

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.544 OF 2015

BONIFACE MWANGI.....PETITIONER

VERSUS

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

OFFICER COMMANDING POLICE DIVISION-

KILIMANI POLICE DIVISION.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

KENYA NATIONAL COMMISSION OF

HUMAN RIGHTS.....INTERESTED PARTY

UN SPECIAL RAPPORTEUR ON THE RIGHTS TO FREEDOM OF PEACEFUL

ASSEMBLY AND OF ASSOCIATION.....AMICUS CURIAE

JUDGMENT

Introduction

1. The Petitioner, Boniface Mwangi, moved this Court by way of a Petition dated 7th December, 2015 challenging the refusal by the 2nd Respondent to allow him and a group of other persons to hold a public march and demonstration to State House Gate A. The intended demonstration was supposed to be held on the 9th December, 2015.

2. In preparation for the said demonstration, the Petitioner issued a Notice addressed to the Officers Commanding Central Police Station and Kilimani Police Station on 3rd December, 2015. The Notice signified the Petitioner's and other persons' intention to hold a public demonstration commencing at Freedom Corner in Uhuru Park and later to proceed to State House Gate A to deliver a petition to the President of the Republic of Kenya. The Notice was served on the two Police Officers by one, Brian Iganga.
3. According to the Petitioner, the first place of service was the office of the OCS, Central Police Station. The said OCS then advised Mr. Iganga to firstly serve the OCS, Kilimani Police Station where the intended demonstration was scheduled to end. On reaching Kilimani Police Station, the OCS directed him to the office of the Officer Commanding Police Division (OCPD), Kilimani. The OCPD, upon reading the Notice, declined to authorize the intended demonstration by indicating, **"March to State House Gate "A" NOT allowed."**
4. Aggrieved by the decision of the OCPD, the Petitioner filed this Petition together with a Notice of Motion Application filed under a certificate of urgency dated 7th December, 2015. The Application sought the following orders;

(a) That the Honourable Court be pleased to certify this matter as urgent.

(b) That pending the inter-partes hearing of this Application and hearing of this Petition, this Court grant ex-parte

orders restraining the 1st and 2nd Respondents from stopping or interfering in any manner with the assembly, demonstration and presentation of a Petition relating to the state of corruption to the President of the Republic of Kenya or his designate scheduled by the Petitioner and other members of the public on December 9, 2015 between 10.00 hours to 18.00 hours requesting, inter alia, the President of Kenya to act firmly on corruption.

(c) That pending the inter-partes hearing of this Application and the hearing of the Petition herein, the 1st, 2nd and 3rd Respondents be compelled to provide the Petitioner and members of the public participating in the march with security as per the requirements of Articles 37 and 244 of the Constitution and Section 5(12) of the Public Order Act.

5. On 8th December, 2015, upon hearing the parties, I grant part of the interim prayers sought in the following terms;

“Prayer 2 of the Application dated 7th December, 2015 is granted in the interim but any Petition to the President shall be presented to him or his designate at Harambee House, Harambee Avenue, Nairobi and not at State House, Nairobi.”

The Petition was thereafter fixed for hearing.

Petitioner’s case

6. The Petitioner’s case is as contained in the Petition dated 7th December, 2015, the Supporting Affidavit dated the same day and his written submissions dated 25th April, 2016.

7. It is his contention that he is highly discontented with the increasing levels of corruption in Kenya and recognizes his responsibility, as a Kenyan citizen, contained in **Articles 3, 10, 22, 201 and 258** of the **Constitution**, to respect, uphold and defend the **Constitution**. That in that regard, he is involved in a good governance campaign dubbed 'Team Courage' which undertakes public education on Kenya's history and campaigns to promote the rule of law and constitutionalism. As part of their campaign, 'Team Courage' supporters planned to conduct a public march to State House Gate A to present a Petition as earlier stated.
8. The Petitioner states further that the failure by the 1st and 2nd Respondents to allow the said demonstration was illegal because in the first instance, the 2nd Respondent was not the officer authorized by law to consider or reject the Notice seeking authorization to conduct the demonstration. Secondly, even assuming that the 2nd Respondent had such powers, his decision was arbitrarily made.
9. The Petitioner argues that in his view, it is an OCS and not an OCPD who has the authority to accept or decline the holding of a public gathering and in support of this proposition, he relies on **Section 5(2)** of the **Public Order Act** which provides that;

"any person intending to convene a public meeting or a public procession shall notify the regulating officer of such intent at least 3 days but not more than fourteen days before the proposed date of the public meeting or procession."

10. Accordingly, that the Act defines a Regulating Officer as the officer-in-charge of a Police Station in the area in which the procession is proposed to start and to end. He reiterates that since the person who rejected the proposed assembly and demonstration was the 2nd Respondent and not the OCS, Kilimani Police Station, as is required by law, then the rejection was unlawful.
11. It is the Petitioner's other contention that any action taken pursuant to **Section 5(2)** of the **Public Order Act** must also meet the precepts of **Article 47** of the **Constitution** and that in this instance, the rejection of the Petitioner's request adversely affected his rights to assemble or march to State House Gate A as a result of which he could not present the intended Petition to the President.
12. The Petitioner further submits that no reasons were provided for the refusal to allow the intended demonstration and avers that this is contrary to **Article 47** of the **Constitution**, the **Public Order Act** and the **Fair Administrative Action Act** which reaffirm the need to give reasons as an important component of fair administrative action.
13. In his further submissions, the Petitioner condemns the violation of his right to peacefully assemble as provided for under **Article 37** of the **Constitution** and argues that this right encompasses the right to freedom of expression, conscience and association. He relies on the

South African case of *South African National Defence Union v Minister of Defence and another* (1999) ZACC 7 where O'Regan J, at the Constitutional Court, proclaimed;

"[Freedom of speech] is closely related to freedom of religion, belief and opinion...the right to dignity..., as well as the right to freedom of association...,the right to vote and to stand for public office...and the right to assembly. These rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognize the importance...of the ability to form and express opinions, whether individually or collectively, even when those views are controversial."

14. It is the Petitioner's position therefore that the right to freedom of peaceful assembly encompasses the right to choose a venue, time and purpose of assembly and asserts that the potency of any demonstration is lost when the choice of venue is controlled. That the right enshrined under **Article 37** also requires that the same ought to be exercised without undue and irrational limitation. For that proposition he relies on the case of *Saska v Hungary Appl.No.58050/08* where the European Court of Human Rights stressed that the freedom of assembly covers the right to choose the time, place and modalities of any assembly.
15. His further contentions are that the limitations under **Article 24** of the **Constitution** must be justifiable in an open and democratic society and

his position is also that the **Constitution** has established a methodical assessment which the Court should follow in assessing whether a limitation of a right is justifiable or not and in addition, **Articles 24** and **25** therefore provide a guiding tool on the issue by particularizing a mechanism under which rights are to be limited.

16. In the above context, the Petitioner asserts that the 1st and 2nd Respondents have failed to place facts before the Court showing why the intended demonstration was not allowed and submits that the onus to satisfy the Court that a limitation is justifiable rests on the person relying on the limitation. That such a justification must be demonstrated through reference to credible evidence and law and further, that the Respondents have failed to justify the limitation. In conclusion, the Petitioner maintains that the actions of the Respondents are unjustifiable in an open and democratic society and urges the Court to allow the Petition in the following terms:

a) That a declaration be issued that the action of the 1st and 2nd Respondent purporting to deny the Petitioner and Team courage Supporters the right to march to State House Gate A on December 9, 2015 are unconstitutional because they offend the principles of rule of law and good governance and hence invalid.

b) That a declaration be issued that the action of the 1st and 2nd Respondent purporting to deny the Petitioner and Team Courage Supporters the right to march to State House Gate A on December 9, 2015 are unconstitutional because they are in violation of the Petitioner's and Team

Courage Supporters' rights under Article 37 of the Constitutional and hence invalid.

- c) That a declaration be issued that the action of the 1st and 2nd Respondent purporting to deny the Petitioner and Team Courage Supporters the right to march to State House Gate A on December 9, 2015 is unconstitutional because they are in violation of the Petitioner's and Team Courage Supporters' rights under Article 47 of the Constitution and hence invalid.*
- d) That an order be issued invalidating the action of the 2nd Respondent purporting to deny the Petitioner and Team courage Supporters' planned assembly, demonstration and march to State House Gate A on December 9, 2015.*
- e) That this Honourable Court be pleased to grant such further Order or Orders as may be just and appropriated.*

The 1st, 2nd and 3rd Respondents' case

- 17. The 1st, 2nd and 3rd Respondents in opposing the Petition rely on their submissions dated 22nd April, 2016.
- 18. Their case is that there was no clear indication as to why the Petitioner and his group had to demonstrate at State House Gate A as opposed to the President's office at Harambee House or any other place. In any event, that the Petitioner had no appointment with any person at State House Gate A and argue that the Petitioner and his team were free to choose an alternative venue which would have met their defined objective. The Respondents' other position is that the **Official Secrets**

Act prohibits access to State House Gate A and its environs and so the intended demonstration was unlawful *ab initio*.

19. It is their further submission that if no reasons for denial of the right to march to Gate A were provided as alleged, the Petitioner is at liberty to request for issuance of the reasons and that it is only when such a request is defied that **Article 47** would be said to be violated. In addition, they submit that the refusal to allow the planned demonstration is not in itself a violation of the **Constitution** because **Article 24** of the Constitution recognizes that certain rights may be limited. Accordingly, the right to assemble may be limited where the security of other persons is at risk.
20. In addressing the question of legality of the decision given by the 2nd Respondent, it is their case that the police service is one body and some matters may be escalated to higher officers who have a higher authority. Accordingly, that the OCPD, Kilimani had authority to issue a response in reference to the Petitioner's Notice of an intending public procession. The Respondents therefore urge the Court to dismiss the Petition with costs.

The Interested Party's case

21. The Interested Party, in support of the Petitioner's case, relies on its submissions dated 3rd June, 2016.

22. It affirms that **Article 37** of the **Constitution** categorically protects a person's right of assembly, demonstration, picketing and petition and further, safeguards the right to assemble which are also provided for in **Article 21** of the **International Covenant on Civil and Political Rights (ICCPR)** as well as the **African Charter on Human and People's Right**.
23. It is also its' submission that the right to assemble is inter-related with freedom of expression which is provided for under **Article 33** of the **Constitution** and accordingly, every person has the right to freely exercise his opinion and expression and this includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media, regardless of any frontiers. In this regard, that the freedom of peaceful assembly includes the right to choose the venue, time and purpose of the assembly.
24. Specifically, with regard to the choice of location, the Interested Party's case is that it behoves the State to facilitate the availability of public space to the organizers and participants of a demonstration and that the choice of venue is significant depending on the gravity of the issues at hand. It follows therefore that the choice of venue is very crucial in exercising one's right to freedom of assembly and in support of its argument, the Interested Party relies on the case of *Eugene Wamalwa v Minister of State for Internal Security* [2011] eKLR and *Muwanga Kivumbi v Attorney General*, Uganda Constitutional Petition No. 9 of 2005.

Amicus Curiae's Case

25. The Amicus Curiae case is as contained in his written submissions dated 4th May, 2016.

26. The Amicus Curiae highlighted the expectation that the State has an obligation under international law to facilitate enjoyment and enforcement of certain rights. Furthermore, that the State also has a negative obligation to prevent any hindrance to the enjoyment of such rights. Further, that denial of the right to choose a venue therefore, is an interference with the right to peaceful assembly and to demonstrate his proposition, he refers the Court to the case of *Chebotareva v Russian Federation, Merits, UN Doc CCPR/C/104/D/1866/2009* where the United Nations Human Rights Committee found a violation of the right to freedom of assembly because authorities had wanted to redirect the assembly to another location. The Amicus thus claims that iconic buildings such as Parliament, the Supreme Court and State House amongst others are ordinarily the choice of venue by demonstrators because they are the seats of policy.

27. The Amicus Curiae also recognizes that there are permissible restrictions set out under **Article 21** of the ICCPR and his position is that those restrictions must conform to the law. In that context, he submits that whereas the State House in Nairobi is indeed a protected area, the roads leading to State House or the area next to State House Gate 'A' is not protected. Consequently, that there is no legal basis to include the roads leading to State House or Gate A of the State House as

protected areas where assemblies are restricted. In conclusion, the Amicus Curiae submits that the perceived limitations on the right to demonstrate must be proportionate to the specific need on which they are predicated.

Determination

28. From the foregoing, the following issues arise for consideration;
- i) Whether the 2nd Respondent had the authority to reject the Notice by 'Team Courage' seeking authorization to conduct a demonstration.
 - ii) Whether by any actions of the Respondents aforesaid, there was a violation of the Petitioner's right to fair administrative action under **Article 47**.
 - iii) What is the extent of the enjoyment of the right to assemble under **Article 37** of the **Constitution** in the present circumstances?

(i) Whether the 2nd Respondent had the authority to reject the Notice seeking authorization to conduct a demonstration.

29. I shall begin my analysis on the first issue by making reference to **Section 5** of the **Public Order Act** which sets the governing considerations regulating the conduct of any public meeting and/or procession.

Section 5 of the Public Order Act provides thus;

- (1) No person shall hold a public meeting or a public procession except in accordance with the provisions of this Section.
- (2) Any person intending to convene a public meeting or a public procession shall notify the regulating officer of such intent at least three days but not more than fourteen days before the proposed date of the public meeting or procession.
- (3) A notice under subsection (2) shall be in the prescribed form and shall specify—
 - (a) the full names and physical address of the organiser of the proposed public meeting or public procession;
 - (b) the proposed date of the meeting or procession and the time thereof which shall be between six o'clock in the morning and six o'clock in the afternoon;
 - (c) the proposed site of the public meeting or the proposed route in the case of a public procession.
- (4) Where, upon receipt of a notice under subsection (2), it is not possible to hold the proposed public meeting or public procession for the reason that notice of another public meeting or procession on the date, at the time and at the venue proposed has already been received by the regulating officer, the regulating officer shall forthwith notify the organizer.
- (5) The notification by the regulating officer under subsection (4) shall

be in writing and shall be delivered to the organiser at the physical address specified pursuant to the provision of subsection (3).

(6) Where the regulating officer notifies the organiser of a public meeting or public procession in accordance with subsection (3) that it is not possible to hold the proposed meeting or procession, such public meeting or procession shall not be held on the date, at the time and venue proposed, but may, subject to this section, be held on such future date as the organiser may subsequently notify.

(7)

(8) The regulating officer or any police officer of or above the rank of inspector may stop or prevent the holding of-

(a) any public meeting or public procession held contrary to the provisions of subsections (2) or (6);

(b) any public gathering or other meeting or procession which, having regard to the rights and interests of the persons participating in such gathering, meeting or procession, there is clear, present or imminent danger of a breach of the peace or public order,

and may, for any of the purposes aforesaid, give or issue such orders, including orders for the dispersal of the meeting, procession or gathering as are reasonable in the circumstances, having regard to the rights and freedoms of the persons in respect of whom such orders are issued and the rights and freedoms of others.

(9)

(10)

(11)

(12)

(13)

(14)

(15)

30. Arising from the above provisions, the first requisite step to take when planning for any public gathering, whether a procession or a meeting, is to notify the Regulating Officer of such intentions. The Notice signifying the intention to have a public procession should contain the following details;
- (i) the full names and physical address of the organizer of the public procession,
 - (ii) the proposed date and time of the procession and
 - (iii) the proposed venue or route to be taken.
31. In this particular case, there is no contest that the organisers of the procession were known or that the intended public procession was to begin at the Freedom Corner, Uhuru Park and end at State House Gate 'A'. The Petitioner however contests that the OCPD, Kilimani Police Station is not a 'Regulating Officer' contemplated under the **Public Order Act** which **Section 2** defines a Regulating Officer as;
- “Officer-in-charge of the police station in the area in which a proposed public meeting is proposed to be held, or in the case of a public procession, the police officer-in-charge of the police station in the area in which the procession is proposed to start and to end.”*
32. The Petitioner's claim in that regard is that it is an OCS who is in charge of a Police Station and therefore has the authority to receive the Notice of a planned demonstration as well as to issue any rejection where the need arises to do so.

33. In answering the Petitioner's claim, I must also refer to **Section 5(8)** of the **Public Order Act** which provides that;

The regulating officer or any police officer of or above the rank of inspector may stop or prevent the holding of-

- (a) any public meeting or public procession held contrary to the provisions of subsections (2) or (6);*
- (b) any public gathering or other meeting or procession which, having regard to the rights and interests of the persons participating in such gathering, meeting or procession, there is clear, present or imminent danger of a breach of the peace or public order...*

34. Taking into account all the provisions of the law above, it is clear to my mind that;

- i) A regulating officer is an OCS and not any other police officer including an OCPD.
- ii) Such an officer can only stop the holding of a public meeting or procession for reasons set out in **Section 5(4)** and **(6)** of the **Public Order Act** to wit that "*it is not possible to hold the public meeting or public procession*" because "*notice of another public meeting or procession on the date, time and at the venue proposed has already been received by the regulating officer.*"

iii) For the above reason, the public meeting or public procession is then postponed to another date.

35. I know no other law and none has been shown to me which grants an OCPD the power to make the above decision and I say so because reliance on **Section 5(8)** of the **Act** is misplaced in that regard. That sub-section relates to events occurring after a Regulating Officer (an OCS) has been notified of a meeting or procession and has had no reason under **Section 5(6)** to postpone it or upon postponing it, the organisers nonetheless proceed to hold it. In either event, he or "*any police officer of or above the rank of inspector may stop or prevent the holding*" thereof for the reasons set out in **Section 5(8)** which are that the holding of the meeting is contrary to **Section 5(6)** aforesaid or that there would be a clear, present or imminent danger of a breach of the peace or public order.
36. The upshot of the above finding is that the role of a non-regulating officer, including an OCPD, in the context of public meetings or processions is limited and does not certainly include receipt or postponement of such meetings or processions.
37. In conclusion on this issue therefore, my finding is that the 2nd Respondent had no authority to reject the Notice by the Petitioner and 'Team Courage' seeking authorization to conduct a demonstration on 9th December 2015. That authority is solely repositied in the OCS of the relevant police station in this case Kilimani and Central Police Stations.

(ii) Whether by any actions of the Respondents aforesaid, there was a violation of the Petitioner's right to fair administrative action under Article 47.

38. On this issue, the Petitioner alleges an infringement of his right to fair administrative action under **Article 47**. The basis of his claim is that;

- i. *The action by the 2nd Respondent was unlawful.*
- ii. *The action aforesaid adversely affected his rights.*
- iii. *No reasons were given for the refusal to allow the intended demonstration*

39. In furthering his claim that the action taken was unlawful, the Petitioner's argument is that the OCPD Kilimani Police Station had no legal powers to reject a notification for a planned public procession. I have already made a determination on this issue and hence the Petitioner's claim to that extent is partly merited.

40. On the other two grounds under which the Petitioner alleges an infringement of his right to fair administrative action, my first point of reference is **Article 47** of the **Constitution** which provides as follows;

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

41. My understanding of this provision is that the right to be given reasons is tied to the possibility of an adverse decision being made against a person. It follows therefore that there is no duty to give reasons where the decision taken is favourable and there has to be a nexus between the giving of reasons on one hand and the adverse consequences on the other hand. An adverse outcome on its own does not necessarily trigger an action for breach of fair administrative action. There has to be something more and that means that either no reasons were given or there was default in the way in which the decision was arrived at or the decision given was manifestly unjust or unreasonable.

42. The need to issue reasons for an unfavourable administrative decision has also been echoed in **Section 4 of the Fair Administrative Action, Act No. 4 of 2015**, which provides;

1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

2) Every person has the right to be given written reasons for any administrative action that is taken against him.

3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

- a) *Prior and adequate notice of the nature and reasons for the proposed administrative action;*
- b) *an opportunity to be heard and to make representations in that regard;*
- c) *notice of a right to a review or internal appeal against an administrative decision, where applicable;*
- d) *a statement of reasons pursuant to Section 6;*
- e) *notice of the right to legal representation, where applicable;*
- f) *Notice of the right to cross-examine or where applicable; or*
- g) *information, materials and evidence to be relied upon in making the decision or taking the administrative action.*

43. The above provisions clearly therefore expound the frontiers of **Article 47** of the **Constitution** by providing a framework under which the right to fair administrative action is to be enjoyed. With regard to issuance of reasons, a duty has been placed upon every administrator to issue adequate reasons to the person affected or likely to be affected by the decision taken.

44. The Petitioner in that context contends that the 2nd Respondent in rejecting the intended demonstration only indicated, “*March to State House Gate “A” NOT allowed.*” In response, the Respondents state that the Petitioner has the discretion to request for reasons if the same were not provided in writing. This is a definite admission on the part of the Respondents that they did not issue reasons for the denial of the intended demonstration. Admittedly, in their written submissions, the Respondents also trivialize this requirement by stating that the need to ensure security of prohibited places like State House is very obvious to the Petitioner. As demonstrated above, the Constitution as well as the **Fair Administrative Action Act** provide in no uncertain terms that reasons must be given where the decision taken has an adverse consequence upon a person’s fundamental right or freedom. This is a constitutional command and the Respondents in exercise of their public authority must abide by the said requirement.
45. I therefore hold that the Petitioner’s right to fair administrative action under **Article 47(2)** of the **Constitution** as read with **Section 4(2)** of the **Fair Administrative Action Act, No.4 of 2015** was infringed by the 2nd Respondent’s failure to provide reasons for the rejection of the Petitioner’s Notice of an intending public demonstration.

(iii) *What is the extent of the enjoyment of the right to assemble under Article 37 of the Constitution in the present circumstances?*

46. In answering the question whether there was a violation of the Petitioner's right to assemble, I shall begin on the premise that *every person has the right, peacefully and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.*" [Article 37 of the Constitution.]

47. The right to assemble is however not absolute and may be limited in certain circumstances. The extent of such limitation is provided for under Article 24 of the Constitution which provides thus:

(1) *A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including--*

(a) *the nature of the right or fundamental freedom;*

(b) *the importance of the purpose of the limitation;*

(c) *the nature and extent of the limitation;*

(d) *the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and*

(e) *the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.*

(2) ...

(3) *The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.* [Emphasis added]

48. Arising from the above, the fundamental constitutional principle underlying the justification for the exercise of any limitation is that *the limitation must be provided by the law and it must be reasonable and justifiable in an open and democratic society.*

49. The first question to dispose of therefore is whether the limitation relied upon by the Respondents is provided for in law and in that regard, I note that the Respondents' case is anchored on the provisions of **Section 3** of the **Official Secrets Act** which provides that;

3 (1) Any person who, for any purpose prejudicial to the safety or interests of the Republic—

(a) **approaches, inspects, passes over, is in the neighbourhood of or enters a prohibited place; or**

(b) **makes any plan that is calculated to be or might be or is intended to be directly or indirectly useful to a foreign power or disaffected person; or**

(c) *obtains, collects, records, publishes or communicates in whatever manner to any other person any code word, plan, article, document or information which is calculated to be or might be or is intended to be directly or indirectly useful to a foreign power or disaffected person, shall be guilty of an offence.*

50. The Respondents' argument in the above context is that State House Gate 'A' is a prohibited area and which has a restricted access to members of the public. In that regard **Section 2** of the **Official Secrets Act** defines a prohibited place as;

(a) any place belonging to or occupied or used by or on behalf of the Government which is used for or in connexion with the maintenance of public security, including arsenals, establishments or stations of the armed forces or the police, factories, dockyards, mines, minefields, camps, ships, aircraft, telegraph, telephone, wireless or signal stations or offices, and places used for the purpose of building, repairing, making or storing any munitions of war or any plans or documents relating thereto, or for the purposes of getting any metals, oil or minerals for use in time of war or emergency; or

(b) any place not belonging to the Government where any munitions of war or any plans or documents relating thereto are being made, repaired, received or stored under contract with, or with any person acting on behalf of, the Government; or

(c) any place that is for the time being declared by the Minister, by order, to be a prohibited place on the ground that information with respect thereto or damage thereto

would be prejudicial to the safety and interests of the Republic.

51. In that regard and as I understand it, any party asserting a fact has the onus of proving that fact to the required threshold and that is why the South Africa Constitutional Court in the case of *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others (CCT 03/04) [2004] ZACC 10* properly summarized the duty to sufficiently place all materials before the Court as follows [Paragraph 36];

“Where justification depends on factual material, the party relying on justification must establish the facts on which the justification depends. Justification may, however, depend not on disputed facts but on policies directed to legitimate governmental concerns. If that be the case, the party relying on justification should place sufficient information before the court as to the policy that is being furthered, the reasons for that policy, and why it is considered reasonable in pursuit of that policy to limit a constitutional right. That is important, for if this is not done the court may be unable to discern what the policy is, and the party making the constitutional challenge does not have the opportunity of rebutting the contention through countervailing factual material or expert opinion. A failure to place such information before the court, or to spell out the reasons for the limitation, may be fatal to the justification claim. There may however be cases where despite the absence of such information on the record, a court is nonetheless able to uphold a claim of justification based on common sense and judicial knowledge.”

52. Connected to the above finding is the determination of the question whether the limitation as set out was ‘*reasonable and justifiable in an open and democratic society.*’ In that regard, what is reasonable and justifiable depends on the circumstances of each case and the **Constitution** guides this Court in determining factors to consider when assessing the merits of any prescribed limitation. These are:

- (a) *The nature of the right or fundamental freedom;*
- (b) *The importance of the purpose of the limitation;*
- (c) *The nature and extent of the limitation;*
- (d) *The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and*
- (e) *The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.*

53. In reference to the above guiding principles, the Constitutional Court of South Africa in the case of *S v Manamela and Another (Director-General of Justice Intervening)* [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC), while interpreting **Section 36** of the **South Africa Constitution**, which is in *pari materia* with **Article 24** of our **Constitution**, held as follows:

“It should be noted that the five factors expressly itemised in section 36 are not presented as an exhaustive list. They are included in the section as key factors that have to be considered in an overall assessment as to whether or not the

limitation is reasonable and justifiable in an open and democratic society. In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected."

54. Further, in the case of *Körtvélyessy v Hungary* (App. No. 7871/10), the European Court of Human Rights held thus [Para 25]:

"The expression 'necessary in a democratic society' implies that the interference corresponds to a 'pressing social need' and, in particular, that it is proportionate to the legitimate aim pursued."

At Para 26, that Court went on to state:

"When the Court carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities but rather to review ... the decisions they took. This does not mean that it has to confine itself to ascertaining whether the State exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine, after having established that it pursued a 'legitimate aim', whether it answered a 'pressing social need' and, in particular, whether it was proportionate to that aim and whether the reasons adduced by the national authorities to justify it were 'relevant

and sufficient. In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in art 11 (a)... moreover, that they based their decisions on an acceptable assessment of the relevant facts."

55. I accept the above expositions of the law and I note that in the present case, the Petitioner alleges a violation of his right to assemble, demonstrate, picket and petition while the Respondents plead the need to ensure preservation of security as a justification for the imposition of the limitation. I am therefore confronted with two competing interests one being, the right to assemble and the other being, the need to maintain security.

56. Undoubtedly, freedom of assembly is an important component for the true existence of a democratic society and I am in that regard attracted to the reasoning in *South African Transport and Allied Workers Union and another v Garvas and others [2012] ZACC 13*, where the Court correctly summarized the significance of the right to freedom of assembly in the following words;

"The right to freedom of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless. This includes groups that do not have political or economic power, and other vulnerable persons. It provides an outlet for their frustrations. This right will, in many cases, be the only mechanism available to them to express their legitimate concerns. Indeed, it is one of the principal means by which ordinary people can meaningfully contribute to the

constitutional objective of advancing human rights and freedoms.”

57. I agree with the general principles of law above but on the flip side, much as the protection of the freedom of assembly must be strongly advocated for, some situations may demand its curtailment. It is common knowledge for example that our Country has severely been affected by various acts of violence such as terrorism and other aggressive behaviours. Such acts have in a great way compromised the security of our citizens. In a bid to ensure adequate protection of the people, both private and public institutions have adopted stringent measures geared towards sealing potential opportunities likely to be utilized in furtherance of such acts of aggression. Some of the measures taken have had adverse effect on the rights and fundamental freedoms of persons and the **Constitution** therefore requires any person that seeks to rely on a limitation to always endeavour to employ less restrictive means available to achieve the same purpose.
58. In that context, although the Respondents did not place the necessary declaration of State House or specifically its Gate A as a prohibited or protected area, **Legal Notice No.187 of 1972** premised on **Protected Areas Act, Cap.204** declared the said premises a protected area. A protected area is then defined by the same Act as follows:

A protected area “means any area, place or premises in relation to which an order made under Section 3 is in force.”

59. Legal Notice No.187 of 1972 is the said order and further, Section 9 of the same Act creates an offence with regard to access to a protected area in the following terms:

“(1) Any person who is in a protected area without permission, contrary to the provisions of Section 3, or who fails to comply with any order issued under that Section, or who fails to comply with any direction given to him under Section 4, or who refuses to allow himself to be searched under Section 5, shall be guilty of an offence and liable to imprisonment for a term not exceeding two years or to a fine not exceeding five thousand shillings, or to both such imprisonment and fine.

(2) ...”

60. Further to the above, I note that Legal Notice No.187 of 1972 as well as Legal Notices Nos.312 of 1974, 56 of 1976, 433 of 1989 and 11 of 1992 are the specific Notices that declared State Houses, Nairobi, Mombasa, Kisumu, Sagana, Eldoret and Nakuru as protected areas with Legal Notice 187 of 1972 specifically referring to State House, Nairobi. It is very difficult for me to separate Gate A of State House with the entire State House as depicted therein and it therefore follows that Gate A of State House Nairobi is inclusive in the definition of State House as a protected area and that any attempt to access it for whatever purpose, without lawful authority, is prohibited by law. It also follows that the right to assemble, demonstrate and present a Petition at the said location is specifically limited by law as aforesaid.

61. It is also evident from my analysis above that the scope of the right to assemble is in some respects dependent on the enjoyment of other rights and although such a right must be respected and preserved, it must be exercised in due regard to other rights. I therefore find that the limitations imposed by law were reasonable and justifiable especially considering that the Petitioner still had an alternative avenue for ventilating his cause. It is a matter of public notoriety for example that the President of the Republic of Kenya has a public office located at Harambee House and it is not conceivable why the Petitioner would insist that his cause would only be sufficiently advocated at State House Gate A as opposed to the President's office at Harambee Avenue.
62. In addition, I note that the Petitioner, the Interested Party and the Amicus Curiae have placed great importance on the choice of venue to exercise **Article 37** rights. Their argument is, in the presence of circumstances, that the right to assemble could not be sufficiently expressed in the absence of the right to choose that particular venue. My finding on that issue is that whereas I recognize the importance of having the freedom to choose a particular venue as a means to sufficiently enjoy the right to assemble, in some cases, like in the present one, the option to choose the venue is limited by virtue of an existing law prohibiting the said choice and I have not been asked to declare that law as being unconstitutional and why. For as long as it remains in our law books therefore, it must be respected and obeyed. Although therefore I accept the Amicus Curiae's intervention on this point, the decision in **Chebotareva (supra)** is clearly distinguishable in

the present circumstances without losing sight of the fundamental principle that the right to assemble and demonstrate logically necessitates that a venue must be chosen by the organisers and not the Regulating Officer. That is all I should say on that issue.

Conclusion

63. Having held as above, I must now revisit the prayers in the Petition and determine whether any are available to the Petitioner.
64. In that regard, in prayers (a), (b), (c) and (d) of the Petition, the Petitioner in sum prays for orders that the actions of the 1st and 2nd Respondents, in denying him and Team Courage the right to march to State House Gate A on 9th December 2015 offend **Articles 37 and 47** of the **Constitution** as well as the principles of the rule of law and good governance. While little was said of the latter, I have held that the 2nd Respondent has no lawful authority to intervene one way or the other with the issue whether the Petitioner and Team Courage could or could not assemble, march or demonstrate on the material date. Similarly, by failing to give reasons for his decision, he acted contrary to **Article 47(2)** of the **Constitution** and **Section 4(2)** of the **Fair Administrative Actions Act**. I have also held that in the unique circumstances of the present Petition, the right to specifically assemble, march to or demonstrate at State House Gate A is lawfully limited by law and until that law is declared unconstitutional (and I have not been asked to do so) then it must be obeyed.

65. On prayer (e), I will shortly make the appropriate order that commends itself to me.

Disposition

66. For the reasons set out above, the Petition dated 7th December 2015 is granted in the following terms only:

(a) It is hereby declared that the Officer Commanding (OCPD) Kilimani Police Division, had no lawful authority to intervene on the issue whether the Petitioner and Team Courage could or could not march to State House Gate A on 9th December 2015, such authority having been vested by law on an Officer Commanding Station (OCS) only.

(b) It is hereby declared that to the extent that the 2nd Respondent's action was unlawful, the same is hereby declared to be a violation of Article 47(1) of the Constitution on the right to fair administrative action.

(c) It is hereby declared that to the extent that the 2nd Respondent failed to give the Petitioner and Team Courage reasons for his unlawful refusal to allow the proposed march on 9th December 2015 to proceed, the

2nd Respondent violated Article 47(2) of the Constitution as read with Section 4(2) of the Fair Administrative Action Act, No.4 of 2015.

(d) Each party shall bear its own costs.

67. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 27th DAY OF January, 2017


ISAAC LENAOLA
JUDGE

DELIVERED AND SIGNED AT NAIROBI THIS 30th DAY OF January, 2017


E. CHACHA MWITA
JUDGE