

MR ONGOYA

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO. 102 OF 2011

IN THE MATTER OF ARTICLES 20, 22 AND 23 OF THE CONSTITUTION OF THE

REPUBLIC OF KENYA

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS  
AND FREEDOMS UNDER ARTICLES 2(4), 3, 10, 27, 163, 166, 73(1)(a), AND 259 OF THE  
CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF THE RECOMMENDATION BY THE JUDICIAL SERVICE  
COMMISSION OF PERSONS FOR APPOINTMENT TO THE OFFICES OF JUDGES OF THE  
SUPREME COURT UNDER THE CONSTITUTION OF THE REPUBLIC OF KENYA

BETWEEN

1. FEDERATION OF WOMEN LAWYERS OF KENYA (FIDA- K) ..... 1<sup>ST</sup> PETITIONER
2. CENTRE FOR RIGHTS EDUCATION AND AWARENESS (CREAW) ... 2<sup>ND</sup> PETITIONER
3. THE LEAGUE OF KENYA WOMEN VOTERS..... 3<sup>RD</sup> PETITIONER
4. WOMEN IN LAW AND DEVELOPMENT IN AFRICA (K) (WILDAF) ....4<sup>TH</sup> PETITIONER
5. CAUCUS FOR WOMEN'S LEADERSHIP .....5<sup>TH</sup> PETITIONER
6. COALITION ON VIOLENCE AGAINST WOMEN (COVAW).....6<sup>TH</sup> PETITIONER

VERSUS

1. THE HON. ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT
2. THE JUDICIAL SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT

IN CHAMBERS ON 17<sup>TH</sup> JUNE 2011

BEFORE THE HONOURABLE LADY JUSTICE GACHECHE

ORDER

UPON READING the application presented to this Court on 17<sup>th</sup> June 2011 by Counsel for the Petitioners/Applicants under Articles 23 (3)(c) of the Constitution Section 19 of the Sixth Schedule of the Constitution of Kenya and Rules 20 and 21 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of Individual) High Court Practice and Procedure Rules, 2006 AND UPON READING the supporting affidavit of GRACE MAINGI - KIMANI sworn on 16<sup>th</sup> June 2011 with the annexures thereto AND UPON HEARING counsel for the Petitioners/Applicants ex parte;

**IT IS HEREBY ORDERED:**

1. **THAT** this matter be and is hereby certified as urgent.
2. **THAT** the matter may proceed ex-parte at the first instance.
3. **THAT** a conservatory order be and is hereby issued restraining the Respondents or any of them and any state officer or Organ of state from carrying on with the process of swearing and appointment of the five Judges of the Supreme Court on the strength of the recommendations made by the Judicial Service Commission on 15<sup>th</sup> June 2011 pending the hearing of the application on 27<sup>th</sup> June 2011.
4. **THAT** the application to be served.

**GIVEN** under my hand and the seal of this Honourable Court this 17<sup>th</sup> day of **June 2011**.

ISSUED at Nairobi this .....	
..... 17 <sup>th</sup> day of Jne	
NAIROBI	
HIGH COURT OF KENYA	
DEPUTY REGISTRAR	
.....	
DATED: .....	
COPY OF THIS IS TRUE	
I CERTIFY THIS IS TRUE COPY OF THE ORIGINAL.	

*Reo A/C*  
DEPUTY REGISTRAR  
**HIGH COURT OF KENYA, NAIROBI**

**PENAL NOTICE**

I CERTIFY THIS IS TRUE COPY OF THE ORIGINAL.	
DATED: 17/6/11	
REO A/C	
DEPUTY REGISTRAR	
HIGH COURT OF KENYA	
NAIROBI	

**TAKE NOTICE** that any party served with this Order and disobeys the same shall be guilty of contempt of Court and liable to imprisonment for a term not exceeding (6) months or both fine and imprisonment.

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
PETITION NUMBER 102 OF 2011

IN THE MATTER OF ARTICLES 20, 22 AND 23 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

HIGH COURT OF KENYA  
CENTRAL REGISTRY

17 JUN 2011

CIVIL SIDE  
NAIROBI

AND IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS  
UNDER ARTICLES 2(4), 3, 10, 27, 163, 166, 73(1)(a), AND 259 OF THE CONSTITUTION OF THE REPUBLIC  
OF KENYA

AND

IN THE MATTER OF THE RECOMMENDATION BY THE JUDICIAL SERVICE COMMISSION OF PERSONS FOR  
APPOINTMENT TO THE OFFICES OF JUDGES OF THE SUPREME COURT UNDER THE CONSTITUTION OF  
THE REPUBLIC OF KENYA

BETWEEN

1. FEDERATION OF WOMEN LAWYERS KENYA (FIDA - K) ..... 1<sup>ST</sup> PETITIONER
2. CENTRE FOR RIGHTS EDUCATION AND AWARENESS (CREAW) ..... 2<sup>ND</sup> PETITIONER
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5. CAUCUS FOR WOMEN'S LEADERSHIP ..... 5<sup>TH</sup> PETITIONER
6. COALITION ON VIOLENCE AGAINST WOMEN (COVAW) ..... 6<sup>TH</sup> PETITIONER

VERSUS

1. THE HON. ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT
2. THE JUDICIAL SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT

CERTIFICATE OF URGENCY

I, Judy Thongori, Advocate of the High Court of Kenya practicing as such in the firm of Judy Thongori and Company Advocates and having the conduct of this matter on behalf of the petitioners do certify the same as extremely urgent and deserving a hearing on priority basis for the following reasons:

1. The Judicial Service Commission on 15.06.2011 recommended for appointment of five persons to the offices of the Judges of the Supreme Court under the Constitution of Kenya 2010.
2. The same Commission had earlier recommended two persons for approval and eventual appointment to the offices of the Chief Justice and the Deputy Chief Justice which recommendations were approved by Parliament on 15.06.2011.



3. Of the persons recommended for the offices of the Chief Justice and Deputy Chief Justice, one was male and one was female making the gender proportion 50%:50%
4. Of the persons recommended for the offices of the Judges of the Supreme Court, one was female and four were male making the gender proportion Male : female to be 80%:20%
5. The said nominations are *prima facie* unConstitutional for being insensitive to gender equality, and equal opportunity provisions as guaranteed by the Constitution.
6. The said nominations set a dangerous precedent and stand out as dangerous rodents eating at the very roots of Constitutionalism and the rule of law that ought to be safeguarded by the Constitution of Kenya 2010 and all persons responsible for implementation and execution of the Constitution.
7. There is real and present danger that unless halted by this Honourable Court, process of appointment and swearing of the five Judges will take place hence further the unConstitutional acts and set in motion foundations of blatant disregard for the Constitution.
8. There is urgent need for this court to move with speed as a custodian of the majesty of the Constitution and strike a blow for the twin principles of Constitutionalism and the rule of law by halting any further blatant and unConstitutional processing of the Judicial Service Commission's nominations to the five offices of the Judges of the Supreme Court pending compliance with the Constitution.
9. It is just and equitable that this application be heard and determined on priority basis.

Dated at Nairobi this

16<sup>th</sup> day of June 2011  
Judy Thongori & Co  
Advocates for the Petitioners

Drawn & Filed By  
Judy Thongori & Co  
Advocates  
Surveyor's Court, Ground Floor  
Woodvale Grove  
Westlands  
P.O. Box 53457 – 00200  
Nairobi

To Be Served Upon

The Hon. Attorney General  
State Law Offices  
Sheria House  
Harambee Avenue  
Nairobi

Judicial Service Commission  
Nairobi

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
PETITION NUMBER  
OF 2011

IN THE MATTER OF ARTICLES 20, 22 AND 23 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA  
NAIROBI

AND

AND IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS  
UNDER ARTICLES 2(4), 3, 10, 27, 163, 166, 73(1)(a), AND 259 OF THE CONSTITUTION OF THE REPUBLIC  
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APPOINTMENT TO THE OFFICES OF JUDGES OF THE SUPREME COURT UNDER THE CONSTITUTION OF  
THE REPUBLIC OF KENYA

BETWEEN

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| 1. FEDERATION OF WOMEN LAWYERS KENYA (FIDA - K) .....        | 1 <sup>ST</sup> PETITIONER |
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VERSUS

- |  |                            |
|--|----------------------------|
| 1. THE HON. ATTORNEY GENERAL .....       | 1 <sup>ST</sup> RESPONDENT |
| 2. THE JUDICIAL SERVICE COMMISSION ..... | 2 <sup>ND</sup> RESPONDENT |

CHAMBER SUMMONS

(Under Articles 23(3)(c) of the Constitution, Section 19 of the Sixth Schedule of the Constitution of Kenya and Rules 20 and 21 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights of the Individual) High Court Practice and Procedure Rules 2006.)

LET ALL PARTIES CONCERNED attend the Honourable Judge at the High Court of Kenya in Chambers on the 27<sup>TH</sup> day of JUNE 2011 at 9.00 O'clock in the morning, in the forenoon or soon thereafter as counsel for the Petitioners/Applicants may be heard on an application for Orders:

1. That this application be certified as urgent and service thereof be dispensed with in the first instance.
2. That pending the hearing and determination of this application *inter partes*, a conservatory order be issued restraining the Respondents or any of them and any State Officer or organ of state from carrying on with the process of swearing and appointment of the five judges of the



supreme court on the strength of the recommendations made by the Judicial Service Commission on 15.06.2011.

3. **That** pending the hearing and determination of the substantive Constitutional Petition a conservatory order be issued restraining the Respondents or any of them and any State Officer or organ of state from carrying on with the process of swearing and appointment of the five judges of the supreme court on the strength of the recommendations made by the Judicial Service Commission on 15.06.2011.
4. **That** in the alternative to (2) and (3) above a declaratory order be and is hereby issued that it would be unConstitutional for any person, state officer or state organ to carry on with the process of appointment and swearing in of the five judges of the Supreme Court on the strength of the recommendations made by the Judicial Service Commission on 15.06.2011.
5. **That** the costs of this Petition be provided for.

**WHICH APPLICATION** is based upon the following grounds and further upon the annexed supporting affidavit of **Grace Maingi Kimani** and on such other and further grounds as may be adduced at the hearing hereof.

- a) The Judicial Service Commission has on 15.06.2011 recommended five persons for appointment to the offices of the Judges of the Supreme Court under the Constitution of Kenya 2010.
- b) The same Commission had earlier recommended two persons for approval and eventual appointment to the offices of the Chief Justice and the Deputy Chief Justice which recommendations were approved by Parliament on 15.06.2011.
- c) Of the persons recommended for the offices of the Chief Justice and Deputy Chief Justice, one was male and one was female making the gender proportion 50%:50%
- d) Of the persons recommended for the offices of the Judges of the Supreme Court, one was female and four were male making the gender proportion Male : female to be 80%:20%
- e) The said nominations are *prima facie* unConstitutional for being insensitive to gender equality, and equal opportunity provisions as guaranteed by the Constitution.
- f) Article 27 of the Constitution of Kenya, 2010, materially requires the state to take legislative and other measures including affirmative action programmes and policies designed to redress any disadvantages suffered by individuals or groups because of first discrimination.

- g) In the past, women, as a group, have been discriminated against and have been underrepresented in top judicial institutions and as at the time of the impugned recommendations, there was no woman in the Kenya Court of Appeal.
- h) The Constitution at article 27 further requires that in addition to the above measures , the state shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective and appointive bodies shall be of the same gender.
- i) That the above recommendations, if allowed to proceed for appointment will defeat the foregoing provision since the office of judges of the Supreme Court will have less than one-third of the female gender and more than two thirds of the male gender.
- j) The said recommendations set a dangerous precedent and stand out as dangerous rodents eating at the very roots of Constitutionalism and the rule of law that ought to be safeguarded by the Constitution of Kenya 2010 and all persons responsible for implementation and execution of the Constitution.
- k) There is real and present danger that unless halted by this Honourable Court, the process of appointment and swearing in of the five Judges will take place hence further the unConstitutional acts and set in motion foundations of blatant disregard for the Constitution.
- l) There is urgent need for this court to move with speed as a custodian of the majesty of the Constitution and strike a blow for the twin principles of Constitutionalism and the rule of law by halting any further blatant and unConstitutional processing of the Judicial Service Commission's recommendations for appointment to the offices of the Judges of the Supreme Court pending compliance with the Constitution.
- m) It is just and equitable that this application be heard and determined on priority basis.

Dated at Nairobi this

16<sup>th</sup> day of April 2011

Judy Thongori & Co  
Advocates for the Petitioners

Drawn & Filed By  
Judy Thongori & Co  
Advocates  
Surveyor's Court, Ground Floor  
Woodvale Grove  
West lands  
P.O. Box 53457 – 00200  
Nairobi

**To Be Served Upon**

**The Hon. Attorney General  
State Law Offices  
Sheria House  
Harambee Avenue  
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**Judicial Service Commission  
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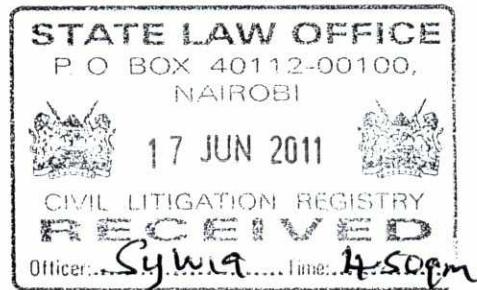
VERSUS

1. THE HON. ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT
2. THE JUDICIAL SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT

SUPPORTING AFFIDAVIT

I, Grace Maingi - Kimani, resident of Nairobi within the Republic of Kenya and of Post Office Box 46324 - 00100 Nairobi do hereby make oath and state as follows:

1. That I am the Executive Director of the Federation of Women Lawyers Kenya (FIDA KENYA), the 1<sup>st</sup> Petitioner herein with the knowledge of the facts attendant to this petition and the application for conservatory orders filed herein hence I am competent to swear this affidavit.
2. That I have the authority of all the Petitioners herein to swear this affidavit on their own behalf.



3. That I adopt and reiterate the facts in the Affidavit sworn by myself in Support of the Petition as if the same were set out in this affidavit in support of the application for conservatory orders.
4. That what is deponed to herein is true to my own knowledge information and belief sources and basis whereof have been expressly disclosed.

Sworn at Nairobi

By the said Grace Maingi- Kimani

This 10th day of June 2011



}  
} Deponent  
}  
}  
}  
}  
}  
}

Commissioner for Oaths

Drawn & Filed By  
Judy Thongori & Co  
Advocates  
Surveyor's Court, Ground Floor  
Woodvale Grove  
Westlands  
P.O. Box 53457 – 00200  
Nairobi

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TO

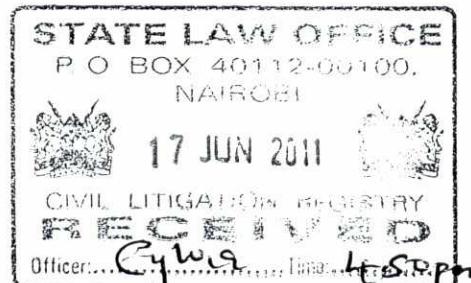
The High Court of Kenya  
Nairobi

PETITION

The humble Petition of FEDERATION OF WOMEN LAWYERS KENYA (FIDA KENYA), CENTRE FOR RIGHTS EDUCATION AND AWARENESS ( CREAW), , THE LEAGUE OF KENYA WOMEN VOTERS of Nairobi in the Republic of Kenya is as follows:

THE PARTIES

1. The Petitioners are Non-Governmental Organizations and Associations incorporated and registered as such under the laws of Kenya. They are also members of the Gender 10 and



Gender plus coalitions which are networks of civil society organizations advancing and advocating for gender considerations in all spheres of development. They bring this petition as groups and associations acting on behalf of their members, on behalf of the women of Kenya and in the public interest. Their address of service for purposes of this suit shall be **C/o Judy Thongori & Company Advocates, Surveyor's Court, Ground Floor, Wood Vale Grove, West Lands, P.O Box 53457 – 00200 Nairobi.**

2. The 1<sup>st</sup> Respondent is the Attorney General of the Republic of Kenya. He is joined to this Petition as Respondent pursuant to the provisions of Article 156 of the Constitution of the Republic of Kenya in his capacity as:
  - a. The principal legal adviser to the Government of the Republic of Kenya.
  - b. The person authorized by law to represent the National Government in court or in any other legal proceedings to which the national government is a party.
  - c. The officer of government under a duty to promote, protect and uphold the rule of law and defender of the public interest.
3. The 2<sup>nd</sup> Respondent is the Judicial Service Commission. It is established as a Constitutional Commission under Article 171 as read with Article 248(2) of the Constitution. Under Article 249(1) of the Constitution, the Judicial Service Commission has a duty to:
  - a. Protect the sovereignty of the people;
  - b. Secure the observance by all state organs of democratic values and principles; and
  - c. Promote Constitutionalism.
4. The 2<sup>nd</sup> Respondent is further joined to this Petition pursuant to the provisions of Article 253 of the Constitution that incorporates it as a body corporate with perpetual succession and a seal and that is capable of suing and being sued in its corporate name.

#### **THE LEGAL FOUNDATIONS OF THE PETITION**

5. The Constitution of Kenya 2010 was promulgated and came into force on 27.08.2010.
6. Article 2(1) of the Constitution of Kenya pronounces the supremacy of the Constitution and provides that the Constitution binds "***all State Organs at both levels of government***".
7. Article 2(5) of the Constitution of the Republic of Kenya provides among other things that any act or omission in contravention of the Constitution is invalid.
8. Article 3 of the Constitution of the Republic of Kenya obligates every person to respect, uphold and defend the Constitution.

9. Article 10 of the Constitution of the Republic of Kenya sets out the National Values and Principles of governance that bind all state officers, state organs, public officers and all persons whenever they **apply or interpret the Constitution**, enact, apply or interpret any law, make or implement public policy decisions.
10. Among the national values and principles of governance are, **the rule of law, equity, inclusiveness, equality, human rights, Non-discrimination, good governance, transparency and accountability.**
11. Article 20 applies the Bill of Rights to all law and binds all state organs and all persons, and, further obligates this Honourable Court, in interpreting the Bill of Rights, to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom, and, the spirit, purport and objects of the Bill of Rights. The same article also requires of this court, in applying a provision of the Bill of Rights to adopt the interpretation that most favours the enforcement of a right or fundamental freedom.
12. Article 22 of the Constitution vests locus standi for the enforcement of the Bill of Rights in, among others, the Petitioners.
13. Article 23 vests authority in this Honourable Court to uphold and enforce the Bill of Rights and highlights some of the remedies that this Honourable Court can grant to uphold and enforce the Bill of Rights.
14. Article 27 of the Constitution of the Republic of Kenya provides for equality and freedom from discrimination and in particular provides that;
  - a. Every person is equal before the law and has the right to equal protection and equal benefit of the law.
  - b. Women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres.
  - c. The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
  - d. To give effect to the realization of the rights guaranteed under this Article, the state shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantages suffered by individuals or groups because of past discrimination.

- e. In addition to the measures contemplated in (d) above, the state shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.
15. Article 163 of the Constitution of the Republic of Kenya establishes the Supreme Court which consists of, the Chief Justice, the Deputy Chief Justice and five other Judges.
16. Article 166 of the Constitution of the Republic of Kenya provides for the process of appointment of the Chief Justice, the Deputy Chief Justice and Other Judges which is, in the case of the Chief Justice and the Deputy Chief Justice, appointment by the president **in accordance with the recommendation of the Judicial Service Commission** and subject to the approval of the National Assembly. In the case of other judges, appointment by the President in accordance with recommendation of the Judicial Service Commission.
17. Article 171 of the Constitution of Kenya establishes the Judicial Service Commission and article 172 vests in the Commission the function of recommending to the President persons for appointment as judges. Under article 172(2) the Judicial Service Commission is expressly required to be guided inter alia by **the promotion of gender equality**.
18. Article 248 of the Constitution of Kenya recognizes the Judicial Service Commission as one of the Constitutional Commissions under Chapter 15 of the Constitution. Pursuant to the provisions of Article 249 of the Constitution, the Judicial Service Commission has, as its objects to;
- a. Protect the sovereignty of the people;
  - b. Secure the observance by all state organs of democratic values and principles; and
  - c. Promote Constitutionalism.
19. Article 259 of the Constitution of the Republic of Kenya provides that the Constitution must be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and **contributes to good governance**.

#### THE FACTS

20. On 15.06.2011, the Judicial Service Commission recommended to the President for appointment five people as judges of the Supreme Court.
21. That of the people recommended for appointment as judges of the Supreme Court, one was a woman and four were men.

22. The Judicial Service Commission had earlier recommended to the President for Parliament's approval persons to the offices of the Chief Justice and the Deputy Chief Justice out of whom one was a man and one was a woman. As a matter of fact, Parliament did approve for appointment of the persons recommended for appointment to the offices of the Chief Justice and the Deputy Chief Justice on 15.06.2011.

**VIOLATIONS OF THE CONSTITUTION AND FUNDAMENTAL RIGHTS AND FREEDOMS- a Failure of the Arithmetic/Mathematics of Constitutional Requirements on Gender Equity**

23. The Constitution required that the Supreme Court comprises of the Chief Justice, the Deputy Chief Justice and Five Other judges.
24. In the process of recommendation for appointment of the Chief Justice and the Deputy Chief Justice, the principles of gender equity required of article 27 was complied with since the gender representation was one-half of either gender.
25. In the process of recommendation for appointment of the five other judges one-fifth of the persons recommended were of the female gender and four-fifths were of the male gender.
26. That even assuming that the composition of the Supreme Court must be considered as a whole, that is, from the Chief Justice to the other judges, it means that out of the 7 people recommended for the office of judges of the Supreme Court  $\frac{5}{7}$  are of the male gender and  $\frac{2}{7}$  are women.
27. If the provisions of article 27 of the Constitution were to be complied with and the female gender were to be the lesser represented in the Supreme Court, it would follow that at least one-third or 33.3 percent of the membership of the Supreme Court must be women and at most 66.7 percent men. The converse would also apply if the male gender were to be the lesser represented in the Supreme Court.
28. In order to comply with the Constitutional requirements, the Judicial Service Commission was under a duty to ensure that in the final analysis of its recommendation, no gender falls below 33.3 percent and no gender exceed 66.7 percent.
29. That in light of the mathematical reality that one-third of 7 members of the Supreme Court is 2.3 and two thirds of the 7 members of the Supreme Court is 4.7, the Judicial Service Commissions should have considered that to avoid reducing the numbers below the Constitutional minimum and the avoid exceeding the Constitutional maximums, the 2.3 ought

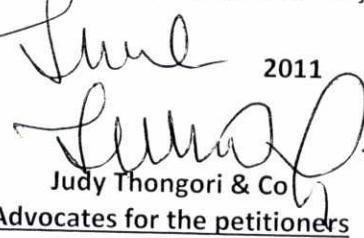
to have been rounded off to 3 and 4.7 ought to have been rounded off to 4 which would have resulted in a Constitutionally compliant ratio.

30. With two women and 5 men in the Supreme Court, it means that the percentage composition of the female gender in the Supreme Court is 28.57 percent whereas the percentage composition of the male gender is 71.43 percent.
31. The logical conclusion from this state of affairs is that the Judicial Service Commission has failed in purposively interpreting article 27 of the Constitution for its full tenor and meaning. The recommendation of the Judicial Service Commission is, therefore, in breach of article 27 of the Constitution and is, within the meaning of article 2(4) of the Constitution invalid.
32. The judicial Service Commission would have easily met the Constitutional criteria by ensuring that the Supreme Court comprised of "more than two" members of either gender.
33. In addition of the foregoing express arithmetic failure the Judicial Service Commission apparently failed to take cognizance of the historical injustice against women in judicial offices and in particular that as at the date of the same nominations, there was no single woman judge of the Court of Appeal in Kenya.

#### **PRAYERS**

**Your Petitioners therefore humbly pray for the following orders**

- a) A declaration that the recommendation of people of more than two-thirds or 66.7 percent of the male gender and less than one-third or 33.3 percent of the female gender for approval and or eventual appointment to the office of Judges of the Supreme Court is gender insensitive, discriminatory against women, disrespectful of women and contrary to article 27, 2, 3, 10, 163, 166, 172(2)(b), 248 and 249 of the Constitution of the Republic of Kenya and is therefore null and void.
- b) An order restraining any further purported appointments of Judges of the Supreme Court pursuant to the recommendations made by the Judicial Service Commission on 15.06.2011
- c) Costs of this Petition.
- d) Or that such other Orders as this Honourable Court shall deem just.

Dated at Nairobi this 16<sup>th</sup> day of June 2011  
  
Judy Thongori & Co  
Advocates for the petitioners

Drawn & Filed By

Judy Thongori & Co

Advocates

Surveyor's Court, Ground Floor

Woodvale Grove

West lands

P.O. Box 53457 – 00200

Nairobi

To Be Served Upon

The Hon. Attorney General

State Law Offices

Sheria House

Harambee Avenue

Nairobi

Judicial Service Commission

Nairobi

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROB  
PETITION NUMBER

OF 2011

HIGH COURT OF KENYA  
CENTRAL REGISTRY

17 JUN 2011

CIVIL SUITE  
NAIROBI

IN THE MATTER OF ARTICLES 20, 22 AND 23 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

AND IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS  
UNDER ARTICLES 2(4), 3, 10, 27, 163, 166, AND 259 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF THE RECOMMENDATION BY THE JUDICIAL SERVICE COMMISSION OF PERSONS FOR APPOINTMENT TO THE OFFICES OF JUDGES OF THE SUPREME COURT UNDER THE CONSTITUTION OF THE REPUBLIC OF KENYA

BETWEEN

1. FEDERATION OF WOMEN LAWYERS KENYA (FIDA - K) ..... 1<sup>ST</sup> PETITIONER
2. CENTRE FOR RIGHTS EDUCATION AND AWARENESS (CREAW) ..... 2<sup>ND</sup> PETITIONER
3. THE LEAGUE OF KENYA WOMEN VOTERS ..... 3<sup>RD</sup> PETITIONER
4. WOMEN IN LAW AND DEVELOPMENT IN AFRICA (K) (WILDAF) ..... 4<sup>TH</sup> PETITIONER
5. CAUCUS FOR WOMEN'S LEADERSHIP ..... 5<sup>TH</sup> PETITIONER
6. COALITION ON VIOLENCE AGAINST WOMEN (COVAW) ..... 6<sup>TH</sup> PETITIONER

VERSUS

1. THE HON. ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT
2. THE JUDICIAL SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT

SUPPORTING AFFIDAVIT

I, Grace Maingi - Kimani, resident of Nairobi within the Republic of Kenya and of Post Office Box 46324 - 00100 Nairobi do hereby make oath and state as follows:

1. That I am the Executive Director of the Federation of Women Lawyers Kenya ( FIDA KENYA), the 1<sup>st</sup> Petitioner herein, with the knowledge of the facts attendant to this petition and the application for conservatory orders filed herein hence I am competent to swear this affidavit.
2. That I have the authority of all the Petitioners herein to swear this affidavit on their own behalf.



3. **That** I am also a citizen of the Republic of Kenya and an Advocate of the High Court of Kenya familiar with the provisions of the law and more specifically the Constitution of the Republic of Kenya.
4. **That** the Constitution of Kenya 2010 was promulgated and came into force on 27.08.2010.
5. **That** Article 2(1) of the Constitution of Kenya pronounces the supremacy of the Constitution and provides that the Constitution binds "***all State Organs at both levels of government***".
6. **That** Article 2(5) of the Constitution of the Republic of Kenya provides among other things that any act or omission in contravention of the Constitution is invalid.
7. **That** Article 3 of the Constitution of the Republic of Kenya obligates every person to respect, uphold and defend the Constitution.
8. **That** Article 10 of the Constitution of the Republic of Kenya sets out the National Values and Principles of governance that bind all state officers, state organs, public officers and all persons whenever they **apply or interpret the Constitution**, enact, apply or interpret any law, make or implement public policy decisions.
9. **That** Among the national values and principles of governance are, **the rule of law, equity, inclusiveness, equality, human rights, Non-discrimination, good governance, transparency and accountability**.
10. **That** Article 20 applies the Bill of Rights to all law and binds all state organs and all persons, and, further obligates this Honourable Court, in interpreting the Bill of Rights, to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom, and, the spirit, purport and objects of the Bill of Rights. The same article also requires of this court, in applying a provision of the Bill of Rights to adopt the interpretation that most favours the enforcement of a right or fundamental freedom.
11. **That** Article 22 of the Constitution vests locus standi for the enforcement of the Bill of Rights in, among others, the Petitioners.
12. **That** Article 23 vests authority in this Honourable Court to uphold and enforce the Bill of Rights and highlights some of the remedies that this Honourable Court can grant to uphold and enforce the Bill of Rights.
13. **That** Article 27 of the Constitution of the Republic of Kenya provides for equality and freedom from discrimination and in particular provides that;
  - i. Every person is equal before the law and has the right to equal protection and equal benefit of the law.

- ii. Women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres.
- iii. The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
- iv. To give effect to the realization of the rights guaranteed under this Article, the state shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantages suffered by individuals or groups because of past discrimination.
- v. In addition to the measures contemplated in (iv) above, the state shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

14. **That** Article 163 of the Constitution of the Republic of Kenya establishes the Supreme Court which consists of, the Chief Justice, the Deputy Chief Justice and five other Judges.

15. **That** Article 166 of the Constitution of the Republic of Kenya provides for the process of appointment of the Chief Justice, the Deputy Chief Justice and Other Judges which is, in the case of the Chief Justice and the Deputy Chief Justice, appointment by the president **in accordance with the recommendation of the Judicial Service Commission** and subject to the approval of the National Assembly. In the case of other judges, appointment by the President in accordance with recommendation of the Judicial Service Commission.

16. **That** Article 171 of the Constitution of Kenya establishes the Judicial Service Commission and article 172 vests in the Commission the function of recommending to the President persons for appointment as judges. Under article 172(2) the Judicial Service Commission is expressly required to be guided inter alia by **the promotion of gender equality**.

17. **That** Article 248 of the Constitution of Kenya recognizes the Judicial Service Commission as one of the Constitutional Commissions under Chapter 15 of the Constitution. Pursuant to the provisions of Article 249 of the Constitution, the Judicial Service Commission has, as its objects to;

- i. Protect the sovereignty of the people;
- ii. Secure the observance by all state organs of democratic values and principles; and
- iii. Promote Constitutionalism.

- 18.** Article 259 of the Constitution of the Republic of Kenya provides that the Constitution must be interpreted in a manner that promotes its purposes, values and principles; *advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.*
- 19.** That on 15.06.2011, the Judicial Service Commission recommended to the President for appointment five people as judges of the Supreme Court.
- 20.** That of the people recommended for appointment as judges of the Supreme Court, one was of female gender and four were of male gender.
- 21.** That the Judicial Service Commission had earlier recommended to the President for Parliament's approval persons to the offices of the Chief Justice and the Deputy Chief Justice out of whom one was a man and one was a woman. As a matter of fact, Parliament did approve for appointment of the persons recommended for appointment to the offices of the Chief Justice and the Deputy Chief Justice on 15.06.2011.
- 22.** That I am advised by Ms Judy Thongori Advocate which advice I verily believe to be sound and I also know of my own knowledge as an advocate that the Constitution of Kenya requires that the Supreme Court comprises of the Chief Justice, the Deputy Chief Justice and Five Other judges.
- 23.** That in the process of recommendation for appointment of the Chief Justice and the Deputy Chief Justice, the principles of gender equity required of article 27 was complied with since the gender representation was one-half of either gender.
- 24.** That in the process of recommendation for appointment of the five other judges one-fifth of the persons recommended were of the female gender and four-fifths were of the male gender.
- 25.** That from the foregoing, I verily believe that the Judicial Service Commission failed in its obligation to ensure gender equity as prescribed by the Constitution while making recommendations for appointment of persons to the offices of '5 Other Judges' of the Supreme Court.
- 6.** That even assuming that the composition of the Supreme Court must be considered as a whole, that is, from the Chief Justice to the other judges, it means that out of the 7 people recommended for the office of judges of the Supreme Court 5/7 are of the male gender and 2/7 are of the female gender.
- . That if the provisions of article 27 of the Constitution were to be complied with and the female gender were to be the lesser represented in the Supreme Court, it would follow that at least one-third or 33.3 percent of the membership of the Supreme Court must be women and at most

two-thirds or 66.7 percent be men. The converse would also apply if the male gender were to be the lesser represented in the Supreme Court.

28. **That** in order to comply with the Constitutional requirements, the Judicial Service Commission was under a duty to ensure that in the final analysis of its recommendation, no gender falls below 33.3 percent and no gender exceeds 66.7 percent.
29. **That** with two women and five men in the Supreme Court, it means that the percentage composition of the female gender in the Supreme Court is 28.57 percent whereas the percentage composition of the male gender is 71.43 percent.
30. **That** in light of the mathematical reality that one-third of 7 members of the Supreme Court is 2.3 and two thirds of the 7 members of the Supreme Court is 4.7, the Judicial Service Commissions should have considered that to avoid reducing the gender ratios below the Constitutional minimum and the avoid exceeding the Constitutional maximums, the 2.3 ought to have been rounded off to 3 and 4.7 ought to have been rounded off to 4 which would have resulted in a Constitutionally compliant ratio. I verily believe that this would have "promoted the values and principles of the Constitution" as required of the Judicial Service Commission, and indeed this Honourable Court, under Article 259 of the Constitution.
31. **That** I verily believe that the logical conclusion from this state of affairs is that the Judicial Service Commission has failed in purposively interpreting article 27 of the Constitution for its full tenor and meaning. The recommendation of the Judicial Service Commission is, therefore, in breach of article 27 of the Constitution and is, within the meaning of article 2(4) of the Constitution invalid.
32. **That** I verily believe that the Judicial Service Commission would have easily met the Constitutional criteria by ensuring that the Supreme Court comprised of "more than two" members of either gender.
33. **That** in addition of the foregoing express arithmetic failure the Judicial Service Commission apparently failed to take cognizance of the historical injustice against women in judicial offices and in particular that as at the date of the same nominations, there was no single woman judge of the Court of Appeal in Kenya.
34. **That** I verily believe that the acts and omissions of the Judicial Service Commission as reflected in the recommendation for appointment of persons to the offices of judges of the Supreme Court made on 15.06.2011 violated the Constitution of Kenya 2010, the Convention on the

Elimination of All Forms of Discrimination Against Women (CEDAW) and other regional and international instruments on non-discrimination and gender equity that Kenya has ratified.

35. That what is deponed to herein is true to my own knowledge, information and belief sources and basis whereof have been expressly disclosed.

Sworn at Nairobi

By the said Grace Majangi-Kimani

This 16<sup>th</sup> day of June 2011

} } Deponent  
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Before Me Joakim Klarie Kamere



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Commissioner for Oaths

Drawn & Filed By

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