# REPUBLIC OF KENYA

## IN THE SUPREME COURT OF KENYA

*(Coram: Ojwang, SCJ)*

**PETITION NO. 18 OF 2014**

***(AS CONSOLIDATED WITH SUPREME COURT PETITION NO. 20 OF 2014)***

*(In the matter of an application for Review and Setting Aside of the Judgment of the Supreme Court delivered on 29th August, 2014 at Nairobi (Mutunga, CJ; Rawal, DCJ; Tunoi, Ibrahim, Ojwang, Wanjala & Njoki, SCJJ) in the consolidated Petitions*)

**–BETWEEN–**

**FERDINAND NDUNG'U WAITITU……APPLICANT**

**–AND–**

1. **EVANS ODHIAMBO KIDERO**
2. **JONATHAN MUEKE**
3. **THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC)**
4. **ISAAC HASSAN**
5. **THE NAIROBI COUNTY RETURNING OFFICER**
6. **THE HONOURABLE ATTORNEY-GENERAL**
7. **THE DCIO GIGIRI POLICE DIVISION, NAIROBI**
8. **THE DCIO KAYOLE POLICE DIVISION, NAIROBI**
9. **THE INSPECTOR-GENERAL OF THE NATIONAL POLICE SERVICE**

**……RESPONDENTS**

# RULING

## A. INTRODUCTION

**[1]** The substantive matter brought by the applicant before the Supreme Court is in the form of a Notice of Motion, dated 18th February, 2016. At this stage,

however, the matter is placed before a single Judge, and the question is whether it is admissible under certificate of urgency.

**[2]** Appearing for the applicant, was learned counsel Mr. Kinyanjui, who preliminarily impugned a Judgment rendered by the entire seven-Judge Bench, presided over by the learned Chief Justice, Dr. W.M. Mutunga, on 29th August, 2014.

## B. ALLEGATION AGAINST SUPREME COURT JUDGMENT

**[3]** Learned counsel urges it to be truly urgent, that the Supreme Court should sit again to *reverse its said Judgment*: because in the recent past, the said decision has been the subject of negative publicity, insofar as "the integrity of the entire decision [has been tainted by*] allegations of corruption* of one of the Judges…who sat to hear and adjudicate upon the two Consolidated Petitions, as part of the Supreme Court Bench"; because "the integrity and transparency of the Supreme Court in determining the consolidated Petitions…and the Supreme Court's upholding of the Principles of [the] Rule of Law, Justice, and Fairness has fallen into grave doubt, arising from *imputations of impropriety* on the part of [one of the seven Judges]".

**[4]** So, the said allegations all by themselves, have so befuddled the applicant that he attributes *wrong, and injustice*, to the full-strength seven-Judge Bench of the Supreme Court, in its Judgment *which had been duly rendered in accordance with the express terms of the Constitution; had been publicised; and had provided*

*the normative, the legal and the valid foundation for the first respondent's occupancy and continuation in office as Governor of Nairobi City County*.

**[5]** The applicant questions, and impugns the basis of legality and validity of office-holding thus declared by the Supreme Court – the apex judicial forum under the Constitution of Kenya, 2010.

**[6]** The applicant comes to state before the Supreme Court that, his own besmirched perception of the electoral scene attending the Nairobi gubernatorial office, is all-transcendent, and the Court must reconsider its Judgment, with its norm-declaration of 29th August, 2014, and re-establish a framework for a new competition process for occupancy of that office. Such an object, the applicant claims, is so conclusively meritorious, that, in the first place, the greatest urgency of hearing ought to be allowed; and secondly, of course, that the intended cause is so definitively laudable, as to merit a hearing before the Supreme Court, as a public-interest question in the domain of justice.

**[7]** The cause is alleged to be laudable and meritorious because: "Justice must not only be done but also BE SEEN to be done", in the matter of the Nairobi gubernatorial election. He contends that such a position flows directly from the terms of Article 159 (2)(a) of the Constitution.

**[8]** The Article thus cited reads as follows:

***"In exercising judicial authority, the courts and tribunals shall be guided by the following principles – (a) justice shall be done to all, irrespective of status...."***

**[9]** The applicant impeaches the Supreme Court's Judgment in the said gubernatorial election cause, asserting, from the allegations which he relies on, that –

*"This principle was irredeemably infringed upon the recent disclosure of the inappropriate interaction between [one member of the Supreme Court Bench] and the... emissaries of the 1st Respondent herein..., prior to the delivery of the impugned decision, touching on corruption allegations..."*

**[10]** From the said "allegations", the applicant multiplies the improprieties that he attributes to the Supreme Court Judgment aforesaid, thus claiming:

*"The imputations of corrupt benefit [from] funds as reported in the public domain said to be given by the 1st Respondent...lends the impression that Justice before the Supreme Court in relation to the [two] Petitions...was for sale, and indeed was sold to the 1st Respondent herein, to the detriment of the Applicant."*

**[11]** The applicant, from the "allegations" upon which he relies, squarely condemns one of the Judges, as he also condemns the totality of the duly-rendered

Judgment of the full seven-Judge Bench of the Supreme Court, in the following terms:

> *"The impugned [Judgment] carried the contribution of [the Judge complained about] which unfairly regarded the Applicant's case…resulting in real danger of prejudice, and gross miscarriage of Justice by the rest of the Judges…, hence the Judgment ought to be vacated."*

**[12]** Although the applicant states clearly that his cause is to be founded upon *"allegations*," he attaches to it the greatest urgency, and "grave public importance touching on the Administration of Justice."

**[13]** The applicant draws the pivotal *allegation* from but one source: a statement sworn by one individual, one Geoffrey Kiplagat, and handed in, not to a *Court*, or *tribunal,* but to a service-policy and advisory Commission under the Constitution (Article 171) – the Judicial Service Commission: an agency to which the legal remit of adjudging upon culpability is not entrusted.

## C. MERITS AND URGENCY

### *(i) Two Questions*

**[14]** Does this matter *lawfully* invoke the jurisdiction of the Supreme Court? And does it merit clearance as an urgent question in the Supreme Court's working arrangements?

### *(ii) What are the Merits of the Applicant's Motion?*

**[15]** From the beginning, it is clear that the applicant is endeavouring to build a case on the foundation of a bare "allegation". It is an allegation of corrupt conduct on the part of one Judge, a Judge forming part of a solid Supreme Court Bench of *seven Judges* – and these are Judges of the most distinguished academic, professional and experiential backgrounds.

**[16]** Learned counsel Mr. Kinyanjui, is clearly cognizant of the foregoing point: and his only claim on the merits-question, is that the "allegation" has generated a *perception of corrupt conduct* – which has then appeared to vitiate the solid Judgment delivered by the entire Bench of the Supreme Court on 29th August, 2014.

**[17]** How does learned counsel justify such a claim based on "allegation", as against a creditable Judgment, backed with elaborate, relevant authority; wholly consistent with the entire terrain of electoral jurisprudence that has been established by the Supreme Court (see *Kimani Njogu & Peter Wafula Wekesa* (eds.), ***Kenya's 2013 General Election: Stakes, Practices and Outcomes*** (Nairobi: Twaweza Communications and Heinrich Böll Stiftung, 2015), pp.308-323); a Judgment that is professionally structured, explicated, rationalised; a Judgment that, today, stands as part of the set *of juridically-authoritative and valid precedents,* in the terms of Article 163(7) of the Constitution of Kenya, 2010;

a Judgment that *bespeaks full legal standing and validity*; a Judgment that can only be said to emanate from the Kenyan people's sovereign power, which is expressly delegated, as regards adjudicatory matters, to *"the Judiciary and independent tribunals"* (Constitution of Kenya, 2010, Article 1(3)(c)); a Judgment that *occupies a valid normative rank as binding law, alongside the statutes of Parliament?*

**[18]** The applicant comes only with an *"allegation*," which bears no more than a *social* or *political* status – but clearly short of a valid stature such as would be confirmed by true fact, lodged in *"Courts"* or *"Tribunals*", and founded on the *terms of the Constitution, the letter of the law, or the recognised principle of law*.

**[19]** Mr. Kinyanjui may have appreciated that the "allegations" whereupon his client relied, were *devoid of juridical cogency*. So, as experienced counsel, he invoked a decision of the common-law experience – the ***Pinochet*** case, from the United Kingdom of Great Britain, in which a past decision had been reversed, on account of a compromising situation among the Judges who first entertained it. From the facts of that case, there are *verifiable facts* that touched upon the members of the Bench hearing the matter. Such is not the case here; all there is, are "allegations" – and allegations that are not within the purview of those entrusted with the judicial competence of the State – *"the Judiciary and independent tribunals"* (Constitution of Kenya, 2010, Art. 1(3)(c)).

## D. CONCLUSION

**[20]** I have to state clearly that the applicant is bringing before the Supreme Court a case that *lacks any legal foundation*. As the matter is not, therefore, properly before the Court, I hereby find and hold that it is inadmissible as a cause in the Supreme Court's work programme.

**[21]** It follows that the motion has no priority, and will not feature in the cause list.

**[22]** I direct that the Supreme Court Registrar shall forthwith refund any money that may have been held as a processing charge.

***Orders accordingly.***

**DATED** and **DELIVERED** at **NAIROBI** this 26th day of February, **2016.**

**.....**
**J.B. OJWANG**

**JUSTICE OF THE SUPREME COURT**

**I certify that this is a true**
**copy of the original**

**REGISTRAR, SUPREME COURT**