



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Petition 55 of 2009

**IN THE MATTER OF SECTION 1, 1A, 10, 30, 42A, 43, 44, 47, 60, 84 & 123 (8) OF THE
CONSTITUTION**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS SECURED AND GUARANTEED UNDER SECTIONS 70 (a) 77,78,79,80 AND 82,
OF THE CONSTITUTION**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (AMENDMENT ACT, 2008 (NO.10
OF 2008))**

AND

IN THE MATTER OF CONSTITUTION OF KENYA REVIEW ACT, 2008 (NO.9 OF 2008

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA REVIEW ACT CAP 3A LAWS OF
KENYA**

BETWEEN

BISHOP JOSEPH K. METHU & 34 OTHERS.....PETITIONERS

AND

THE HONORABLE THE ATTORNEY GENERAL... RESPONDENT

RULING

On the 26th January, 2006, 35 petitioners moved the court by way of a petition seeking to have the court declare Sections 4, 5, 6, 7, 9, 14, 41(3), 47A, and 60A of the Constitutional Amendment Act, 2008 (No.10 of 2008) unconstitutional. They also seek for a declaration that the Constitution of Kenya Review Act, 2008, is void for being inconsistent with the Constitution, incurably defective and dysfunctional for purposes of facilitating the review process. Further, they seek for orders restraining the Interim Independent Electoral Commission (IIEC) from conducting a Referendum as envisaged in the Constitution of Kenya Review Act, 2008, until it completes the process of fresh registration of voters and creation of new voter-registers.

Simultaneous with the petition, a Chamber summons was filed under certificate of urgency pursuant to Section 84 of the Constitution. The said application sought for conservatory orders of temporary injunction to stop the implementation of the Constitution of Kenya (amendment) Act, 2008 (No.10 of 2008) pending hearing of the application in the first instance and the petition. Similar order were sought in regard to the Constitution of Kenya Review Act (No.9 of 2009), more particularly, Sections 30, 32 & 33.

A. PRELIMINARY OBJECTION

The Respondent, the Attorney General filed a Notice of Preliminary Objection dated the 10th of March, 2009, opposing the petition. In the objection the Respondent raises two grounds, first, that the High Court lacks jurisdiction to hear and determine this matter by virtue of Section 60A of the Constitution. Second, that it is only the Independent Constitutional Dispute Resolution Court (ICDRC) that has jurisdiction to determine all matters arising from the Constitutional Review process.

The Respondent contended that this court lacks jurisdiction to hear and determine this petition, as all the prayers in the petition touch on the Constitution review process and therefore only the ICDRC has jurisdiction under Section 60A of The Constitution as Parliament did not give the High Court this particular jurisdiction. He urged the court to uphold the Principle of Separation of powers and not to investigate the process of enacting this law. The Respondent relied on the following authorities:-

- 1. Hiliare Barnet on Constitutional & Administrative Law.**
- 2. Pickin vs. British Railway Board (1974) AC 765;**
- 3. Lanson F.N. Cases in Constitutional Law;**
- 4. Love Land Ian, Constitutional Law and Human Rights,**
- 5. Manuel & Others vs. Attorney General (1982) Ch 77,**
- 6. Martin V.O. Sulman, (Inspection and Taxes) 1982 STC; 4/16 &**
- 7. Peter O. Ngoge v. Francis Kaparo & 4 Others Nrb Misc Civil Appl. No. 22 of 2004**

B. PETITIONERS' RESPONSE

The petitioners opposed the Preliminary Objection. They contended that since ICDRC has yet to be established by Parliament, there exists a vacuum and it follows therefore, they argue, that the High has jurisdiction to hear and determine matters arising from the Constitutional Review process, by virtue of section 60 of the constitution. In any event they contend the petition before us questions the Constitutionality of the Constitutional Amendment Act, 2008, (No. 10 of 2008), as a result challenging the Constitutionality of the ICDRC and therefore the said court cannot adjudicate upon this matter as it cannot be a Judge in its own cause. They also argue that the jurisdiction of ICDRC is limited to the adjudication of matters arising from the Constitution review process, whereas, the petitioners have invoked Section 10, 44, 100, 84 & 123 of the Constitution.

On the issue of separation of powers the petitioners submit that judicial power is vested in the High Court and the Court of Appeal and the doctrine of separation of power does not allow Parliament to establish a court to operate under it and as it wishes. That S. 77(7) of the Constitution presupposes a court that is impartial and independent. That ICDRC as constituted can only be commission and as such subordinate to the High Court as envisaged by S.123 (8) of the Constitution.

C. REJOINDER TO THE PETITIONERS' RESPONSE

In response the respondent contended that ICDRC was set to allow quick facilitation of the

Constitution Review process and that the said court will only deal with limited issues and should not be seen to compete with the High Court.

D. ISSUE FOR DETERMINATION

Whether the High Court has jurisdiction under Section 60 of The Constitution to hear and determine the petition before it filed pursuant to sections 70 (a), 77, 78, 79, 80 & 82 of the Constitution, where there is an allegation of violation of fundamental rights & freedoms.

E. VIEWS, COMMENTS & FINDINGS

We have considered the pleadings before us, the submissions by learned counsel and the authorities cited.

Without looking at the constitutionality or otherwise of the ICDRC, it is not disputed that the said court is yet to be established. Neither the Judges have been appointed nor the procedure of operations set out as envisaged under Section 60A of the Constitution, meaning that there is a vacuum until such a time when the said court is established, and as such, in our view, in the event that issues arise from the ongoing Constitutional Review Process, Section 60 of the Constitution empowers the High Court to hear and determine such matters. We are also of the considered view that the vacuum created by Parliament's failure to establish and operationalise the court, cannot in any event deny an aggrieved litigant recourse to law.

In REPUBLIC V THE RETURNING OFFICER KAMUKUNJI & ANOTHER EX-PARTE NG'ANG'A MBUGUA Misc Ch. Appli. 13 of 2008 Nyamu J and Wendoh J stated in part:-

“It is the responsibility of the court to ensure that the executive action is exercised responsibly and as Parliament intended. The High Court has a responsibility for the maintenance of the rule of law and there cannot be a gap in the application of the rule of law and the court must at all times embrace a willingness to oversee executive action and to refuse to countenance behavior that threatens either basic human rights or the rule of law.”

Guided by the above authority, we are of the view that the Constitutional Review process is an important event in the history of the country and a matter of grave concern to most Kenyans, and we cannot agree more with the sentiments of Nyamu J & Wendoh J, as the court indeed has a duty not only to oversee executive action but to ensure that the actions of Parliament do not create a vacuum that would either threaten the fundamental rights and freedoms of the citizens or the rule of law. It follows therefore, that and in the absence of ICDRC, the High Court is under a duty to arbitrate disputes as envisaged under Section 60 to of the Constitution.

Section 60 (1) provides:-

“There shall be a High Court, which shall be a superior court of record, and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.

Having stated as above, we are cognizant that Section 60 A (1) of the Constitutional Amendment Act (No.10 2008) limits the jurisdiction of ICDRC to matters arising from the Constitutional review excise. The said section provides:-

“Notwithstanding section 60 there shall be an Interim Independent Constitutional Dispute Resolution Court which shall have exclusive jurisdiction to hear and determine all and only matters arising from the Constitutional Review Process.”

The petitioners' issues in our view are outside the Constitutional review process. The Petitioners question the constitutionality of the amendments, Parliament's action within the doctrine of separation of powers;

they also plead contravention of their Fundamental rights & freedoms under the Constitution. We find that the issues raised by the Petitioners fall squarely within the jurisdiction of this court. It is only the High Court which has original jurisdiction under the Bill of Rights; Chapter V of the Constitution, as envisaged by Section 84 of the Constitution. Section 84 gives the High court the power to enforce protective provisions; The said section states:-

“ (1) Subject to subsection (6), if any person alleges that any of the provisions of sections 70 to 83 (inclusive) has been , is being or is likely to be contravened in relation to him (or, in case of a person who is detained, if any other person alleges such contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the high court for redress.”

We also find that Section 123 (8) of the Constitution gives further powers to the courts to undertake judicial review of authorities and persons exercising constitutional powers or any other power under the law.

Section 123 (8) states:-

“No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any function under the Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has exercised those functions in accordance with this Constitution or any other law”

We do not at this stage, wish to dwell in depth with the issue of separation of powers suffice it to say, that the courts have made findings on the subject that we have taken into account while considering the issue for determination before us. In **R V THE JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIRS AND OTHERS EX-PARTE GEORGE SAITOTI** Misc. civil Application No.102 of 2006 where the Court stated in part:-

“..... of course we must caution that in Kenya unlike other Commonwealth countries such as the United Kingdom, it is the Constitution that is Supreme and not any of the three arms of government and therefore the Common law Cases concerning the Supremacy of Parliament in the United Kingdom must be read with the proviso in mind. The effect of this is that where any of the other arms encroach on a territory that is not theirs under the Constitution they can be challenged under the Constitution”

In **EX-PARTE NG'ANG'A MBUGUA (SUPRA)**, The court referred to the warning by Chief Justice Marshall in the case of **MALBURY V MADISON 5 US 137 (1803)**, that without judicial review, the legislative branch would enjoy a practical and real omnipotence and would reduce to nothing a constitution. The court also observed that the High Court must remain faithful to the will of the people and that judicial review is the cornerstone of the doctrine of separation of powers and the rule of law. We therefore find that the doctrine of separation of powers does not limit the role of the court but enhances the same as the High court not only interprets the Constitution but is indeed the custodian of this supreme law.

Having considered all the above we are of the view that this court has jurisdiction to hear and determine the petition. We accordingly dismiss the preliminary objection and order that, the chamber summons dated 26th January 2009 do proceed for hearing.

Dated and delivered at Nairobi this 2nd day of October, 2009

R.P.V WENDOH

JUDGE

G. DULU

JUDGE

ALI-ARONI

JUDGE

Advocates

Mr. Kibe Mungai for the Petitioners

Mr. Onyiso for the Respondent

Court Clerks: Muturi

David

Njoroge