

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION. E400 OF 2020

IN THE MATTER OF THREATENED CONTRAVENTION OF ARTICLES 1, 2, 3, 4(2), 10, 12(1) (a), 19, 20, 21, 22, 23, 24, 27, 35,47,73,77,79, 129,201,232,255,256,257, 258, 259, & 260 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

THIRDAY ALLIANCE PARTY OF KENYA.....1ST PETITIONER
MIRURU WAWERU.....2ND PETITIONER
DR. ANGELLA MWIKALI.....3RD PETITIONER

AND

**THE STEERING COMMITTEE ON BUILDING
BRIDGES TO UNITY
ADVISORY TASK FORCE1ST RESPONDENT**
BUILDING BRIDGES NATIONAL SECRETARIAT.....2ND RESPONDENT
**THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION.....3RD RESPONDENT**
THE HONOURABLE ATTORNEY GENERAL.....4TH RESPONDENT

AND

**THE SPEAKER OF THE NATIONAL ASSEMBLY.....1ST INTERESTED
PARTY**
THE SPEAKER OF THE SENATE.....2ND INTERESTED PARTY
COUNTY ASSEMBLY OF MOMBASA.....3RD INTERESTED PARTY
COUNTY ASSEMBLY OF KWALE.....4TH INTERESTED PARTY
COUNTY ASSEMBLY OF KILIFI.....5TH INTERESTED PARTY
COUNTY ASSEMBLY OF TANA RIVER.....6TH INTERESTED PARTY
COUNTY ASSEMBLY OF LAMU.....7TH INTERESTED PARTY
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COUNTY ASSEMBLY OF MAKUENI.....	19 TH	INTERESTED PARTY
COUNTY ASSEMBLY OF NYANDARUA.....	20 TH	INTERESTED PARTY
COUNTY ASSEMBLY OF NYERI	21 ST	INTERESTED PARTY
COUNTY ASSEMBLY OF KIRINYAGA.....	22 ND	INTERESTED PARTY
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CCOUNTY ASSEMBLY OF NAIROBI CITY.....	49 TH	INTERESTED PARTY

CERTIFICATE OF URGENCY

I, ELIAS MUTUMA, Advocate for the Applicants **DO HEREBY CERTIFY** that the application herein is extremely urgent and ought to be heard on priority basis for the reasons;

1. That on 8th of February, 2021, this Honourable Court issued conservatory orders restraining the IEBC, 3rd Respondent herein from facilitating and subjecting the Constitution of Kenya (Amendment) Bill, 2020 to a referendum or taking any other function to advance the Constitution of

Kenya (Amendment) Bill, 2020, pending the hearing and determination of the consolidated petitions.

2. That however, by the time the said interim orders were issued, the County Assemblies, were yet to debate the impugned Bill but subsequently, during the pendency of the consolidated petitions, over forty (40) County Assemblies debated and approved the impugned Constitution of Kenya (Amendment) Bill, 2020 and subsequently forwarded certificates of approval to Parliament by dint of Article 257 (6) of the Constitution.
3. That indeed the said Bill has now been tabled before the joint houses of Parliament pending debate and approval.
4. That in the prevailing political climate, there is a high likelihood that the said Bill will be approved and forwarded to the President for assent and publication by dint of Article 256 (3) before Judgment in the Consolidated petitions is delivered.
5. That whereas the said interim orders only anticipated a scenario where the Bill would be subjected to a Referendum, there is a real threat, that by dint of Article 256 (5), once the bill is presented to the President, he might assent to the same if he forms the opinion that the proposed amendments do not relate to the protected clauses under Article 255 (1) of the Constitution.
6. That the urgency is that, once the President assents to the Bill, the same becomes not only law, but part and parcel of the Constitution whose validity and/or legality will automatically be excluded from challenge by or before any court of law by dint of Article 2 (3) of the Constitution.

7. That if that be the case, the Consolidated petitions and the pending judgment which will be delivered on notice, shall have been rendered nugatory, moot, and obsolete.

Dated at NAIROBI this ...19th ... day of ...March..... 2021



.....
**MUTUMA GICHURU & ASSOCIATES
ADVOCATES FOR THE PETITIONERS**

Drawn & Filed By:-

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NOTICE OF MOTION

(Under Article 22 and 23,159,165 (3) (d) of the Constitution of Kenya, 2010; Rule19, 23 and 24 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of fundamental Freedoms) Practice and Procedure Rules, 2013; the inherent jurisdiction of the Court and all other enabling provisions of the law)

TAKE NOTICE THAT this Honourable court shall be moved on the.....day of**2021** at 9.00 O’clock in the forenoon or soon thereafter as the counsel for the Applicant may be heard in an application for **ORDERS:** -

1. That this Application be certified urgent and fit to be heard with utmost urgency basis and service thereof be dispensed with in the first instance.

2. That this Honorable Court be pleased to vary, modify and/or enhance the conservatory orders issued on 8th February, 2021 to include an order

against the 1st and 2nd Interested Parties herein i.e. Speakers of joint Houses of Parliament restraining them, upon passing of the Constitution of Kenya (Amendment) Bill, 2020, from submitting to the President;

- a. The Constitution of Kenya (Amendment) Bill 2020 for assent and publication,
 - b. A certificate that the Bill has been passed by Parliament.
3. Any other relief that this Honourable Court deems fit to grant.
 4. Costs of this Application.

WHICH APPLICATION is premised on the grounds set out in the Supporting Affidavit of **MIRURU WAWERU** filed herein together with other grounds herein and reasons to be adduced at the hearing thereof: -

1. That on 8th of February, 2021, this Honourable Court issued conservatory orders restraining the IEBC, 3rd Respondent herein from facilitating and subjecting the Constitution of Kenya (Amendment) Bill, 2020 to a referendum or taking any other function to advance the Constitution of Kenya (Amendment) Bill, 2020, pending the hearing and determination of the consolidated petitions.
2. That however, by the time the said interim orders were being issued, the County Assemblies, were yet to debate the Bill but subsequently during the pendency of the consolidated petitions, over forty (40) County Assemblies debated and approved the impugned Constitution of Kenya (Amendment) Bill, 2020 and subsequently forwarded certificates of approval to the joint houses of Parliament by dint of Article 257 (6) of the Constitution.
3. That the said Bill has now been tabled before the joint houses of Parliament for debate and approval.

4. That in the prevailing political climate, there is a high likelihood that the said Bill will be approved and forwarded to the President for assent and publication by dint of Article 256 (3) before Judgment in the Consolidated petitions is delivered.
5. That whereas the said interim orders only anticipated a scenario where the Bill would be subjected to a Referendum, there is a real threat, that by dint of Article 256 (5), once the bill is presented to the President, he might assent to the same if he forms the opinion that the proposed amendments do not relate to the protected clauses under Article 255 (1) of the Constitution, without the need for a referendum.
6. That there is no known criteria and/or legal framework to guide the President in making the determination under Article 256 (5) on whether the proposed amendments relate to Article 255(1) hence this is left purely at the President's discretion and opinion.
7. That the danger is, once the President assents to the Bill, the same becomes not only law, but part and parcel of the Constitution whose validity and/or legality will automatically be excluded from challenge by or before any court of law by dint of Article 2 (3) of the Constitution.
8. That if that be the case, the Consolidated petitions and the pending judgment which will be delivered on notice, shall have been rendered nugatory, moot, obsolete and an academic exercise.
9. That the Bill having been tabled before the joint houses of Parliament and the people of Kenya not being in control of Parliament's itinerary, the said Bill could be passed and forwarded to the President in a matter of days.
10. That this Application does not in any way seek to interfere with the legislative role of Parliament but to avert a looming threat and/or contravention of the Constitution.

11. That it is in the interest of justice and public interest that the Application herein be allowed pending the delivery of judgment on the Consolidated Petitions.

12. That no party at all in the consolidated petitions shall suffer any prejudice if the orders sought are granted.

DATED AT NAIROBI THIS.....19TH DAY OFMARCH ..2021



.....
MUTUMA GICHURU & ASSOCIATES
ADVOCATES FOR THE PETITIONERS

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Linda Musumba and Jack Mwimali as the
intended Amicus Curie in Petition No.
E282/2020)

REPUBLIC OF KENYA
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SUPPORTING AFFIDAVIT

I, MIRURU WAWERU, of Post Office Box Number 4781-00100 Nairobi do make oath and state as follows:

1. That I am a Kenyan Citizen and the 2nd Petitioner herein and therefore authorized and competent to make this affidavit.
2. That I swear this Affidavit in support of the Petition and the Application herein based on my own knowledge and advice given to me by my advocates on record.
3. That on 8th of February, 2021, this Honourable Court issued conservatory orders restraining the IEBC, 3rd Respondent herein from facilitating and

subjecting the Constitution (Amendment) Bill, 2020 to a referendum or taking any other function to advance the Constitution amendment Bill 2020, pending the hearing and determination of the consolidated petitions. (Annexed and Marked “MW-1” is a copy of the Ruling dated 8th February, 2021).

4. That however, by the time the said interim orders were being issued, the County Assemblies, were yet to debate the Bill.
5. That I am aware that by 1st of March, 2021, during the pendency of the consolidated petitions, over forty (40) County Assemblies debated and approved the impugned Constitution of Kenya (Amendment) Bill, 2020 and subsequently forwarded certificates of approval to the joint houses of Parliament by dint of Article 257 (6) of the Constitution.
6. That I am aware that the said Bill has now been tabled before the joint houses of Parliament for debate and approval, and that Parliament has already started considering the Bill and called for public participation requiring submissions of memorandum to reach it by 5th of March, 2021, which date is now past; that following the conclusion of receiving public views, the only remaining task is for Parliament to debate and vote on the impugned Bill.
7. That today, the 19th day of March, 2021, this Honourable Court completed a three-day longed hearing of the Consolidated Petitions on merit and has reserved its judgment to be delivered on notice.
8. That I am apprehensive that in the prevailing political climate, there is a high likelihood that the said Bill will be approved and forwarded to the President for assent and publication by dint of Article 256 (3) before judgment in the Consolidated petitions is delivered.
9. That I am informed by my Advocates on record, which information I verily believe is true that, whereas the said interim orders only anticipated a scenario where the Bill would be subjected to a Referendum, there is a real threat, that by dint of Article 256 (5), once the bill is presented to the President, he might assent to the same if he forms the opinion that the

proposed amendments do not relate to the protected clauses under Article 255 (1) of the Constitution.

10. That I am advised by my Advocates on record, which advice I verily believe is true that there is no known criteria and/or legal framework to guide the President in making the determination under Article 256 (5) on whether the proposed amendments relate to Article 255(1) hence this is left purely at the President's discretion and opinion.
11. That I am apprehensive that, once the President assents to the Bill, the same becomes not only law, but part and parcel of the Constitution whose validity and/or legality will automatically be excluded from challenge by or before any court of law by dint of Article 2 (3) of the Constitution.
13. That if that be the case, the Consolidated petitions and the pending judgment which will be delivered on notice, shall have been rendered nugatory, moot, obsolete and an academic exercise.
14. That I am apprehensive that the impugned Bill having been tabled before the joint houses of Parliament and the people of Kenya not being in control of Parliament's itinerary, the said Bill could have passed and forwarded to the President in a matter of days as there are no Standing Orders that provide the minimum period within which the Bill must be considered, debated and passed.
15. That this Application does not in any way seek to interfere with the legislative role of Parliament but to avert a looming threat and/or contravention of the Constitution.
16. That it is in the interest of justice and public interest that the Application herein be allowed pending the delivery of judgment on the Consolidate Petitions and that no party at all in the consolidate petitions shall suffer no prejudice if the orders sought are granted.
17. That I am apprehensive that unless this Honourable court intervenes, the President, who has taken a lead role in the conception of the said Bill would not hesitate to assent to the same.

18. That all that is deponed to herein above is true to the best of my knowledge, information and belief.

SWORN at NAIROBI
By the said MIRURU WAWERU
This 19th day of March 2021

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DEPONENT

BEFORE ME



COMMISSIONER FOR OATHS

Drawn & Filed By:-

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