

JUSTICE | Eight NGOs had filed case on grounds that nominations were made without consultation and regard to gender equity

Women win big as court puts a damper on nominations

Move was a breach of Constitution that guarantees fundamental rights and freedom of women and men to equal opportunities, judge ruled

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The recent High Court ruling declaring President Kibaki's nominees to justice and budget office jobs unconstitutional is being seen as a victory for women because it recognises and upholds gender equity.

The ruling says President Kibaki's nominations breached the Constitution because he failed to name a woman to at least one of the four key positions.

On the other hand, Kenyans who argue that consultations do not have to result in consensus have found favour with the High Court. But they should not celebrate too fast.

High Court Judge Justice Daniel Musinga ruled that there seems to have been some consultation between the President and the Prime Minister in relation to the nominations.

In reaching the conclusion that there was some consultation, the judge looked at the definition of the word consult, according to the shorter Oxford English dictionary.

Therefore consultation is said to mean the action of consulting or taking counsel together.

But the judge was quick to add that notwithstanding the meaning of consensus, the law must be read in the spirit of the national accord.

It indicates that a coalition government must be a partnership with commitment on both sides to govern together and push through the reform agenda for the benefit of all Kenyans.

In what appears to be a double-edged ruling, Justice Musinga held that provisions in the Constitution must be read in harmony with other relevant parts of the basic law.

"In interpreting the Constitution, the letter and the spirit of the supreme law must be respected. Various provisions of the Constitution must be read together in order to get proper interpretation," held the judge.

And, in interpreting the law, he was guided by the provisions of Section 259. This section requires that the interpretation be done in a manner that promotes its purpose, values, principles, advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights, permits the devel-

opment of law and contributes to good governance.

Justice Musinga ruled that it will be unconstitutional for any State organ to approve the nominees.

"In view of the court's findings regarding constitutionality of the manner in which the nominations were done, I make a declaration that it will be unconstitutional for any State organ to carry on with the process of approval and eventual appointment to the offices of CJ, DPP and AG based on President Kibaki's nominations."

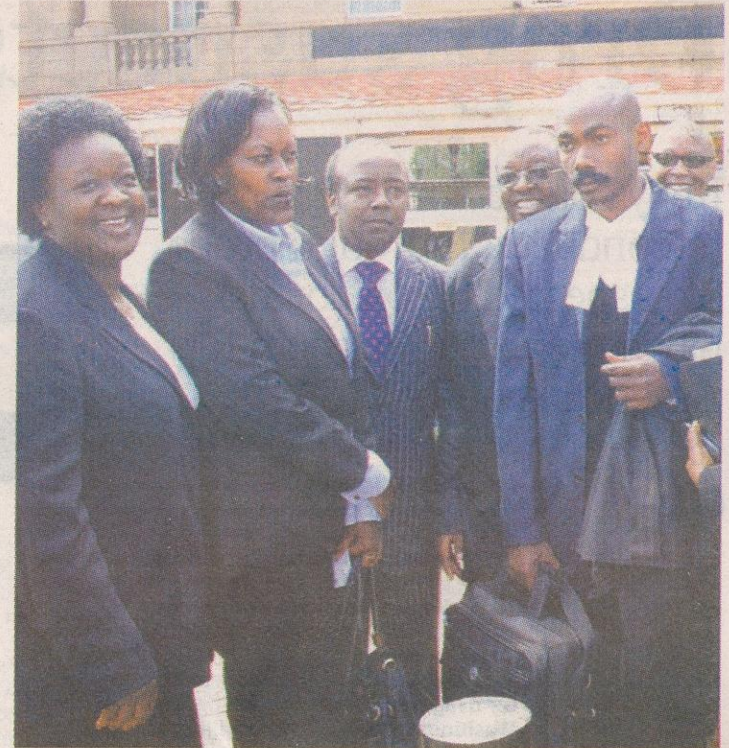
Reason? The chief legal adviser conceded on two grounds that there was violation of the Constitution.

The Attorney-General conceded that the process ought to have received recommendations from the Judicial Service Commission as required by the Constitution.

He also conceded that there was violation of the Constitution to the extent that of the four nominations, none was a woman despite the constitutional requirement for gender equality.

"I am satisfied that the nominations were in breach of Article 27(3) of the Constitution that guarantees fundamental rights and freedom of women and men to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres," Justice Musinga ruled.

His order arose out of a case filed by eight non-governmental



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Lawyer Elisha Ongoya (centre) and representatives of women's rights groups after the High Court ruled that four key nominations were unconstitutional.

requiring consultation and consideration of gender equity.

The case by the organisations was prompted by President Kibaki's nomination of Justice Alnashir Visram as CJ, Prof Githu Muigai as AG, Mr Kioko Kilukumi as DPP and Mr William Kirwa as Controller of Budget.

State counsel Wanjiku Mbiyu had urged the court not to give any temporary orders.

Mrs Mbiyu, in her submissions, said the material placed before court to show that the two principals did not consult were all newspaper cuttings and therefore cannot be relied on

not to grant any temporary orders saying there was no crisis in the country.

The lawyer said the process was political and the court should leave it to politicians.

Mr Kihara urged the court to keep in mind that the country is in a transition stage, and therefore the appointment of a CJ is at this stage a preserve of the Executive.

On this, the judge said that even though he would not stop Parliament from doing its work, the court was under obligation to make an appropriate declaration and bring it to the attention of the

66

The letter and the spirit of the supreme law must be respected."

4 nominees

The number of people who were