

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL PETITION No. 2 OF 2021 (Formerly Msa PT No. 1 of 2021)

BETWEEN

MUSLIMS FOR HUMAN RIGHTS (MUHURI)..... PETITIONER

AND

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION 1ST RESPONDENT

SPEAKER OF THE SENATE2ND RESPONDENT

SPEAKER OF THE NATIONAL ASSEMBLY3RD RESPONDENT

AFFIDAVIT IN SUPPORT OF THE NOTICE OF MOTION BY

PETITIONERS IN PETITION E400 OF 2020 ON 19 MARCH 2021

I, **KHELEF KHALIFA**, a male adult of sound mind and a resident of Mombasa County within the Republic of Kenya, do solemnly make oath and state as follows;

1. **THAT** I am the Chairperson of the Petitioner herein and I am competent and have the authority to swear this Affidavit on behalf of the Petitioner.
2. **THAT** the facts deponed to hereto fall within my personal knowledge, unless otherwise stated.
3. **THAT** I am conversant with the contents of the Notice of Motion made by Petitioners in Petition E400 of 2021 in which they seek to vary the Orders made by this Court on 8 February 2021.
4. **THAT** I swear this affidavit in support of that Notice of Motion and in order to provide grounds and materials necessary for the full and fair adjudication of that Motion by this Court.

5. **THAT** I am aware that on 4 March 2020, the Constitution of Kenya (Amendment) Bill 2020 (the BBI Bill) was tabled in the National Assembly and underwent the 1st Reading.
6. **THAT** making a communication from the Chair, the Speaker of the National Assembly noted that Parliament was required to expeditiously consider the Bill. He noted that since there were no Standing orders to guide the processing of a Bill to amend the Constitution through a popular initiative, the following procedure would ensue in the consideration of the Bill:

1. Upon its First Reading, the Constitution of Kenya (Amendment) Bill, 2020, promoted by the Building Bridges Initiative, will stand committed to the Departmental Committee on Justice and Legal Affairs for consideration and facilitation of public participation. The Committee shall hold joint sittings with the Senate Standing Committee on Justice, Legal Affairs and Human Rights.

2. The Clerk of the National Assembly is directed to release an invitation for public participation on the Bill immediately and to note particularly the promoters of the Bill as key participants.

3. When the time comes, the Motion for the Second and Third Readings of the Bill shall be moved by the Departmental Committee on Justice and Legal Affairs.

4. At the appropriate time the House Business Committee will be proposing a Motion for limitation of debate on the Bill before its Second Reading.

The House is accordingly guided. I thank you, Hon. Members.

I attach herewith and mark as annexure **KK-1** the National Assembly Order Paper and the Hansard for March 4, 2021.

7. **THAT** similarly, on 3 March 2021, the Speaker of the Senate gave a similar communication with duplicate directions to those given by Speaker of the National Assembly. The Bill was also read at the Senate for the 1st time on 4 March 2021 and committed to a joint Committee of National Assembly and the Senate.

I attach herewith and mark as annexure **KK-2** the Senate Order Paper of 4 March 2021.

8. **THAT** the Communication by the two Speakers of Parliament required the National Assembly Departmental Committee on Justice and Legal Affairs and the Senate Standing Committee on Justice, Legal Affairs and Human Rights. To which the BBI Bill was jointly committed for facilitation of public participation to finalize their processes and return the Bill to the Houses before 23 March 2021.

9. **THAT** on 5 March 2021, the Clerks of Parliament published a Notice inviting the public to submit views on BBI Bill. The Notice informed the public that their views must be received by 11 March 2021. The advertisement was published in local dailies on 6 March 2021.

I attach herewith and mark as annexure **KK- 3** the public notice calling for applications.

10. **THAT** I have reviewed both the Hansard of the Senate and the National Assembly relating to the Communication by the Speakers on BBI Bill and contributions made by numerous members when the BBI Bill was tabled and especially have noted the following:

- (a) That there are no Standing Orders or other published parliamentary procedures to guide the Parliamentary process of considering a bill to

amend the Constitution through a popular initiative. On this National Assembly Speaker noted in his Communication of 2 March 2021:

Hon. Members, you will recall that, during the period of admitting returns from the county assemblies with respect to the Punguza Mizigo Initiative, the Speaker of the Senate and I observed that our rules of procedure are deficient with respect to fully actualising the parliamentary process contemplated under Article 257 of the Constitution.

(b) That as a result of lack of rules/promulgated procedures by Parliament on its consideration of a popular initiative Bill a number of critical procedures were unclear. The Speaker of the National Assembly notes at least the following two:

- (i) *Should the Bill be republished, and if so, what value would the republication add to the process; and,*
- (ii) *Does Standing Order No.120 regarding the 14 days maturity period apply to such a Bill before its introduction in Parliament?*

It is also clear from the Speaker's Communication and ensuing debate that there was no clarity on a few other important procedural issues, including:

- i. Should there be a 90-day hiatus between the 1st and 2nd Reading of the Bill*
- ii. What level of public participation is required?*
- iii. Can Parliament amend the Bill?*

(c) To Members whether the Bill to amend the Constitution through a popular initiative requires to be published by National Assembly or the Senate before it is introduced. While initially the two Speakers had communicated

to Members that the Bill required to be published they later changed that view. On this Speaker of National Assembly notes:

I attach herewith and mark as annexure **KK-4** the National Assembly Hansard of 2 March 2021 that contains the Communication of the Chair regarding BBI Bill.

11. **THAT** the foregoing is quite concerning that Parliament would subject such an important process to the whims of the Speakers who are allowed to make-up procedures of processing popular initiative Bill as they go – denying both Parliament and the people opportunities to participate in determining what are the proper and appropriate procedures that should guide Parliament's consideration and approval of a popular initiative bill.

12. **THAT** I have further perused the relevant Hansard records and it is clear to me that the Speakers as well as Members of Parliament have called for expedited processing of the Bill. For example the Majority Leader in National Assembly while moving the Motion for 1st Reading of the Bill noted:

Now, therefore, this House notes the approval of the draft Constitution of Kenya (Amendment) Bill, 2020 by a majority of the county assemblies and affirms to expeditiously consider the said Bill in keeping with the requirements of Article 257(7) of the Constitution.

And while committing the Bill to the Joint Committee to facilitate public participation the Speaker of the National Assembly stated:

The two committees are at liberty to jointly undertake public participation on the Bill and are expected to expeditiously report back to the Houses of Parliament on or before Tuesday, 23 March 2021.

13. **THAT** the Petitioner herein is therefore concerned that Parliament may pass the Bill soon and as early as 23 March 2021 given Parliament's propensity to hurry the process including by truncating (or doing away altogether with) critical legislative processes as it has already done by providing very little time for public participation and doing away entirely with the 14-day waiting period between publication/introduction of the Bill and 1st Reading. This shows the passage of the Bill by Parliament is imminent. Also imminent is the transmittal of the Bill, upon passage, to the President for his consideration and possible assent under Article 257(9) of the Constitution.

14. **THAT** I am advised by my advocate on record which information I believe as true that Article 257(9) read together with Article 256(4) and (5), where Parliament passes a popular initiative Bill it is left to the President to form an opinion whether the Bill "proposes an amendment relating to a matter mentioned in Article 255(1)(a)". Where the President is of the opinion that the Bill does not propose an amendment relating to a matter mentioned in Article 255(1)(a) he is at liberty to assent to the bill at upon receipt and to publish it.

15. **THAT** I am advised by my advocate on record which information I believe as true that the President may form the said opinion based on the advice from the Attorney General since under Article 156(4)(a) the Attorney General is "the principal legal adviser to the government." Whatever the case, it is unfair that a Party to these proceedings - and who has taken a partisan position - may hold the wild card that will not only render the Consolidated Petitions nugatory but will make the administration of justice a mockery. This is highly prejudicial to the Petitioners and a standalone reason why this Court should grant the Order sought.

16. **THAT** I am advised by my advocate on record which information I believe as true that it is possible for the President to assent to the Bill and cause it to be published on the same day he receives it from Parliament or very soon thereafter and that once published, the Bill effectively amends the Constitution.

17. **THAT** in any event, I am advised by my advocate on record which information I believe as true that even if the President does not assent to the Bill and does not refer it to Independent Electoral and Boundaries Commission (IEBC) the Bill could be deemed assented 14 days after receipt by President by dint of Article 115(6) hence effectively amending the Constitution. That provision provides that where the President does not assent to the Bill and does not communicate to Parliament any reservation “the bill shall be taken to have been assented to on expiry of that period” [14 days].

18. **THAT** in view of the foregoing, I am highly apprehensive that unless this Court grants the Order prayed in the Notice of Motion, Parliament will send the Bill to the President before the final determination of the Consolidated Petitions and that there is a real danger that the President will assent to the Bill before the Petitions are determined or the Bill by operation of law “shall be taken to have been assented to” within 14 days of its transmittal to the President rendering the Consolidated Petitions nugatory and hence extinguishing the adjudicatory authority of this Court.

19. **THAT** in the circumstances, I believe this is a fit and proper case for issuance of the Order prayed and I believe no prejudice would be occasioned to the Respondents or anyone else through issuance of the Order or where any prejudice is occasioned the probative value of the Order outweighs such prejudice.

20. **THAT** I swear this affidavit in support of the notice of motion dated 19
March 2021.

21. **THAT** what is sworn to herein is true to the best of my knowledge, information
and belief.

SWORN at **NAIROBI** by the said)

KHALEF KHALIFA)

This **22** day of **March 2021**) _____

) Deponent

BEFORE ME)

COMMISSIONER FOR OATHS)

DRAWN AND FILED BY:

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