



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

*(Before Hon. Lady Justice Maureen Onyango)*

**PETITION NO. 100 OF 2020**

**IN THE MATTER OF ARTICLES 10(1)(a), (b) and (d), ARTICLE 232(1)(f) and (g) OF THE CONSTITUTION OF KENYA AND SECTION 32 OF THE PUBLIC SERVICE ACT**

**AND**

**IN THE MATTER OF ARTICLE 27(3)(4) AND (8) OF THE CONSTITUTION OF KENYA AND ARTICLES 2 OF CEDAW AND ARTICLE 2 OF MAPUTO PROTOCOL**

**AND**

**IN THE MATTER OF THE APPOINTMENT OF MEMBERS OF THE BUSINESS PREMISES TRIBUNAL OF THE LANDLORDS AND TENANTS (SHOP AND CATERING ESTABLISHMENT) ACT (CAP 301)**

**AND**

**IN THE MATTER OF ALLEGED VIOLATION OF ARTICLES 169(1)(d) OF THE CONSTITUTION OF KENYA, 172(1) OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**BERNARD ODERO OKELLO..... PETITIONER**

*VERSUS*

**CABINET SECRETARY FOR INDUSTRIALIZATION,**

**TRADE AND ENTERPRISE DEVELOPMENT..... 1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL..... 2<sup>ND</sup> RESPONDENT**

*AND*

**CYPRIAN MUGAMBI NGUTARI..... 1<sup>ST</sup> INTERESTED PARTY**

**PATRICIA MAY CHEPKIRUL..... 2<sup>ND</sup> INTERESTED PARTY**

**KYALO MBOBU..... 3<sup>RD</sup> INTERESTED PARTY**

**ANDREW MUMA..... 4<sup>TH</sup> INTERESTED PARTY**

**CHEGE CHARLES GAKUHI..... 5<sup>TH</sup> INTERESTED PARTY**

**LAW SOCIETY OF KENYA..... 6<sup>TH</sup> INTERESTED PARTY**

CONSOLIDATED WITH PETITION NO. 99 OF 2020

IN THE MATTER OF: ARTICLES 22, 23, 25, 27, 47, 50, 154 AND 162(2)(a) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: THE ALLEGED VIOLATION ARTICLES 1, 2, 3, 4(2), 10, 27, 41(1), 47, 232 AND 259(1) OF THE CONSTITUTION

AND

IN THE MATTER OF: SECTIONS 4, 5, 6 AND 11 OF THE FAIR ADMINISTRATIVE ACTIONS ACT, ACT NO. 4 OF 2015

AND

IN THE MATTER OF: ALLEGED VIOLATION OF SECTION 10(1) & (2) OF THE NATIONAL EMPLOYMENT AUTHORITY ACT NO. 3 OF 2016

AND

IN THE MATTER OF: SECTION 11 AND 16 OF BUSINESS PREMISES RENT TRIBUNAL ACT, CAP 301

AND

IN THE MATTER OF: REGULATIONS 2 & 21 OF THE LANDLORD AND TENANT (SHOPS, HOTELS AND CATERING ESTABLISHMENTS) (TRIBUNAL) (FORMS AND PROCEDURE) REGULATIONS, 1966 (REGULATIONS MADE PURSUANT TO SECTION 16 OF THE ACT)

AND

IN THE MATTER OF: GAZETTE NOTICE NO. 4244 DATED 22<sup>ND</sup> JUNE 2020 AND PUBLISHED IN THE KENYA GAZETTE ON 26<sup>TH</sup> JUNE 2020

AND

IN THE MATTER OF: THE PURPORTED APPOINTMENT OF THE CHAIRMAN AND VICE CHAIR/MEMBERS OF THE BUSINESS PREMISES RENT TRIBUNAL (BPRT)

BETWEEN

THE KENYA INVESTORS ASSOCIATION..... PETITIONER

VERSUS

CABINET SECRETARY FOR INDUSTRIALIZATION,

TRADE AND ENTERPRISE DEVELOPMENT..... 1<sup>ST</sup> RESPONDENT

THE HON. ATTORNEY GENERAL..... 2<sup>ND</sup> RESPONDENT

RULING

The Business Premises Rent Tribunal (The Tribunal/BPRT) is established under Section 11 of the **LANDLORD AND TENANT (SHOPS, HOTELS AND CATERING ESTABLISHMENTS)** Chapter 301 of the Laws of Kenya (the **Act/Cap 301**). The Tribunal is mandated to adjudicate disputes between landlords and tenants for shops, hotels and catering establishments under controlled tenancies as defined by the Act.

On 15<sup>th</sup> June, 2020 the term of the sole member of the Tribunal who was also the Chairperson, Mr. Dennis Silas Mbichi Mboroki expired. Vide Gazette Notice No. 4244 dated 22<sup>nd</sup> June, 2020 issued by the 1<sup>st</sup> Respondent, the 1<sup>st</sup> Respondent appointed the 1<sup>st</sup> to 5<sup>th</sup> Interested Parties as members to the Tribunal. Aggrieved by this decision of the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Petitioner filed a Petition in **Petition 99 of 2020: The Kenya Investors Association v CS Ministry of Industrialization, Trade & Enterprise Development & Another** dated 29<sup>th</sup> June, 2020 on 30<sup>th</sup> June, 2020. Equally aggrieved, the 1<sup>st</sup> Petitioner filed a Petition in **Petition No. 100 of 2019: Bernard Odera Okello v CS Ministry of Industrialization, Trade and Enterprise Development** dated 30<sup>th</sup> June, 2020 and filed on 1<sup>st</sup> July, 2020.

Contemporaneously with its Petition, the 1<sup>st</sup> Petitioner, filed a Notice of Motion Application under Certificate of Urgency dated 30<sup>th</sup> June, 2020 and filed on 1<sup>st</sup> July, 2020 (the **1<sup>st</sup> Petitioner's Application**). Therein, the 1<sup>st</sup> Petitioner sought conservatory orders by way of injunction to interalia prohibit the assumption of office by the Interested Parties. The 1<sup>st</sup> Petitioner's Application was placed before this Court on 1<sup>st</sup> July, 2020 wherein orders were granted as follows:-

- 1. That the application be and is hereby certified urgent.*
- 2. That the Deputy Registrar is directed to fix the application to be served today for interparties hearing before any Judge within the next 14 days.*
- 3. That in the meantime, a temporary stay be and is hereby granted restraining the interested parties from assuming office pending the interparties hearing of the application.*

The Application was opposed by all the Respondents and Interested Parties. On 15<sup>th</sup> July, 2020, the Law Society of Kenya – the 6<sup>th</sup> Interested Party, filed a Notice of Motion application dated 6<sup>th</sup> July, 2020. Therein they sought joinder to the Petition and an order to vary and stay the Court's orders of 1<sup>st</sup> July, 2020

On 20<sup>th</sup> July, 2020, the 1<sup>st</sup> Respondent filed a Replying Affidavit sworn by Amb. John Weru, the 1<sup>st</sup> Respondent's Principal Secretary.

On 22<sup>nd</sup> July, 2020, the 1<sup>st</sup> to 5<sup>th</sup> Interested Parties filed a Notice of Preliminary Objection dated 21<sup>st</sup> July, 2020 (the **Preliminary Objection**) seeking to strike out both Petitions.

The 1<sup>st</sup> Petitioner's Application came up for hearing before this Court on 15<sup>th</sup> July, 2020. On that date this Court issued orders (the **Court Orders/the Orders**) for the consolidation of the two Petitions retaining Petition 100 of 2020 as the lead file. Further, this Court prohibited the Interested Parties from undertaking any business of the Tribunal pending determination of the Petition.

This Court further directed the parties to proceed with the Petition by way of written submissions and gave timelines for substantive hearing of the Petition concurrently with the 1<sup>st</sup> Petitioner's Application in view of the urgency of the matter. These Orders form the basis of the motion for determination by this Court.

Aggrieved by this Court's Orders, the 1<sup>st</sup> to 5<sup>th</sup> Interested Parties/Applicants filed a Notice of Motion Application dated 21<sup>st</sup> July, 2020 (the **Motion**) on 22<sup>nd</sup> July, 2020 contemporaneously with the Preliminary Objection. The Motion is brought under **Article 159, 259(1); 3(a&b)** of the Constitution of Kenya, **Section 53** of the Interpretation and General Provisions Act, **Sections 12(3) and 16** of the Employment and the Labour Relations Act, **Rule 17(7) and 33(d)** of the Employment and Labour Relations Court Rules and other enabling provisions of the law.

The Motion seeks the following orders:-

- 1. Spent*
- 2. Spent*
- 3. The consolidated Petitions herein be transferred for hearing in the Environment and Land Court.*
- 4. This Court's Order of 15<sup>th</sup> July, 2020, prohibiting the 1<sup>st</sup> to 5<sup>th</sup> Interested Parties from discharging their duties as members of the Business Premises Rent Tribunal be and is hereby varied and/or vacated to allow the 1<sup>st</sup> to 5<sup>th</sup> Interested Parties to continue discharging their functions pending the hearing and determination of the Petitions filed herein.*
- 5. In the alternative the Consolidated Petitions No. 99 and 100 of 2020 be and are hereby dismissed.*

The Motion is supported by the grounds on the face of the Motion and the Supporting Affidavit of Cyprian Mugambi Nguthari, the 1<sup>st</sup> Interested Party. In opposition to the Motion, the 1<sup>st</sup> Petitioner swore a Supplementary Affidavit on 23<sup>rd</sup> July, 2020 filed on 27<sup>th</sup> July, 2020. This Court having considered that the Motion raises an objection to this Court's jurisdiction and review of the Court's Orders of 15<sup>th</sup> July, 2020, directed that the Motion be heard on 28<sup>th</sup> July, 2020.

The substantive issues for this Court's determination arise from the prayers sought in the motion which are:-

1. Whether this Court has jurisdiction to determine the petitions or whether the Petitions ought to be transferred to the Environment and Land Court.
2. Whether this Court's Orders of 15<sup>th</sup> July, 2020 should be reviewed?
3. Whether the Petitions ought to be dismissed.

## **Jurisdiction**

With respect to jurisdiction, on the grounds on the face of the Motion, the Petitioner pleaded that there is no employer – employee relationship between the Petitioners and the Applicants. That the Petitions do not challenge any matter anchored on employment and labour relations hence the Jurisdiction of this Court has not been established. Further that the Environment and Land Court exercises supervisory jurisdiction over the Tribunal. As such, the proceedings of the Tribunal as presided over by the Applicants cannot be challenged purely on the basis of their appointment.

In the Supporting Affidavit sworn by the 1<sup>st</sup> Interested Party on 21<sup>st</sup> July, 2020 (the **Supporting Affidavit**), the deponent reiterated the grounds on the face of the Motion as pleaded on this issue.

This position was opposed by the 1<sup>st</sup> Petitioner in the Supplementary Affidavit sworn by the 1<sup>st</sup> Petitioner on 23<sup>rd</sup> July, 2020 (the **Supplementary Affidavit**). Therein, the deponent deposed that it is the Employment and Labour Relations Court that has jurisdiction to examine the process of appointment of the Applicants and constitutionality of their terms of service that employment can only be addressed by this Court as held on several occasions.

The 1<sup>st</sup> Petitioner deposed that in dealing with a similar matter of appointment of members of the National Land Commission this Court held in **Okiya Omtatah Okoiti v Selection Panel for the National Land Commission & 3 Others; Gershon Otachi Bw’omanwa & 10 others (Interested Party) [2019] eKLR** that it is the Employment and Labour Relations Court which has the power to decide on the appointment of public servants.

During submissions, learned Counsel Mr. Kanjama for the Applicants submitted that the Petitioners are seeking orders to interfere with the dispute resolution process at the Tribunal. He submitted that the proper Constitutional body to deal with the matter under **Article 162 (2) (b)** is the Environment and Land Court (**ELC**) since the Tribunal meets the definition of a subordinate Court. As such, the matter should be placed before the special Court which is the ELC.

It was the Learned Counsel’s submission that the jurisdiction of the Employment and Labour Relations court is two-fold. The first being that **Section 12** of the Employment and Labour Relations Court Act, relates to the employer-employee relationship which has not been established by the Petitioners. Further, the Tribunal being the employer has not been enjoined in the matter. He submitted that for the second aspect of jurisdiction the Courts have severally affirmed this Court’s jurisdiction with respect to appointments. It was his submission that jurisdiction must be established in the pleadings. That a challenge to an appointment must begin with a challenge of the qualification and competence of the person appointed. It must also include a challenge to the process of appointment.

He submitted that in this case, none of the Petitioners is challenging qualifications or competence or stating that the appointment did not correspond with the 1<sup>st</sup> Respondent’s statutory power. That the Petitioners are merely stating that certain processes were not followed which would be considered irrelevant.

Learned Counsel, in closing, relied on the decision in **S. K. Macharia v KCB & 2 Others [2012] eKLR** where the Supreme Court held that jurisdiction is a primary matter to be dealt with by the Court.

In his submissions, Learned Counsel for the 1<sup>st</sup> Petitioner, Mr. Mwiti submitted that the Petition is challenging the process of appointment of public officers which relates to, who has the right to appoint and what the composition of appointment is with specific respect to gender. It was the Learned Counsel’s submission that these are issues falling under the jurisdiction of this Court by dint of **Article 162** of the Constitution and **Section 12** of the Employment and Labour Relations Court Act. In support of this submission, Mr. Mwiti relied on the case of **Okiya Omtatah Okoiti v Attorney General & 2 Others; Francis K. Muthaura (AMB) & 5 Others (Interested Parties) [2019] eKLR**.

During rejoinder, Mr. Kanjama submitted that in matters touching on Landlord and Tenant disputes, the ELC sits in an appellate capacity by virtue of Cap 301. He submitted that the Supreme Court has held that parties should exhaust alternative dispute mechanisms before they move to Court. He submitted that Magistrate Courts do not have jurisdiction in cases involving protected tenants.

Further, Learned Counsel submitted that asking litigants to transfer pending cases at the Tribunal to another Court would violate their Constitutional rights to access justice.

### **Review of the Court’s Orders of 15<sup>th</sup> July 2020**

On the grounds on the face of the Motion, the 1<sup>st</sup> to 5<sup>th</sup> Interested Parties pleaded that the Court effectively paralyzed the operations of the Tribunal on an indefinite basis. That the Tribunal is registering a high number of new cases as numerous landlord-tenant disputes are increasing since they are currently falling behind on rent payment on account of the COVID-19 Pandemic.

It was pleaded that the Orders were also issued at a time when the Tribunal had already heard several matters and scheduled an intense hearing calendar for the months of July, August and September, 2020 and dispatched hearing notices to the landlords and tenants across the Country notifying them of the hearing dates. It was pleaded that the proceedings of the Tribunal as presided over by the Applicants cannot be challenged purely on the basis of their appointment.

Further, in the Supporting Affidavit, the deponent deposed that in accordance with **Section 53** of the **Interpretation and General Provisions Act**, any of the proceedings undertaken by the Interested Parties as members of the Tribunal cannot be challenged purely on the basis of their appointments. That the Constitution ought to be interpreted in a manner that promotes good governance so that a function or power conferred on an office should be exercised by the holder of such office. It was the deponent’s deposition that good governance calls for the Interested Parties to continue with their sittings at the Tribunal.

In response, the 1<sup>st</sup> Petitioner deposed in the Supplementary Affidavit with respect to this issue that there would be no lacuna

in the Tribunal for the following reasons:-

- i. The office of the Chairperson and sole member of the Tribunal was vacant for six months and ELC could hear urgent matters. Further, that now gazetted Magistrates can also hear those matters. He relied on the case of **Philemon Murungi v Neno Courier Services & Another [2017] eKLR** to demonstrate this position.
- ii. The ELC has jurisdiction to deal with the Tribunal matters as demonstrated in the case of **Joseph Kangethe T/A Kangethe & Company Advocates v Pan African Life Assurance Limited & Another [2014] eKLR**.

The 1<sup>st</sup> Petitioner deposed that to ensure that the dispute is heard expeditiously, this Court gave directions that all pleadings by the respective parties be filed within three days and the 1<sup>st</sup> Petitioner's Application and the Petitions be heard together. He further deposed that the Interested Parties are seeking to impugn the Court Orders by raising extraneous issues. That the decision of this Court came after the Court considered all matters including the urgency of the case and gave orders whose rationale has not changed as the Interested Parties have raised the same issues in the Motion. As such, the Interested Parties are seeking this Court to sit on appeal of its own decision.

The 1<sup>st</sup> Petitioner also deposed that the Motion is incompetent and should not be allowed since it would amount to defining a new trajectory of the dispute different from the case presented by principal parties as stated in **Francis Kariuki Muruatetu & Another v Republic & 5 Others [2016]**

During submissions, it was Learned Counsel Mr. Kanjama's submission that the Applicants were sworn in to office before the matter was first placed before this Court. He submitted that the Applicants had already worked for a period of two weeks before the Court issued orders to stop them from occupying office.

He submitted that the Applicants had demonstrated that the Tribunal has the highest backlog and hundreds of complaints have been received in this regard. That as such, public interest is fanned by the Court reviewing the Orders. Learned Counsel invoked **Section 16** of the Employment and Labour Relations Court Act and **Rule 33** of the Employment and Labour Relations Court Rules.

In support of his submission, Mr. Kanjama relied on this Court's decision in **Transport Workers Union v Etihad Airways [2019] eKLR** where this Court reviewed its previous decision on the basis of new evidence. He relied on the case of **Bernard Ngeno & another v County Assembly of Bomet & another; Governor, County Government of Bomet (Interested Party) [2019] eKLR** where **Mbaru J.** reviewed her decision on the basis of material non-disclosure by the Petitioners.

It was Learned Counsel's submission that the Tribunal has hundreds of thousands of cases to support the review of the previous order. He relied on the decision of the Court of Appeal in **Katiba Institute v PSC** the Court of Appeal held that matters of competitiveness and merit relating to the Public Service Commission Act are matters to be handled internally by the said body. He submitted that the Petitioners have not established a prima facie case on the basis of the Court of Appeal decision. However, Learned Counsel did not provide the decision or a citation for the same.

It was Mr. Kanjama's submission that the Petitioners failed to stop the swearing in thus the Petition has been overtaken by events. He submitted that the Petitioners by their Petitions were disguising removal in the name of stopping appointments which have already taken place.

Mr. Odukenya, Learned Counsel for the 1<sup>st</sup> Respondent associated fully with the submissions by Mr. Kanjama and further submitted that the Orders go against the doctrine of legality to the effect that anything done within the law is legal unless proved by evidence. He submitted that the Interested Parties were indeed sworn in by the Judiciary but the Judiciary has not raised any objection and the Petitioners have not demonstrated that they sought information from the Judiciary and were denied.

In conclusion, Mr. Odukenya urged this Court to vacate the Orders. He submitted that the Petitioners have not established what prejudice they would suffer that cannot await hearing of the Petition of be compensated by way of damages.

Mr. Mwiti, Learned Counsel for the 1<sup>st</sup> Petitioner submitted with respect to the review to vacate/set aside the Orders that, no grounds have been established for the same. It was his submission that due to the apparent unconstitutional conduct admitted in the Affidavit by the Petitioner that the Orders were issued to preserve the sub stratum of the Petition.

On the issues of public interest with respect to the Orders as raised by Mr. Odukenya, Learned Counsel for the 1<sup>st</sup> Petitioner submitted that there can be no public interest against the Constitution. He submitted that there would be no vacuum as the ELC has jurisdiction to hear matters when the Tribunal is not sitting.

Ms. Mwikali holding Mr. Gathu's brief for the 6<sup>th</sup> Interested Party supported the Applicant's Motion and submissions. On the other hand, Learned Counsel Mr. Ojienda for the 2<sup>nd</sup> Petitioner supported the 1<sup>st</sup> Petitioner's position and submissions.

## **Analysis and Determination**

### **On Jurisdiction**

It is the contention of the Applicants that this Court lacks jurisdiction to determine the Petition and that the same should be transferred to the Environment and Land Court which exercises supervisory jurisdiction over the Tribunal.

As previously stated by this Court, under **Article 162(2)(a)** of the Constitution, parliament is empowered to establish a Court with the same status as the High Court to hear and determine disputes relating to employment and labour relations disputes. Consequently, this Court was established under the Employment and Labour Relations Court Act. **Section 12 (1) (a)** of the Act, grants this Court exclusive original and appellate jurisdiction to hear and determine all disputes relating to or arising out of employment between an employer and an employee.

Under **Articles 22(2) (c)** and **258(2) (c)** court proceedings may be instituted by a person acting in the public interest where a person's right or fundamental freedom in the Bill of Rights has been violated or denied or where the Constitution has been contravened or threatened with contravention. This is the basis of public interest litigation and which gives the Petitioners *locus standi*. Further, in so far as the substratum of the Petitions is premised on the appointment of the Applicants in an employment capacity, there is no requirement for a nexus of employment between the Petitioner and the Applicants or indeed the Tribunal.

The Court in the case **Abdikadir Suleiman v County Government of Isiolo & Another [2015] eKLR** held-

*"...The original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions in disputes between employers and employees rests with this court as vested with the appropriate jurisdiction under Articles 159(1), 162 (2) (a) as read with Article 165(5) and (6) of the Constitution; Articles 22(1) and 258(1) of the Constitution, and the provisions of the Employment and Labour Relations Act, 2011. The court holds that the jurisdiction spreads to all issues in the employment relationship and related matters including the enforcement of the fundamental rights and freedoms under Article 22 of the Constitution and enforcement of the Constitution under Article 258 as far as the issues in dispute are, evolve, revolve or relate to employment and labour relations. The court holds that the compass or golden test for the court's jurisdiction is the subject matter in the dispute namely disputes relating to employment and labour relations as provided for Article 162 (a) of the Constitution and as amplified in the Employment and Labour Relations Court Act, 2011 and not the remedies sought or the procedure of moving the court or the situ of the applicable law or any other extraneous considerations as may be advanced by or for a litigant."* [Emphasis added]

The Petitioners dispute the appointment of the Applicants by the Respondent on the basis that the appointments were in contravention of the Constitution. The Petitioners have come to this Court by dint of **Articles 22** and **258** for purposes of enforcement of the Bill of Rights in the public interest. While the Petitioners do not personally have employment relationships either with the Tribunal or the 1<sup>st</sup> Interested Parties, this is ultimately an employment related dispute challenging the appointment of the Applicants. It is apparent that the Petitioners are not challenging the proceedings of the Tribunal but the manner of their appointment and their composition. There is nothing related to environment and land that would invite the ELC to determine a matter of appointment of members of the Tribunal.

In view of the foregoing it is my finding that this Court has the jurisdiction to determine the Petitions.

### **Review of Court Orders**

The power to review decisions is provided for under **Section 16** of the ELRC Act and **Rule 33** of the Employment and Labour Relations Court (Procedure) Rules as properly invoked by the Applicants in their Motion. **Section 16** provides the Court shall have power to review its judgements, awards, orders or decrees in accordance with the Rules. **Rule 33** of the **Employment and Labour Relations Court (Procedure) Rules** provides that a person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling –

- a. if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
- b. on account of some mistake or error apparent on the face of the record;
- c. if the judgment or ruling requires clarification; or
- d. for any other sufficient reason.

In the present case, it is apparent that there has been no discovery of a new and important matter not brought to the attention of this Court prior to the issuance of the Orders. Further there is no allegation that the Orders have an error or that a clarification is required. As such, the request for review is for any sufficient reason. The High Court had occasion to consider the threshold to be met for invoking this provision in **Republic v Public Procurement Review Board & 2 Others [2018] eKLR**, where it was held;

*"Review can also be allowed for any other sufficient reason. The expression 'any other sufficient reason' means a reason sufficiently analogous to those specified in the rule... My finding is also fortified by the holding in the case of **Evan Bwire v Andrew Nginda** where the court held that 'an application for review will only be allowed on very strong grounds....'".*

It is the Applicants' contention that the Court Orders must be reviewed in the interests of justice and public interest. The core of these contentions is that the Orders have effectively paralyzed the operations of the Tribunal for an indefinite period. The Applicants' contention is that the continued subsistence of the Orders would only go to increase the already heavy backlog of the Tribunal. The Applicants further contend, that in any event, under **Section 53** of the **Statutes and General Interpretations Act**, any of the proceedings undertaken by the Applicants as members of the Tribunal cannot be challenged purely on the basis of their appointments. The balance of convenience to their contention would thus favour the vacation of the Orders to enable the Applicants proceed with the business of the Tribunal as constituted.

The Applicants have invited this Court to review its Orders on the basis that there would be a greater harm occasioned to the public if the Tribunal does not sit to carry out its mandate. I find great relevance in the consideration of this issue in the decision in **Kinyanjui v Kinyanjui [1995-98] 1 EA 146** where it was held:

*“For a Court of law to shirk from its constitutional duty of granting relief to a deserving suitor because of fear that the effect would be to endanger serious ill will and probable violence between the parties or indeed any other consequences would be to sacrifice the principle of legality and the dictates of the rule of law at the altar of convenience as would be to give succour and sustenance to all who can threaten with sufficient menaces that they cannot live with and under the law.”*

Human Rights espoused in the Bill of Rights enjoy a prima facie inviolability and will trump aspects of public good or public interest. See **[Jacqueline Okuta & Another v Attorney General & 2 Others [2017] eKLR]**. In any event as rightly stated, the ELC in the absence of the Tribunal has the jurisdiction to determine landlord and tenant disputes arising under controlled tenancies as defined under the **Cap 301**.

On 15<sup>th</sup> July, 2020, this Court had already issued directions to fast track the hearing of the Petitions. Directions were issued for main hearing. If parties had complied with the Directions, the matter would be well on its way towards Judgment. This Court is minded of the urgency of this matter and accommodated the parties to ensure the expeditious determination of the same.

Counsel for the Applicants in its submissions on the concerns with respect to the gender composition of the Tribunal stated that the bench of the Supreme Court has not met the two-thirds gender rule. This submission, I find was made almost as if it is intended to sanitize the concerns raised by the Petitioners with respect to the composition of the Tribunal. It begs the question can two wrongs make a right? If one criminal is set free should all criminals be set free?

Even though this Court has the jurisdiction to vary, set aside or discharge orders issued, the Courts have held that this discretion must be exercised with great caution and is ordinarily only exercised to correct an error or oversight or to effect a review of the proposed order so that the orders may be able to deal more appropriately with the issues as litigated by the parties. This Court is called to strike a delicate balance to ensure justice of both parties. The inconvenience of the Applicants and the litigants who have access to the ELC cannot outweigh the alleged unconstitutionality of the Tribunal as constituted. I agree with Learned Counsel Mr. Mwiti’s submission that there can be no public interest against the Constitution. I accordingly deny the prayer to review the Orders of 15<sup>th</sup> July, 2020.

#### **Should the Petitions thus be dismissed?**

The final prayer of the Applicants is for the dismissal of the Petitions. This prayer can only be considered after substantive hearing of the Petition. This prayer is thus on the face of it unmerited and accordingly dismissed.

**The upshot is that the entire Motion fails and is accordingly dismissed. Costs shall abide the outcome of the Petitions.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7<sup>TH</sup> DAY OF AUGUST 2020**

**MAUREEN ONYANGO**

**JUDGE**

#### **ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**