REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram; Koome (CJ & P), Mwilu (DCJ & VP), Ibrahim, Njoki & Lenaola SCJJ)

PETITION No. 29 of 2020

BETWEEN

OKIYA OMTATAH OKOITI.....1ST APPLICANT

NYAKINA WYCLIFFE GISEBE.....2ND APPLICANT

AND

THE HON. ATTORNEY GENERAL .....1ST RESPONDENT

THE PARLIAMENT OF KENYA.....2ND RESPONDENT

(An application for review of findings and holding in Advisory Opinion No. 2 of 2012 of the Supreme Court (Mutunga, CJ & P, Tunoi, Ojwang, Wanjala & Njoki SCJJ)

RULING OF THE COURT

A. INTRODUCTION

[1] The matter is brought under certificate of urgency dated 26th November 2018 and lodged on 28th October 2020. The Application is supported by an affidavit and a further affidavit of Okiya Omtatah Okoiti, and is anchored on Rule 20(4), (4A) & (5) of the Supreme Court Rules, 2012; and all other enabling provisions of the Law.

[2] The Applicants seeks that the Court certifies this matter as urgent and be heard on a priority basis; that this Court's findings on *the gender principle* in ***Advisory Opinion No. 2 of 2012, In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR***, be declared unconstitutional, and therefore, invalid, null and void.

[4] In opposition, 1st Respondent filed Preliminary Objection (PO) dated 14th December 2020 and lodged on 1st January 2021, premised inter-alia on the following grounds:-

(a) The Application is not based on any constitutional or statutory jurisdiction of the Court and is improperly framed as one invoking an original jurisdiction of the Court to depart from the Court's advisory opinion, which original jurisdiction is non-existent in law.

(b) The Applicants lack locus standi to seek an advisory opinion of the Supreme Court under the Constitution and therefore also lack the legal standing to seek a review of the Court's advisory opinion.

(c) The Application is not premised on any substantive proceedings before the Supreme Court, it is not hinged on any original petition or reference for the Court's advisory opinion.

B. SUBMISSIONS

i. Applicants submissions

[5] It is the Applicants submission that this Court has expressed itself on the exercise of its jurisdiction to review and/or vary its decisions. The Applicant relies on the case of ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate & 4 others*** [2013] eKLR where it was observed that as an apex Court, it can depart from its previous decisions, for good cause and after taking into account the legal

considerations of significant weight. In this regard, they urged the Court to vacate its *Advisory Opinion No. 2 of 2012* because the 1st Respondent misled the Supreme Court by misconstruing the gender principle as the gender rule and by asking the question 'when' and not 'if' the gender rule applied to the composition of Parliament.

[6] The Applicants also contend that the Supreme Court had no jurisdiction to render an advisory opinion in matters where there was a dispute in the courts below it, as it did in *Advisory Opinion No. 2 of 2012*. The dispute in question concerned whether or not the gender quotas in Articles 27(8) and 81(b) of the Constitution were applicable to the National Assembly and the Senate immediately as of 4th March 2013 or progressively at a later date.

[7] It was submitted, *inter alia*, that Article 163(6) of the Constitution vests a consultative or advisory jurisdiction on the Supreme Court to give its opinion, on questions unconnected with a pending case, a live dispute, a violation and/or threat to the Bill of Rights or other provisions of the Constitution, to the national government, any state organ, or any county government with respect to any matter concerning county government.

[8] In this regard, it was submitted that when the Supreme Court deals with a reference for an advisory opinion, it is not supposed to 'hijack' or remove any matter from the regular court processes, as it would amount, in this particular case, to the encroachment of the jurisdiction and function of the High Court.

[9] On the issue of *locus standi*, the Applicants submit that Articles 22 (1) & (2) and 258 (1) & (2) of the Constitution are clear that any person can institute proceedings in a court, claiming the violation of rights and fundamental freedoms under the Constitution, on behalf of another person or in the public interest. In the

circumstances, the Applicants urge that they have *locus standi* to institute these proceedings.

[12] In conclusion, the Applicant urges the Court allow the Application as prayed and to depart from its finding and holding in *Advisory Opinion No. 2 of 2012*.

ii. 1st Respondent's Submissions

[13] The 1st Respondent filed its submissions in support of the Preliminary Objection dated 7th January 2021 and filed on the same date. It argues that the instant Application has not been made based on any specific rules of procedure and is not hinged on any substantive proceedings before the Supreme Court.

[14] Further it argues that the Application is framed as one invoking an original jurisdiction of the Court to depart from its previously issued advisory opinion, which jurisdiction does not exist in law.

[15] It is the 1st Respondent's case that although the Court has inherent and residual jurisdiction in exceptional circumstances to review its decisions, the instant Application does not meet the threshold set for review. In this regard, the 1st Respondent relies on the Supreme Court decision of ***Fredrick Otieno Outa vs Jared Odoyo Okello & 3 Others*** [2017] eKLR and ***Jasbir Singh Rai case*** (supra).

[16] The 1st Respondent contends that the Applicants were not parties to the proceedings leading to the decision they now wish reviewed or varied. Therefore, they lack *locus standi* in the first place to seek an advisory opinion of the Supreme Court and therefore it follows that it cannot review the advisory opinion. It was

further submitted that the Supreme Court has on numerous occasions pronounced itself on which parties have *locus standi* to seek the Court's advisory opinion.

[17] Finally, the 1st Respondent submits that the instant Application seeks to invoke a non-existent original jurisdiction of the Supreme Court that is unknown to law. In conclusion, the 1st Respondent submitted that it is constitutionally impermissible for a party who lacks legal standing to seek the Supreme Court's advisory opinion to seek a reconsideration of the Court's advisory opinion through an amorphous application to the Supreme Court. The 1st Respondent prays that the application be dismissed with costs.

C. ISSUES FOR DETERMINATION

[18] Taking into account the submissions of the parties, two issues emerge for determination:

(i) Whether Applicants have locus-standi

(ii) If the answer to (i) is in the affirmative, whether this Court has jurisdiction to review its own decision.

D. ANALYSIS

a) Whether the Applicants have locus standi

[21] Article 163(6) of the Constitution grants this Court jurisdiction to issue an advisory opinion at the request of the national government, any state organ, or any county government with respect to any matter concerning county government.

[22] This Court on several occasions interrogated the issue of who can seek an advisory opinion. *In the* **Matter of the National Gender and Equality Commission** [2014] eKLR the Court held that*:*

> ***" ....a party moving the Court under Article 163 (6) must have locus standi. It held that under this condition, the Court must always consider whether the party seeking to move it, falls within the categories of parties decreed as having such* standi *by the Constitution"***.

[23] Similarly, in ***Re Matter of the Interim Independent Electoral Commission*** [2011] eKLR this Court held:

> **"*..... The only parties that can make a request for an Advisory Opinion are the national government, a State organ, or county government. Any other person or institution may only be enjoined in the proceedings with leave of the Court, either as an intervener (interested party) or as amicus curiae".***

[24] Having considered the submissions of the parties herein, we do find that the Applicants do not fall within the categories contemplated under Article 163(6) of the Constitution and therefore they do not have *locus standi* to seek a review of orders issued by this Court in the advisory opinion.

[25] We also note that the Applicants were not parties to the proceedings in *Advisory Opinion No. 2 of 2012* and as such, they lack *locus standi* to approach this Court to review and/or vary its orders therein.

[26] Having found that the Applicants do not have the proper capacity to appear before us, we find that to respond to the second question, as to whether this court can review its decisions in Advisory Opinions, would constitute an academic exercise in this particular matter and we decline so to do. Consequently, the Application is dismissed.

E. DISPOSITION

[27] Flowing from our findings above, the final orders to be made are as follows:

(i) The Application is dismissed.

(ii) As previously decided by this Court in the ***Jasbir case,*** costs follow the event. In this instance, only the 1st Respondent shall have the costs of the appeal since the 2nd Respondent did not participate in the proceedings, in any meaningful way.

[28] It is so ordered.

DATED and **DELIVERED AT NAIROBI** this 3rd day of December 2021.

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M. KOOME
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

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P.M. MWILU	**M.K. IBRAHIM**
DEPUTY CHIEF JUSTICE &	
VICE PRESIDENT OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
NJOKI NDUNGU	**I. LENAOLA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA