



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION E425 OF 2020
CONSOLIDATED WITH PETITION E014 OF 2021

**IN THE MATTER OF REMOVAL FROM OFFICE UNDER ARTICLE 181 OF THE
CONSTITUTION & SECTION 33 OF THE COUNTY GOVERNMENT ACT, 2012**

AND

**IN THE MATTER OF ARTICLES 10, 19, 22, 23, 25(C), 47, 48, 50, 81, 101, 155, 159, 165, 174, 175,
181, 196 OF THE CONSTITUTION**

AND

**IN THE MATTE ROF THE SENATE MOTION OF REMOVAL FROM OFFICE BY
IMPEACHMENT OF HON. MIKE MBUVI SONKO AS GOVERNOR OF NAIROBI COUNTY**

AND

**IN THE MATTER OF COUNTY ASSEMBLY OF NAIROBI CITY RESOLUTION FOR THE
REMOVAL OF HON. MIKE MBUVI SONKO AS GOVENOR FOR NAIROBI**

AND

**IN THE MATTER OF SECTION 14 OF THE COUNTY GOVERNMENT ACT, 2012 AND
ORDERS NO. 67 AND 72 OF THE NAIROBI CITY COUNTY STANDING ORDERS**

AND

**IN THE MATTER OF THE SENATE RULES ON REMOVAL OF GOVERNORS FROM
OFFICE**

AND

IN THE MATTER OF THE ASSUMPTION OF OFFICE ACT

AND

IN THE MATTER OF THE CONSTITUTIONAL RULES

BETWEEN

HON. MIKE MBUVI SONKO.....1ST PETITIONER

OKIYA OMTATA.....2ND PETITIONER

VERSUS

THE CLERK, COUNTY ASSEMBLY OF NAIROBI.....1ST RESPONDENT

THE SPEAKER OF NAIROBI CITY COUNTY ASSEMBLY.....2ND RESPONDENT

THE NAIROBI CITY COUNTY ASSEMBLY.....3RD RESPONDENT

THE CLERK OF THE SENATE.....4TH RESPONDENT

THE SPEAKER OF THE SENATE OF KENYA.....5TH RESPONDENT

THE SENATE OF KENYA.....6TH RESPONDENT

THE HON. ATTORNEY GENERAL.....7TH RESPONDENT

THE INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION (IEBC).....8TH RESPONDENT

THE ASSUMPTION OF THE OFFICE OF COUNTY, GOVERNOR

COMMITTEE, NAIROBI CITY COUNTY.....9TH RESPONDENT

THE AG. GOVERNOR, NAIROBI CITY COUNTY.....10TH RESPONDENT

RULING

APPLICATION

1. Before Me is a Notice of Motion brought pursuant to *Article 165(4) of the Constitution of Kenya, 2010, Rules 23, 24 & 25 of the Constitution of Kenya (Protection of Rights & Fundamental Freedoms) Practice and Procedure Rules 2013, Section 1A, 1B, 3A, 63(c) & (e) of the Civil Procedure Act, Chapter 21 Laws of Kenya, Order 9 Rules 5 & 6, Order 40 Rule 7, Order 5, Rule 1, Order 50 rule 1 of the Civil Procedure Rules* and all other enabling provisions of the Law by the 1st Respondent herein seeking the following orders:-

a) This Honourable Court be please to Order a stay of execution of the Order (G) of the Orders issued by the Hon. Justice J. A. Makau on 23rd December, 2020 pending the inter partes hearing of this application.

b) The Honourable Court be pleased to stay the proceedings herein pending inter partes hearing of this application.

c) This Honourable Court be pleased to discharge, vary, set aside and/or review Order (G) of the

Orders issued by the Hon. Justice J. A. Makau on 23rd December, 2020.

d) This Honourable Court be pleased to certify Nairobi High Court Constitutional Petition No. E425 of 2020 as raising a substantial question of law.

e) This Honourable Court be pleased to refer the entire Petition herein to the Hon. Chief Justice for the composition of a bench of uneven number of Judges to hear and determine the dispute.

f) This Honourable Court be pleased to issue an order for the consolidation of HC Petition No. 64 of 2020, HC Pet No. 66 of 2020, HC Pet. No. 105 of 2020, HC Const. Pet. No. E348 of 2020, HC Const. Pet. No. E405 of 2020, HC Pet. No. E425 of 2020, HC Pet. No. E430 of 2020, ELRC Pet. No. 35 of 2020, ELRC Pet. No. 52 of 2020, ACEC Pet No. 1 of 2020 and any other suit touching on the leadership of the Nairobi City County Government (specifically the nomination, appointments, election into the offices of Governor & Dep. Governor), the transfer of functions to the Nairobi Metropolitan Services and budgeting and appropriation in respect of the County.

g) This Honourable Court be pleased to make such orders as may be necessary for the ends of justice or to prevent an abuse of the process of the Court.

h) The Costs of this application be provided for.

2. The Application is premised on the following grounds on the face of the application:-

a) On 21st December, 2020 the Petitioner herein filed a Constitutional petition before this Court and ex-parte directions issued on the same day following consideration by this Court of the interlocutory application filed contemporaneously with the Petition.

b) When the Petition came up for inter partes hearing on 23rd December, 2020 the 1st Respondent made a presentation to the Honourable Court that the Petition raised serious questions of law deserving a reference to the Hon. Chief Justice for the composition of an uneven number of Judges to hear the matter.

c) At the time of the 1st Respondent's said presentation no serious concerns were raised and no objection was made by any of the parties to have this Petition settled by a bench of uneven number of Judges as envisaged under Article 165 (4) of the Constitution of Kenya, 2010.

d) On 23rd December, 2020 and following an amendment of the Petitioner's pleadings, the Hon. Mr. Justice J. A. Makau rendered himself in this matter by finding that the Petition before this Court does raise substantial questions of law as would justify referral to the Hon. Chief Justice to constitute a bench, and further declined to refer the same to the Hon. Chief Justice due to constitutional timelines in the Petition.

3. The 1st Respondent contend that the Court in declining to find that the petition raises substantial questions of law as to justify its referral to Chief Justice to constitute a bench made a mistake and that there is an error apparent on the face of the Order (G) of the said Order inter alia:-

i) The Constitutionality of the Nairobi City County Assembly Appropriation Act, 2020;

ii) The Constitutional limits of the 2nd Respondent's power and functions when acting in the capacity of the 10th Respondent including constitutionality of acts already performed in that capacity;

iii) Inconsistencies between the Constitution of Kenya, 2010, the Elections Act No. 24 of 2020 and the Assumption of the Officer of Governor Act, No. 4 of 2020;

- iv) Constitutionality of the 3rd Respondent's electronic voting guidelines and procedures;*
- v) Constitutionality of an impeachment motion brought under section 33 of the County Governments Act, No. 17 of 2012;*
- vi) Constitutional limits of the 4th, 5th and 6th Respondent's powers and functions while carrying out its quasi-judicial duties as an impeachment tribunal;*
- vii) Constitutionality of the Nairobi Metropolitan Services and the transfer of functions to it from the Nairobi City county Government; and*
- viii) Whether Constitutional time limits for the performance of a statutory obligation can be injunctioned, suspended or extended by a Court of law.*

4. The 1st Respondent further urge the Court acted inconsistently and ignored the fact that there have been a multiplicity of Court cases in the recent past involving the same or substantially similar subject matter that is to say HC Petition No. 64 of 2020, HC Pet. No. 66 of 2020, HC Pet. No. 105 of 2020, HC Const. Pet. No E348 of 2020, HC Const. Pet. No. E405 of 2020, HC Pet. No. E425 of 2020, HC Pet. NO. E430 of 2020, ELRC Pet No. 35 of 2020, ELRC Pet. No. 52 of 2020, ACEC Pet No. 1 of 2020 amongst others where the trial court has already referred the issues raised to the Hon. Chief Justice for the Constitution of a bench of uneven number of Judges in some instances.

5. It is further submitted that the Court was misdirected by the Petitioners to an error and made a mistake by determining that there were peculiarly short constitutional timelines requiring the matter to be heard expeditiously when in fact the issues raised in this Petition have no constitutional timelines attached to them and that the impending Nairobi gubernatorial by-election which the 8th Respondent has scheduled for the 18th February, 2020 has no bearing on the Petitioner's rights or the exercise of judicial discretion in the matter.

6. It is further contended by the 1st Respondent that the Court's impugned Order (G) was made in error by failing to appreciate that the totality of the above circumstances meet the Constitutional threshold under **Article 165(4) of the Constitution of Kenya, 2010**. It is urged that **Article 165(4) of the Constitution of Kenya, 2010** acknowledges that of the various Constitutional Petitions that are filed before this Honourable Court from time to time, some raise substantial questions of law on whether any right in the Bill of Rights has been denied, violated, infringed or threatened.

7. The 1st Respondent further contend that some provisions of the Supreme Law also recognises that a substantial question of law can include:-

- a) The interpretation of the Constitution on such issues as whether any law is inconsistent with or in contravention of the Constitution; or,*
- b) Whether anything said to be done under the authority of the Constitution or any other law is, in fact inconsistent with, or in contravention of the Constitution; or,*
- c) Any matter relating to the Constitutional powers of state organs in respect of County Governments and any matter concerning their relationship with the national government; or,*
- d) Any questions relating to conflict of laws of the County Government and National Legislation.*

8. The 1st Respondent further urge the Petition has raised critical questions touching on the Nairobi City County Government and the 3rd Respondent's Apex offices and capacity to discharge their constitutional and statutory mandates which if not determined by a properly constituted bench will occasion further uncertainty in the operations of the Nairobi City County. Further it is stated that the unique and exceptional circumstances of Nairobi City county also warrant the Constitution of bench in that unlike

other counties that have faced impeachment motions against the apex office, both the Governor's and the Deputy Governor's office in this County are currently vacant.

9. The 1st Respondent aver that the application has been brought at the earliest possible opportunity and without unreasonable delay. It is further stated that there is sufficient cause and good reason, in the instant case to discharge vary, set aside and/or review the impugned Court Orders.

10. The 1st Respondent argue that the impugned orders issued are not of a final resort and this Honourable Court therefore has the requisite jurisdiction to set them aside for proper and just cause such as in the instant case. The Court granted leave to 1st Respondent to appeal against order (G) but no appeal has been preferred by any party as yet. It is as such contended by the 1st Respondent that the Court has jurisdiction to grant the orders sought.

11. The 1st Respondents' application is further supported by the affidavit of Edward Ombwori Gichana sworn on 4th January 2021 and annexures thereto.

RESPONSE OF 4TH, 5TH, 6TH AND 8TH RESPONDENTS

12. The 4th, 5th, 6th and 8th Respondents have not filed responses to the 1st Respondents application but have left the matter to the Court.

THE 2ND, 3RD, 9TH AND 10TH RESPONDENTS RESPONSES

13. The 2nd, 3rd, 9th and 10th Respondents support the 1st Respondent's application. The 2nd Respondent rely on Replying Affidavit dated 21st January 2021 and on submissions dated 21st January 2021. The 3rd and 9th did not file any submissions but submitted orally. The 10th Respondents filed submissions dated 22nd January 2021 and Replying Affidavit dated 12th January 2021.

THE 1ST PETITIONER'S RESPONSE

14. The Petitioner rely on a Replying Affidavit dated 7th January 2021 and submission of even date. The 1st Petitioner opposes the application on points of law, was set out in the 1st Petitioner's Replying Affidavit dated 7th January 2017.

15. The 1st Petitioner is opposed to the 1st Respondent's application and sought to rely on 1st Petitioner's pleadings and submissions.

ANALYSIS AND DETERMINATION

16. I have very carefully considered 1st Respondent's applications and Supporting Affidavits; the Replying Affidavits, Counsel rival submissions both oral and written and from the same the following issues arise for consideration:-

a) Whether the Applicant has met the threshold for this Petition to be referred to Chief Justice under Article 165(4) of the Constitution?

b) Whether the Applicant has met the threshold for the issuance of orders for review?

c) Whether the Court has jurisdiction to issue orders sought?

d) Whether the application for consolidation is properly before this Court?

A. WHETHER THE APPLICANT HAS MET THE THRESHOLD FOR THIS PETITION TO BE

REFERRED TO CHIEF JUSTICE UNDER ARTICLE 165(4) OF THE CONSTITUTION?

17. *Article 165(4) of the Constitution* provides that *any matter certified by the court as raising a substantial question of law under clause (3)(b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.*

18. The Court of Appeal in consideration of the threshold to be met in application of *Article 165(4) of the Constitution*, addressed itself in *Okiya Omtata Okiiti & another v Anne Waiguru – Cabinet Secretary, Devolution and Planning & 3 Others* [2017] eKLR, and stated thus:-

“There is therefore wisdom to be gained from the pronouncements of the Supreme Court of Kenya respecting interpretation of Article 163(4)(b). In Hermanus Phillipus Steyn v Giovanni Gnechi – Ruscone [2013] eKLR, the Supreme Court of Kenya pronounced governing principles for purposes of certification under Article 163(4)(b) some of which are relevant in the context of certification under Article 165(4). Drawing therefore, we adopt, with modification, the following principles:

“(i) For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the Court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;

(ii) The Applicant must show that there is a state of uncertainty in the law;

(iii) The matter to be certified must fall within the terms of Article 165 (3)(b) or (d) of the Constitution;

(vi) The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought.””

19. It is contended that the various Constitutional Petitions lodged before this Honourable Court from time to time, some raise substantial questions of law. *Article 165(4) of the Constitution* states that any matter certified by the Court as raising a substantial question of law under *Clause 3(b) or (d)* shall be heard by uneven number of Judges, being not less than three, assigned by the Chief Justice.

20. The Petitioner filed the instant Petition on 18th December 2020. The same was amended on 21st December 2020. That upon amendment of the Petition the Petitioner in paragraph 35 to 39 raised the issue of Constitutionality of Appointment of Anne Kananu as Deputy Governor of Nairobi County, and sought for revocation of the same in his prayers in the said amended Petition.

21. It is further contended that it is clear that the Petitioner also raises the issue of constitutionality of the nature and scope of the duties and functions purportedly performed out of the purview of Law by the 10th Respondent as the acting governor of Nairobi City County.

22. It is noted that the Applicant herein in his application has set out various grounds that transcend and go beyond the circumstances of this case. The Applicant aver that the instant matter raises the following additional issues;

a) Constitutionality of impeachment motions that are brought under Section 33 of County Government Act.

b) Determination of suits quasi-judicial powers of 4th, 5th, and 6th Respondents during the impeachment process.

c) Constitutionality of the Nairobi City County appropriation Act and limits of powers of an

Acting Governor, transferring powers from Nairobi City county to Nairobi Metropolitan Services.

d) Constitutionality of the election guidance of Nairobi City County Assembly.

e) Whether a Constitutional time limit can be injunctioned, suspended or extended by the Court.

23. There is no dispute that all the above issues as enumerated by the 1st Respondent in its application emanate from the Petition herein. The amended Petition further raises various uncertainties in law as properly identified and concisely set out in the Applicant's Notice of Motion at Paragraph 6. Consequently, the questions raised fall squarely under the ambit of **Article 165(3)(d)(ii)(iii), of the Constitution**. Looking at, Nairobi Constitutional Petition No. 64 of 2020, etc, it is contended that, the Court certified the Petition therein, stemming from the constitutionality of the deed of transfer and formation of the Nairobi Metropolitan Service, matters that are also in issue herein.

24. The Petitioner on the other hand, contend that the threshold under **Article 165(4) of the Constitution** has not been met by the 1st Respondent/applicant but had not denied that the issue submitted on by the Respondent have not been raised in the amended Petition nor have it been demonstrated that the issues do not raise substantial question of law.

25. In view of the issues raised in the amended Petition, and the 1st Respondents submission as well as submission by 2nd and 10th Respondents, the decision whether or not to empanel a bench of more than one Judge ought to be made only where it is absolutely clear and necessary and in such compliance with the relevant constitutional and statutory provisions based on the pleadings and not arbitrary.

26. Upon considering the application herein, the clearly outlined substantial question of law which also border on inconsistency in the letter of law between the Constitution and the election laws, I find that the issues raised in the instant Petition fall within the four issues that are contemplated under **Article 165 (3) (d) of the Constitution**. It is pleaded in the amended Petition of the breach and infringement of the Petitioner's rights. This also falls under **Article 165(3)(b) of the Constitution** and as such I find that this meets the Constitutional threshold for certification of a matter as raising substantial questions of law as sought by the 1st Respondent herein.

B. WHETHER THE APPLICANT HAS MET THE THRESHOLD FOR THE ISSUANCE OF ORDERS FOR REVIEW?

27. **Order 45 of the Civil Procedure Rules, 2010** provides for instances where a review can be preferred. **Order 45(1) of the Civil Procedure Rules** states:-

“Application for review of decree or order.

1. (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

28. The 1st Respondent /Applicant is under duty and obligation to demonstrate that he is entitled to orders

of Review. The applicant is under duty to satisfy the conditions set out under **Order 45 of Civil Procedure Rules**. Key of the relevant conditions is to demonstrate there being sufficient reasons to warrant a review.

29. The Petitioner is opposed to the application and contend that the Court is being urged to sit on appeal on its own decision; that the issue raised herein is Res-judicata, that no grounds for review has been show; that there is no error apparent on record; and that the current amended application by the Petitioner will remain unprosecuted if this application is allowed.

30. It is contended that a cursory look at the ground set out in the Amended Petition with specificity to grounds therein, is a matter that is live in Nairobi Constitutional Petition No. 64 of 2020 as consolidated with Petitions 66 and 105 of 2020, to wit, Hon. Justice Ngaah deemed it fit, as hereinabove quoted, to certify the issues arising as conforming to the provisions of **Article 165(3)(d)(ii)(iii)**. Further added, in **Ferdinand Waititu impeachment matter**, the Court then, was moved to certify the matter as squarely falling within the ambit of **Article 165(3)(d)** as raising substantial questions of Law and therefore fit for determination by an uneven number of Judges. It is further surmounted by the litany of suits preferred in relation to the aforementioned subject matter including **Petition No. E014 of 2021; Okiya Omtata vs. Nairobi County Assembly & Others**, a matter that was consolidated to the present Petition.

31. **Order 45 of Civil Procedure Rules 2010** clearly allows a party considering himself aggrieved by a decree or order from which an appeal is allowed, from where no appeal has been preferred, to seek review before the same Court. A Court dealing with an application for review of its own decree or order cannot therefore be said to be sitting on appeal on its own decision as alluded to by the Petitioner's Counsel nor can it be said that an application for review is Res judicata nor is it an error for court to do so as alluded to by the Petitioner.

32. Considering application for review, and for court to allow such an application the Court has to be satisfied with reasons or grounds set out in the application as set out under **Order 45 of Civil Procedure Rules**. The Court can allow the application if reasons set out under **Order 45 of Civil Procedure Rules** are met or for any other sufficient reason and in which the application for review is made without unreasonable delay.

33. Having considered the reasons for seeking review, I find that the 1st Respondent has demonstrated that at the time the orders were being sought, there was no formal application and no response, and since the order was issued new and several issues have arisen with multiplicity of Petitions raising almost similar issues. I have considered the reasons for seeking review and upon consideration thereof, I am satisfied that these are sufficient reasons to warrant granting review. The application was filed on 4th January 2021 seeking review of this Court's Order (G) issued on 22nd December 2020. I find the application for Review was made without unreasonable delay. The same is in my view merited.

C. WHETHER THE COURT HAS JURISDICTION TO ISSUE ORDERS SOUGHT?

34. The Petitioner has raised the issue of this Court not having jurisdiction to hear and determine the application on various grounds, urging that the Court is sitting on appeal on its own decision and that the matter is Res judicata. It is urged the Court having issued impugned orders in this matter it has become functus officio by having issued orders in the same matter.

35. In dealing with the principle of functus officio, I am guided by the case of **Raila odinga & 2 Others v. Independent Electoral & Boundaries Commission & 3 Others (Supra)** where the Supreme Court of Kenya rendered itself thus:-

“[18] ...Daniel Malan Pretorius, in “The Origins of the functus officio Doctrine, with specific Reference to its Application in Administrative Law,” (2005) 122 SALJ 832, has thus explicated this concept:

“The functus officio doctrine is one of the mechanisms by means of which the law gives

expression to the principle of finality.

According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter...The (principle) is that once such decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

[19] This principle has been aptly summarized further in Jersey Evening Post Limited v. Al Thani [2002] JLR 542 at 550:

"A Court is functus when it has performed all its duties in particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available". (Emphasis added)

36. I have no doubt that this court has inherent power by virtue of **Section 3A of the Civil procedure Act** to make such Orders as may be necessary for the ends of justice and inherent power is not donated by any statute or legal provisions. In the **Republic vs Public Procurement Complaints Review and Appeals Board and another Exparte Jacorossi Impresse Spa Mombasa HCMA 365/2006** the Court made it clear that *"the court has power under its inherent jurisdiction to make orders that may be necessary for the ends of justice and to enable the court maintain its character as a Court of justice and that this repository power is necessary to be there in appreciation of the fact that the law cannot make express provisions against all inconveniences."*

37. I find that it is absolutely clear that inherent power of the Court ought to be involved in order to make necessary orders for the ends of Justice or to prevent abuse of the process of the Court, and have Justice prevail on litigation. I find that there is no dispute that this court has not heard this matter to finality or made its final decision and as such I find the application for review is properly before this Court. I strongly find that this court has jurisdiction to hear and determine the review application arising out of its own orders.

D. WHETHER THE APPLICATION FOR CONSOLIDATION IS PROPERLY BEFORE THIS COURT?

38. The 1st Respondent in its application pray under prayer No.6 that this Court be pleased to issue **an order for the consolidation of HC Petition No. 64 of 2020, HC Pet No. 66 of 2020, HC Pet. No. 105 of 2020, HC Const. Pet. No. E348 of 2020, HC Const. Pet. No. E405 of 2020, HC Pet. No. E425 of 2020, HC Pet. No. E430 of 2020, ELRC Pet. No. 35 of 2020, ELRC Pet. No. 52 of 2020, ACEC Pet No. 1 of 2020 and any other suit touching on the leadership of the Nairobi City County Government (specifically the nomination, appointments, election into the offices of Governor & Dep. Governor), the transfer of functions to the Nairobi Metropolitan Services and budgeting and appropriation in respect of the County.**

39. It is noted that the various matters sought to be consolidated with the instant Petition herein are before other Courts with various components that are currently being litigated by various parties before various courts. The recitation of these cases are evident from the narrator at paragraph 22 of the Amended Petition and as set out in the above-mentioned paragraph.

40. The 1st Respondent did not have the files transferred and placed before this Court to see the nature of the claims thereto although the 1st Respondent contend that those suits have one thing in common, which is urged, touches on the leadership of the Nairobi City County Government (specifically the nomination, appointments, election into the offices of Governor and Deputy. Governor, the transfer of functions to the

Nairobi Metropolitan Services and budgeting and appropriation in respect of the county).

41. It is further contended on the 1st Respondent's side that, the aforesaid suits that the 1st Respondent seeks to have consolidated were within the knowledge of Court and parties as at 23rd December, 2020 when the impugned prayer (G) was issued by the Court.

42. The 1st Respondent further urge that the case that the 1st Respondent seeks to be consolidated are all constitutional petitions filed before Courts of similar status in Kenya. An example is **Mike Mbuvi Sonko versus Clerk of Nairobi City County Assembly & 5 others ELRC Constitutional petition No. 35 of 2020** where a Conservatory order akin to those sought in the Amended Notice of Motion was sought. Therefore, there is no fetter as to consolidation owing to the similarity of claims and issues in those petitions. It is further 1st Respondent's contention that in any event the forum of Courts is not a major consideration in determining the consolidation of cases.

43. The Petitioner on issue of consolidation are of the view that this Court cannot extend its jurisdiction to deal with matters not within the Court's jurisdiction. The Petitioner urge that the Court lacks jurisdiction to deal with matters pending before other judges with jurisdiction to hear and issue orders of consolidation. It is further averred that in absence of parties and, without notice to parties for consolidation, the Court cannot proceed to deal with the issue of consolidation. The Petitioner contend that this Court's jurisdiction is limited by virtue of provisions of **Article 165(5)(b) of the Constitution** as regards matters falling within the jurisdiction of the Courts contemplated in **Article 162(2) of the Constitution of Kenya**. Some of the matters in which the 1st Respondent seeks consolidation are before Employment and Labour Relations Court (ELRC) to which the High Court has no jurisdiction. It will therefore be extending this Court's jurisdiction contrary to the law to purport to consolidate matters not before this Court and in absence of the parties concerned.

44. The Principles of consolidation of cases has been settled in myriads of cases. Any Court before consolidation of cases, is required to ensure the relevant cases have common questions of law or fact, so that they render it desirable for the whole matters to be disposed of at the same time. That before consolidation can be considered the court should be seized of all the matters; parties duly served and given an opportunity to be heard by the court before orders of consolidation are made. I find that to proceed otherwise would be a clear violation of fair hearing as clearly provided for under article 25 (c), and 50 of the Constitution.

45. In Indian Case of **BRIJ KISHORE VSBIR SINGH & OTHERS at the High Court of Punjab and Harana (L.R 5922 of 2013) Justice Paramjeat Singh** quoted the following from the Supreme Court case of **Premlalanahata & Another Vschandi Prasad Sikaria, (2007) 2, Supreme Court cases 551 at paragraph 18:-**

"It cannot be disputed that the Court has power to consolidate suits in appropriate cases. Consolidation is a process by which two or more causes or matters are by order of the Court combined or untied and treated as one cause or matter. The main purpose of consolidation is therefore to save costs, time and effort and to make the conduct of several actions more conveniently by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or causes pending tin the Court and it appears to the Court that some common questions of law or fact arises in both or all the suits or that the rights to relief claimed in the suits are in respect of or arise out of the same transaction or series of transactions; or that for some other reasons it is desirable to make an order consolidating the suits."

46. In the instant application, the 1st Respondent admitted that the several cases sought to be consolidated with this Petition are before different courts and not before this court. The 1st Respondent further admitted that the respective cases have not been transferred to this court nor have the parties and their counsel been served with the application seeking consolidation of the said cases. The Petitioner is opposed to consolidation of the cases for various reasons. I agree where possible matters should be consolidated to save on costs, time, and convenience and enable prompt disposal of several matters in one

matter. However consideration must be made in accordance with the relevant constitutional provisions, which include the right to fair hearing, right to be heard and be served with the respective pleadings. The Court should be seized of the matters and be able to make a finding that the cases are based on common question of law or facts arising in both or all the suits or that the rights to relief claimed in the suits are all in respect of or arise out of the same transaction or series of transactions or that it is desirable for court to make an order consolidating the suits. An Order of consolidation should in my view not be made arbitrary and without affording all parties an opportunity to be heard as by doing so and without having parties, heard would be against the rules of natural justice and undermining the principles of fair hearing.

47. In the instant application the parties in suits sought to be consolidated were not served with the application nor made aware of the intended prayers being sought by the 1st Respondent. No reason has been given why the parties were not served or joined in the application. The suits have all not been referred to the Chief Justice for empanelment of a bench yet. Secondly no reason has been given as to why the application for empanelment of the bench by Chief Justice cannot or could not be made before the various courts. It appears the application for consolidation may not be in good faith; and intended may be to abuse the court process. I find the same to be improper and premature and not before the Court seized of the matters. This Court cannot assume jurisdiction in respect of matters pending before other Courts of concurrent jurisdiction and purport to issue orders without even seeing the files or being seized of the matters. It would be wrong for this Court to presume on the nature of the claim or relief in various matters pending in other courts of competent jurisdiction. I find no basis to order consolidation.

48. It is urged that the ***High Court Petition No. 64 of 2020, High Court Petition 66 of 2020, and HC Petition No. 105 of 2020*** amongst others are touching on leadership and management of both the ***Nairobi City County Government*** and the ***Nairobi City County Assembly*** involving the same or substantially similar subject matter to this Petition yet none has been referred by the trial Judges to the chief Justice for Constitution of a bench of uneven number of Judges to adjudicate upon the same. That notwithstanding I find that it would be improper for this Court to consolidate these Petitions with the already Petitions referred to Chief Justice for empanelment of a bench. I find perhaps the only option is for this court to urge the Chief Justice in constituting a bench to constitute one bench in respect of the already referred ***Petitions No. 64 of 2020; Petition 66 of 2020 and HC Petition No. 105 of 2020*** and other similar Petitions; so that the parties can proceed to move the bench to consider the need to consolidate the Petitions and hear the same together.

49. ***The upshot is that the 1st Respondent's Notice of Motion dated 13th January 2021 partially succeeds and I proceed to make the following orders:-***

a) Prayer No. 1 of the Notice of Motion is spent.

b) Prayer No. 2 of the Notice of Motion is spent.

c) The Order (G) of the Court's order dated 22nd December 2020 be and is hereby discharged, varied and set aside on ground of sufficient reasons, but not on an error apparent on the face of the record.

d) The Nairobi High Court Constitution Petition No. E425 of 2020 is certified as raising substantial questions of law. The Petition is accordingly referred to Hon. Chief Justice for assigning of a Bench of uneven number of Judges to hear and determine the dispute and probably assign the same Bench that shall be hearing Petitions arising out of similar matters related to the impeachment of the Petitioner herein to hear all similar matters.

e) Prayer No. 6 of the 1st Respondent's application seeking consolidation of HC Petition No. 64 of 2020, HC Pet No. 66 of 2020, HC Pet. No. 105 of 2020, HC Const. Pet. No. E348 of 2020, HC Const. Pet. No. E405 of 2020, HC Pet. No. E425 of 2020, HC Pet. No. E430 of 2020, ELRC Pet. No. 35 of 2020, ELRC Pet. No. 52 of 2020, ACEC Pet No. 1 of 2020 and any other suit touching on the leadership of the Nairobi City County Government (specifically the nomination, appointments, election into the offices of Governor & Deputy Governor), the transfer of

functions to the Nairobi Metropolitan Services and budgeting and appropriation in respect of the County, being not placed before this Court the application for consolidation is improper and premature and the prayer for consolidation is declined.

f) No orders as to costs.

Dated, Signed and Delivered at Nairobi on this 25th day of February, 2021.

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J. A. MAKAU

JUDGE