Constitution take actions which may be construed to amount to supervision of decisions made by a Superior Court. Article 165(6) of the Constitution donates to the High Court supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
14. Apart from the foregoing the said prayer 3 seeks temporary orders during the pendency of the appeal and not during the pendency of this petition. Conservatory orders in my view are meant to keep matters in situ pending the determination of the petition rather than the pendency of an appeal. Where a party wants the orders with which he is aggrieved to be kept in abeyance pending an appeal to the Court of Appeal, he ought to invoke the jurisdiction of the High Court under Order 42 rule 6 of the Civil Procedure Rules or Rule 5(2)(b) of the Court of Appeal Rules rather than opening another front in litigation. It has been held time and again that it is an abuse of the court process to institute several proceedings in order to challenge the same action and the Court has inherent jurisdiction to prevent such abuse. See **Billy Ngongah vs. Khan & Associates Civil Appeal No. 104 of 2001; Richard Saidi vs. Sembi Motors Civil Appeal No. 9 of 1991** and **Arbuthnot Export Services Ltd. vs. Manchester Outfitters Nairobi HCCC No. 2252 of 1989.**
15. In the case of **Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009 Kimaru, J** dealing with the issue of abuse of the process of the Court stated as follows:

"This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it".

16. Similarly, in **Nyokabi Karanja & 3 Others vs. Kamuingi Housing Co. Limited Civil Application No. Nai. 61 of 2005,** it was held that it is an abuse of the process of the Court to maintain two parallel and identical applications on the same matter. In **Havelock Muriuki & Raval Advocates vs. Jatantilal Dharamshi Gosrani Nairobi (Milimani) HCMCC No. 60 of 2007, Kimaru, J** held that the court having dismissed an application seeking stay of execution in seeking a stay of the said order the respondent is in effect making a similar application to stay the said taxation under the guise of an application for stay of proceedings pending the hearing and determination of the intended appeal. According to the Judge the court's interpretation of the said ruling is that if the respondent is aggrieved by the said decision, he is at liberty to apply for an order of stay from the Court of Appeal instead of appearing before the same court seeking essentially the same order which was denied by the court.
17. In this case it is not denied that the Election Court rejected an application for stay. The effect of granting the orders sought herein would be to stay the orders made in the election petition. In other words the petitioners herein would have obtained the orders which they were unable to obtain in the said petition by the backdoor. This court cannot countenance such an abuse of its process. In such matter as was held in **Abbas G Essaji vs. Gordhan Dewji Solanki Dar-Es-Salaam**

HCMCC No. 40 of 1967, it is the substance of the matter that must be looked at, rather than the words used. In **Evelyn Kowido & Another T/A Evedel Enterprises vs. Bamburi Supermarkets Ltd Mombasa HCCA No. 18 Of 2006,** it was held that where the bottom line of the many long winding words in the prayers in an application is seeking orders for injunction to maintain status quo pending either the hearing of the suit or the case filed at the Business Premises Tribunal, the rest is a question of language, semantics and polemics which is not the concern of courts of law and it is evident that the application before the Court had earlier been decided on the basis of a near similar application and the order has not been appealed against, the cardinal point is that a Court of concurrent jurisdiction had made findings on the issues raised and the issues in the application were res judicata.

18. A similar scenario presented itself in the case of **Kombo vs. Attorney General** (supra), in which **Ole Keiwua, J** (as he then was) expressed himself *inter alia* as follows:

> **"All the applicant's complaints were criticisms on how the election court had acted and this was in the nature of an appeal which appeal did not lie to a Judge of coordinate jurisdiction as the election court and was further an attempt to circumvent the provisions of section 44(5) of the Constitution which provide against any appeal from all decisions of the election court… The election court had sat as a High Court in terms of section 44(1) of the Constitution whereas the present application was made to the High Court pursuant to the provisions of section 84(1) of the Constitution… The applicant had not set out how the Attorney General, the Respondent was in breach of his constitutional rights as all the allegations were made and directed to the election court…. The High Court sitting pursuant to the provisions of section 84 of the Constitution cannot override decisions of the same High Court exercising its constitutional jurisdiction under section 44".**

19. Although **Mr Ondieki** has attempted to distinguish the decision from the present case it is my respectful view that it is a distinction without a difference since the principles are the same.
20. In the premises it is my view and I so hold that the Notice of Motion dated 4th October 2013 is a gross abuse of the process of the Court. It is accordingly dismissed with costs to the 1st and 2nd respondents.

Dated at Nairobi this 11th day of October 2013

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ondieki for the Petitioners

Mr Arua for the 1st and 2nd Respondents

Mr Odhiambo for the 3rd Respondent