REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Ibrahim, Wanjala, Njoki, Lenaola, Ouko, SCJJ)

PETITION (APPLICATION) NO.5 (EOO7) OF 2021

–BETWEEN–

HAKI NA SHERIA INITIATIVE .... APPELLANT

–AND–

THE INSPECTOR GENERAL OF POLICE .... 1ST RESPONDENT

THE CABINET SECRETARY FOR

INTERNAL SECURITY.. 2ND RESPONDENT

THE HONORABLE ATTORNEY GENERAL .... 3RD RESPONDENT

–AND–

KENYA NATIONAL HUMAN RIGHTS AND

EQUALITY COMMISSION .... INTERESTED PARTY

Being an application for conservatory orders in an appeal from judgment of the Court of Appeal at Nairobi ***(Karanja, Sichale & J. Mohamed JJ.A)*** *dated* ***19th June 2020*** *in* ***Civil Appeal No. 261 of 2018*** *)*

RULING OF THE COURT

A. INTRODUCTION

[1] The present application is predicated upon Petition of Appeal ***No. 5 (E007) of 2021*** which is dated 3rd August 2020 and filed on 30th March 2021. This was following a Ruling of the Court delivered on 24th March 2021 extending time for filing of the Appeal.

[2] The Applicant has moved this Court vide Notice of Motion dated **12th July 2021** and filed on **14th July 2021.** The same is filed pursuant to Section 24 (1) of the Supreme Court Act No. 7 of 2011, Rule 31 of the Supreme Court Rules, 2020 and other enabling provisions of the law and seeks conservatory orders restraining the Respondents from declaring, publishing and enforcing curfew order pursuant to Section 8 of the Public Order Act as well as costs of the application.

B. BACKGROUND

[3] The genesis of this matter is the imposition of the curfew that followed the heinous terrorist attack on Garissa University on 2nd April, 2015, that resulted in the killing of at least 148 Kenyans and injuring scores more. Thereafter, the 2nd Respondent imposed a curfew to run in four counties: Wajir, Garissa, Mandera and Tana River during the hours of 6.30 pm to 6.30am and from 3rd to 16th April, 2015. The 2nd Respondent extended the curfew to 16th June 2015 which was then lifted through a Presidential directive on 18th June, 2015.

[4] During the pendency of the curfew, the Applicant filed a Petition on 22nd May 2015 ***Petition No. 6 of 2015: Haki na Sheria Initiative vs The Inspector General of Police & 3 others*** at the High Court of Kenya at Garissa challenging the constitutionality of the curfew and Sections 8 and 9 of the Public Order Act (Chapter 56 of the Laws of Kenya) on which the curfew was predicated. On **14th March 2017**, the High Court (*Dulu J.*) delivered its Judgment noting that in spite of the Applicant submitting that the Sections 8 and 9 of the Public Order Act are unconstitutional, it had failed to point out any specific Article of the Constitution which was violated by the impugned sections. The Court acknowledged that though some constitutional rights had been limited, this did not prevent prayers by the residents of the four counties, it only meant that they could not pray at the Mosque during the hours of night.

[5] The Court further found that under Article 58, the President's power to declare a state of emergency imposes military law which is dissimilar from imposition of curfew orders which were fundamentally police and internal security matters intended to maintain of law and order to enable investigations to be conducted. Further, that each case of imposition of a curfew order has to be considered on its own merits. The Court ultimately found that the impugned curfew order was justified at the time it was imposed and not unconstitutional. The Court therefore dismissed the Petition.

[6] Further aggrieved, the Applicant filed ***Civil Appeal No. 261 of 2018*** in the Court of Appeal challenging the entire High Court decision. The Court of Appeal (*Karanja, Sichale & Mohammed JJ. A*) rendered its Judgment on **19th June 2020** finding that the object of the Public Order Act is to maintain public order which is an integral component in national security as defined under Article 238 (1) of the Constitution and which presupposes a state of security, peace and stability that is free from criminal activities and violence. The learned Judges of Appeal found that given the curfew orders were issued following a terrorist attack in Garissa, the basis of issuance of the orders was in the interest of the attainment of peace, security and public order for good of the residents of the Four Counties and the country at large to forestall further loss of life, injury and destruction of property, thus in the circumstances, justifiable. The Court consequently found that in situations where public order or safety has been or is at risk of being violated due to factors which include terror attacks or criminal insecurity, the limitation of the affected persons' rights and freedoms within the context of Sections 8 and 9 of the Public Order Act is justifiable, reasonable and necessary under Article 24 of the Constitution to ensure the delicate balance of the rights of citizens.

[7] The Court of Appeal further found that the powers that the Cabinet Secretary to issue curfew orders pursuant to Sections 8 and 9 of the Public Order Act are not unchecked for several reasons. First that the same are issued on the advice of the Inspector-General of the National Police Service and the police officer in charge of

the police in a county or a police officer in charge of a police division, and in the interest of public order. That Section 9(4) of the Public Order Act provides that once a curfew restriction order is declared it should be immediately reported to the Commissioner of Police who has the authority to vary or rescind the same. Further that pursuant to Article 58 of the Constitution, curfew orders imposed under Section 8 and 9 of the Public Order Act are, like a State of Emergency, subject to judicial oversight. More importantly, that there is nothing in the Constitution which prohibits the declaration of curfew orders or curfew restriction orders as envisaged under the Public Order Act. That even after the promulgation of the Constitution, ***the Security Laws (Amendment) Act, 2014 No. 19 of 2014*** amended certain provisions of the Public Order Act but left intact the powers to declare curfews under Sections 8 and 9. Accordingly, the Court found the Appeal to be lacking in merit thereby dismissing it.

[8] Aggrieved further, the Applicant moved to this Court and filed ***Petition No. 5 (E007) of 2021*** seeking for the appeal to be allowed, the Court of Appeal Judgment be set aside and that Sections 8 and 9 of the Public Order Act be declared unconstitutional.

C. THE APPLICATION

[9] The grounds upon which the Application is premised upon are set out in the Application and supporting affidavit of Barre Adan Kerrow sworn on 12th July, 2021. The Applicant relies on its written submissions dated **12th July 2021** and filed on **14th July 2021**, and Supplementary written submissions dated **17th August 2021** and filed on **23rd August 2021**.

[10] It is opposed by way of submissions by the Respondents dated **28th July 2021** and filed on **16th August 2021**.

D. THE PARTIES' RESPECTIVE CASES

(i) The Applicant's case

[11] The Applicant contends that the Application meets the threshold for issuing conservatory orders. That on the premise of curbing the Covid-19 pandemic, the President through the Cabinet Secretary for the Ministry of Interior and Coordination of National Government has over the last couple of months continuously invoked Section 8 of the Public Order Act, the subject matter of the Applicant's petition. That they have done so by issuing numerous night Curfew Orders, that is Legal Notice No. 36 the Public Order (State Curfew) Order 2020; Legal Notice No. 43 the Public Order (State Curfew) Variation Order 2020 and Legal Notice No. 57 the Public Order (State Curfew) Variation Order 2020.

[12] The Applicant urges that the Petition of Appeal pending is challenging the constitutionality of Sections 8 and 9 of the Public Order Act which impugned provisions provide curfew orders and restrictions. The Applicant contends that the Appeal is arguable, not frivolous and inherently merited with very high chances of success. The Applicant submits that, taking cognizance of the fact that Covid-19 pandemic is a public health emergency requiring necessary action from the Respondents, the ultimate question for the court to answer is whether the legal route taken by the Respondents is legal and constitutional.

[13] It points out that the Public Order Act strictly relates to public disorder and security issues and not public health emergency. That despite that, the Cabinet Secretary has invoked the provision on a public health emergency therefore acting *ultra vires* and a clear abuse of statutory power.

[14] The Applicant argues that natural disasters and public emergencies such as the Covid-19 pandemic were anticipated by the drafters of the Constitution and covered under Article 58 and parameters including checks and balances provided for. That the declaration of night curfews and continuous extensions by the Respondents pursuant to the impugned provisions is tantamount to declaring a state of emergency through the back door without parliamentary and judicial oversight as envisaged under Articles 58 and 95(5)(b) and (6) of the Constitution.

The Applicant contends that it cannot have been the intention of the drafters of the Constitution to limit the powers of the President, who is a democratically elected representative of the people on the one hand but allow a Cabinet Secretary and Police to have similar sweeping powers without checks or balances. Further that the Respondents' justification for the curfew orders to curb the spread of Covid-19 pandemic is the protection of life, is a fallacy and an excuse premised on scaremongering to whip up the Court's emotion. That this is geared to hoodwink the Court to decline the orders sought due to *'public good'*. That public interest does not lie in violation of the Constitution and thus cannot be an excuse for infringement of fundamental rights and freedoms especially on a mass scale, regardless of how good the Respondent's intentions.

[15] It is further contended that the impugned provisions have the same effect and consequence as a state of emergency in curtailing fundamental freedoms and human rights in the bill of rights without checks and balances. That curfew orders have led to continuous infringement of several Articles of the Constitution namely **Articles 39** on the right to movement, **27** on the right to equality and freedom from discrimination, **29** on the right to liberty, **32** on the right to freedom of conscience, religion, thought, belief and opinion, **26** on the right to livelihood and life, **37** on the right to assembly, demonstration and picketing and **43** on the right to economic and social rights of the Constitution. That also, these illegal actions of the President and the Executive breach the provisions of **Articles 10, 24, 58 and 73** of the Constitution. That this limitation is not reasonable in an open and democratic society based on human dignity, equality and freedom and is therefore not acceptable.

[16] The Applicant contends that the impugned Statute is archaic and colonial whose date of commencement is **13th June 1950** and which was used to regulate African labour and movements of Africans. It is further contended that the impugned statute being an inherited law from the colonial masters did not

consider human rights and good governance as there was no constitutional provisions such as Articles 238, 10 or 73 at the time of commencement.

[17] It submits that both parliamentary and judicial oversight cannot be wished away. The Applicant drew comparisons with Turkey and Malawi in how they handled the Executive implementing curfews. That in 2015, Turkey experienced an upsurge in terror attacks by a group called Kurdistan Workers Party (PKK) against both civilians and security forces. That this prompted the Turkish authorities to declare curfews under the Provincial Administration Laws. The Venice Commission, officially European Commission for Democracy through Law, an advisory body of the Council of Europe, rendered its opinion on how the Turkish Government handled the situation in **European Commission for Democracy Through Law (Venice Commission), Opinion on Legal Framework Governing Curfews.** The Venice Commission noted that the Provincial Administration Law, on which the decisions to impose curfews were based on, did not meet the requirements of legality enshrined in the Constitution and resulting from Turkey's international obligations in the area of fundamental rights, in particular under the European Convention on Human Rights (*ECHR)* and the relevant case law.

[18] The Venice Commission therefore invited the Turkish authorities to implement *inter alia* the following recommendations; to no longer use the provisions of the Provincial Administration Law as a legal basis for declaring curfews and to ensure that the adoption of all emergency measures including curfews is carried out in compliance with the constitutional and legislative framework for exceptional measures in force in Turkey; to review the legal framework on states of emergency to ensure that all exceptional decisions and measures such as curfew taken by authorities when a state of emergency is formally declared; and to introduce all the necessary amendments to the State of Emergency Law so that there is a clear description in the law of the material, procedural and temporal arrangements for the implementation of curfews.

[19] The Applicant points out that in Malawi, the Constitutional Court in the case of ***The State (On the Application of) Esther Cecilia Kathumba and 4 Others Vs. President of Malawi & 5 Others, Constitutional Reference No. 1 of 2020*** in declaring the Malawian lockdown rules unconstitutional, the Court held that a state of emergency was imposed through a back door without following Sections 45 of the Malawian Constitution that provides for checks and balances. That the Minister under the Covid-19 Rules was purporting to arrogate himself sweeping powers more than those the President has under a state of emergency. This act visited violence upon this Country's constitutional scheme. The Court further held that the checks and balances on declaration of a state of emergency serves the purpose of safe guarding human rights.

[20] That unless restrained by an order of the Court, the Executive shall continue to issue and/or extend such curfew orders pursuant to the impugned provisions and detriment of the public. That it is trite law once rights and fundamental freedoms are violated, they cannot really be compensated with whatever amount of damages so issued.

[21] The Applicant urges that allowing such violation to continuously occur will render the present Petition nugatory on the premise that the unconstitutional and illegal curfew order affects the entire population and that human rights violation is incapable of being remedied since it is impossible for the 1st Respondent to compensate the entire Kenyan population for breach of their fundamental freedoms and human rights.

[22] Similarly, that Respondents will suffer no prejudice if the orders are granted and it is in fact the public that stands to suffer great prejudice. That granting the orders sought herein will be upholding the rule of law, democracy, good governance and accountability of government further affirming the fidelity of the Constitution. It is contended that granting the orders sought will not be determinative of the Petition but only protect fundamental freedoms and human

rights during the pendency of the petition so as to avert irreversible and irremediable harm to the public.

(ii) The Respondents case

[23] The Respondents rely on their submissions dated **28th July 2021** and filed on **16th August 2021** in opposition to the Application. They submit that it is well settled law that in interpreting the Constitution, the court would be guided by the general principle that there is a rebuttable presumption of law that a legislation enacted by Parliament is constitutional and the onus of proof lies on any person who alleges otherwise. They rely on the High Court decision in ***Boniface Oduor Vs Attorney General & Another; Kenya Bankers Association & 2 Others (Interested Parties) (2019) e KLR)*** to buttress their point. That the impugned Sections enjoy the presumption of constitutionality and remain good law at this stage of proceedings and the Court cannot determine its inconsistency with the Constitution without dicing into a detailed analysis of the facts and law. That in order to decide on the constitutionality of the impugned provisions, the Court will be required to examine the purpose and effect of the impugned provisions which is not a requirement at this stage. That the Applicant has not established an arguable prima facie case to warrant grant of conservatory orders.

[24] On whether there is public interest, the Respondents rely on the decision of ***Nubian Rights Forum & 2 Others Vs. Attorney General & 6 Others; Child Welfare Society & 8 Others (Interested Parties); Centre For Intellectual Property & Information Technology (Proposed Amicus Curiae) (2019) e KLR*** where the Court adopted the definition of public interest as follows:

> *"A matter is of public or general interest does not mean that which is interesting as gratifying curiosity or a love of information or amusement but that in which a class of community have a pecuniary*

interest or some interest by which their legal rights or liabilities are affected."

[25] The Respondents argue that in the present case, public interest lies in saving the lives of Kenyans and protecting their well-being against Covid-19 bearing that the World Health Organization declared the disease a pandemic thereby rendering the disease a threat of life which is a fundamental right to be protected under Article 26(1) of the Constitution. That the State's invocation of Section 8 of the Public Order Act was aimed at curbing the spread of Covid-19 and therefore protecting Kenyans' right to life. They rely on the decision in ***Law Society of Kenya Vs. Hillary Mutyambai Inspector General National Police Service & 4 Others; Kenya National Commission on Human Rights & 3 Others (Interested Parties) (2020) e KLR*** to emphasize that the State has a duty to take protective measures without having to wait until the reality and seriousness of those risks are fully demonstrated or manifested. They conclude that the Application does not meet the threshold for granting the orders sought.

E. ANALYSIS AND DETERMINATION

[26] The principles that guide this Court in determining applications for conservatory orders are now old hat, but bear repeating nonetheless. As enunciated in this Court's decision in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*** *(supra)* are:

a) **The Appeal or intended appeal is arguable and not frivolous**

b) **Unless the orders sought are granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory**

c) **That it is in public interest that the conservatory orders be granted.**

[27] It must be remembered that the question whether an appeal is arguable, does not call for the interrogation of the merit of the appeal, and the Court, at this stage must not make any definitive findings of either fact or law. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court.

[28] On the nugatory aspect, the concern is whether what is sought to be stayed if allowed to happen is reversible; or if it is not reversible, whether damages will reasonably compensate the party aggrieved. See the decision of the Court of Appeal in ***Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others Civil Application No 31 of 2012, [2013] eKLR***.

[29] However, before we can begin to delve into deliberation as to whether the Application meets the threshold, we note an issue that neither party has addressed the court on. The facts that led the Applicant to institute proceedings in the High Court, which issues are now on appeal pending determination before us, are different from the facts relied on in the Application.

[30] In the time it has taken for the Appeal to reach this Court, the world has been rocked by the Covid-19 pandemic which was first identified in December of 2019 and declared a global pandemic in March 2020. We take judicial notice that on 25th March 2020, the President, as part of the Government's containment and treatment protocols announced a nationwide overnight curfew to take effect from 27th March 2020 between the hours of 7pm to 5am. We further take judicial notice that the night time curfew has been continuously extended with some modifications on the effective hours being reduced but the same has since been lifted by Presidential directive on 20th October 2021.

[31] Without delving into the merits of Petition, we further note that the curfew imposed after the 2015 Garissa University attack, was prompted by security concerns. However, as rightly pointed out by the Applicant, the contested curfew

orders in the Application are due to the Covid-19 pandemic and which has been declared a public health emergency.

[32] The Court has settled that for an appeal to lie to the Supreme Court from the Court of Appeal under Article 163(4)(a), the constitutional issue must have first been in issue at both the High Court and then the Court of Appeal for determination. That is, the Supreme Court recognizes and respects the constitutional competence of courts in the judicial hierarchy to resolve matters before them. We stated this principle in the case of ***Peter Oduor Ngoge vs Francis Ole Kaparo & 5 Others***, Supreme Court Petition 2 of 2012 ***[2012] eKLR*** at paragraphs 29-30:

> *"The Supreme Court, as the ultimate judicial agency, ought in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals. In the instant case, it will be perverse for this Court to assume a jurisdiction which, by law, is reposed in the Court of Appeal, and which that Court has duly exercised and exhausted.*
>
> *"In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court."*

[33] Similar principles were enunciated in the decisions of ***Erad Suppliers & General Contractors Limited V National Cereals & Produce Board***, Supreme Court Petition 5 of 2012 ***[2012] eKLR*** we held as follows at paragraph 13A:

"In our opinion, a question involving the interpretation or application of the Constitution that is integrally linked to the main cause in a superior Court of first instance, is to be resolved at that forum in the first place, before an appeal can be entertained."

[34] We subsequently summed it up in ***Gladys Wanjiru Munyi v Diana Wanjiru Munyi [2015] eKLR*** thus:

"In Peter Ngoge v. Francis Ole Kaparo & 5 Others, Sup. Ct. Petition No. 2 of 2012 [2012] eKLR, we signalled the guiding principle that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, do indeed have the competence to resolve all matters turning on the technical complexities of the law, and that only cardinal issues of law, or of jurisprudential moment, deserve the further input of the Supreme Court."

[35] We note that the underlying challenge for the curfew orders of 2015 and the curfew orders of 2020 is the constitutionality of Sections 8 and 9 of the Public Order Act on which the curfew orders are premised. However, as we have pointed out the facts giving rise to the cause of actions are premised on different aspects; the 2015 curfew orders on security concerns following a terrorist attack and the 2020 curfew orders on a public health emergency following the continuing threat of a global pandemic.

[36] From the record it is clear that at no point were the Superior Courts called on or had opportunity to render themselves on the legality and constitutionality or otherwise of the 2020 curfew orders issued with a view to contain the Covid-19 virus as a public health emergency. We think it, greatly dishonest for the Applicant to seek to introduce this new aspect when on final appeal before this Court. More so without having argued it before both the High Court and Court of Appeal.

[37] In the circumstances, we are inclined to disallow the application for conservatory orders.

F. ORDERS

[38] Consequently, we make the following Orders:

i. ***The Notice of Motion dated 12th July 2021 is dismissed.***

ii. ***Costs will abide the outcome of the appeal***.

[39] Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **3rd** Day of **December 2021.**

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M. K. IBRAHIM **S.C. WANJALA**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

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N. NDUNGU **I. LENAOLA**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

....

W. OUKO

JUSTICE OF THE SUPREME COURT

THE SUPREME COURT JUDICIARY REPUBLIC OF KENYA

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA