REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
(Coram: A.C. Mrima, J.)
CONSTITUTIONAL PETITION NO. E128 OF 2022

-BETWEEN-

KATIBA INSTITUTE.....APPLICANT/PETITIONER

-VERSUS-

1. **JUDICIAL SERVICE COMMISSION**
2. **THE CHIEF JUSTICE OF THE REPUBLIC OF KENYA**
3. **THE ATTORNEY GENERAL.....RESPONDENTS**

-AND-

1. **THE KENYA MAGISTRATES AND JUDGES ASSOCIATION**
2. **THE LAW SOCIETY OF KENYA**
3. **INTERNATIONAL COMMISSION OF JURISTS (KENYA CHAPTER) ..... INTERESTED PARTIES**

RULING NO. 2

Introduction:

1. The constitutional obligation of *Judicial Service Commission*, (hereinafter referred to as ***'the JSC', 'the Commission'*** or ***'the 1st Respondent'***) in Article 172(1) of the Constitution is at the heart of this ruling.

2. The proceedings in this matter were triggered by the publication of Gazette Notice No. 2529 and Gazette Notice No. 2530 (hereinafter collectively referred to as ***'the Gazette Notices'***) in *Kenya Gazette Vol. CXXIV No. 44* dated 11th March, 2022 declaring vacancies and inviting interested and qualified persons to fill six positions in the Office of Judge of Court of Appeal and 20 positions in the Office of Judge of High Court.

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3. Responding to the Gazette Notices, the Petitioner herein, *Katiba Institute,* a constitutional research, policy and litigation institute established to promote knowledge and understanding of Kenya's Constitution and constitutionalism, and to defend and facilitate implementation of the Constitution, filed a Petition and an application by way of a Notice of Motion (hereinafter referred to as ***'the application'***) both evenly dated 31st March, 2022.

4. The application was heard, hence, this ruling.

The Application:

5. The application, which sought to forestall the process of recruiting new Judges of the Court of Appeal and the High Court, was supported by the two Affidavits of *Christine Nkonge,* the Petitioner's Executive Director, deposed to on 31st March, 2022 and 28th April, 2022 respectively.

6. The following prayers were sought in the application: -

> ***1. .....***
>
> ***2. A conservatory Order be and is hereby issued suspending the implementation and/or closure of the period for receiving applications pursuant to Gazette Notice No. 2529 and 2530 dated 4th March 2022 in the Kenya Gazette Vol. CXXVI-No. 44 dated 11th March 2022 to the extent that it invites interested and qualified persons to apply for appointment to the office of Judge of the Court of Appeal and Office of Judge of High Court by 4th April 2022.***
>
> ***3. A conservatory order be and is hereby issued suspending any further action by the 1st Respondent including invitation, consideration, evaluation, deliberation, processing, review and/or interview of applicants and or applications for appointment to the office of Judge of the Court of Appeal and Office of Judge of High Court pursuant to the decision contained in Gazette Notice No. 2529 and 2530 dated 4th March 2022 in the Kenya Gazette Vol. CXXVI-No. 44 dated 11th March 2022.***
>
> ***4. Any other relief and/or orders the honourable court deems appropriate and/or fit and just to grant.***

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5. Cost of the application be in the cause.

7. The 3rd Interested Party, the International Commission of Jurists – Kenya Chapter (hereinafter referred to as ***'the ICJ-Kenya'*** or ***'the 3rd Interested Party'***) supported the application.

8. The Respondents and the 1st and 2nd Interested Parties vehemently opposed the application.

9. Going forward, I will consider the parties' cases and their respective submissions.

The Applicant's case:

10. The Applicant laid a brief background of the Petition and the application.

11. It was deposed that it was improper for the Commission to commence a subsequent recruitment drive whilst there are Judges resulting from a previous recruitment process whom, despite the Commission's recommendation, have not been sworn into office owing to the President's failure to appoint them.

12. To lend credence on impropriety of the current recruitment process, the Applicant referred to the dispute in High Court Petition No. 369 of 2019, ***Adrian Kamotho Njenga -vs- Attorney General; Judicial Service Commission & 2 Others*** 2020 eKLR, where it was found that the President is constitutionally bound to appoint all the 41 persons recommended by the Commission.

13. The Applicant further deposed that the findings of the High Court in foregoing decision were currently the subject of appeal before the Court of Appeal in Nairobi.

14. It was contended that the President's appointment of only 34 Judges out of the 41 recommended by the Commission, yielded the dispute in Petition No. 206 of 2020, ***Katiba Institute -vs- President of the Republic of Kenya & 2 Others; Judicial Service Commission & 3 Others*** which *inter-alia* compelled the President to appoint the 6 Judges that were left out.

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15. The Applicant pointed out that the High Court decision was appealed against and is currently the subject of appeal in Nairobi Court of Appeal Civil Appeal No. E088 of 2022, ***Attorney General -vs- Katiba Institute & 6 Others*** and Civil Appeal No. E110 of 2022 ***President of the Republic of Kenya -vs- Katiba Institute & 6 Others.***

16. The Applicant disclosed that upon filing of the appeal, the Attorney General and the President instituted Civil Application No. E365 of 2021 and Civil Application No. 368 of 2021 respectively where they obtained orders staying the findings of the High Court in Petition No. 206 of 2020, Katiba Institute -vs- President of the Republic of Kenya & 2 Others (supra).

17. In the thick of the foregoing challenges, the Applicant was emphatic that it was then improper and a derogation of the 1st Respondent's constitutional mandate to commence a subsequent recruitment process.

18. The Applicant further questioned whether the actions by the 1st and 2nd Respondents were inconsistent with the rule of law, good governance, constitutional values and constitutionalism by virtue of Articles 1(1), 3(1), 159(1), 160(1), 172(1), 249(1) and (2) of the Constitution.

19. It was further its case that the decision of the 1st and 2nd Respondents to recruit more Judges without first resolving the existing stalemate with the Executive is reckless, irrational and unprocedural and diminishes the JSC's independence and also fails to protect and uphold the independence of the Judiciary. It was contended that in such instances, the 1st and 2nd Respondents derogated their constitutional mandates in contravening the national values and principles of good governance under Article 10 of the Constitution and the Judicial Service Act.

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The Applicant's Submissions:

20. In further support of its case, the Applicant filed written submissions and a Bundle of Authorities both dated 8th May, 2022.

21. *Miss. Soweto*, Counsel for the Applicant argued that the Applicant had surpassed the threshold for the granting of conservatory orders. Reference was made to *Wilson Bursen Mokua v Central 4 Kenya Conference of the Seventh Day Adventist & Another; Nairobi Cosmopolitan Conference Limited (Interested Party)* [2021] eKLR where the Court observed that in determining whether a *prima facie* case has been made out, a Court must look at the whole case, weigh *albeit* preliminarily, the pleadings, the factual basis, the respective parties' positions, the remedies sought and the law.

22. In submitting that the Applicant had made out a *prima facie* case, Counsel emphasized that what was being challenged was an issue of bad governance, an issue marked as important by the Supreme Court in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*** [2014] eKLR which touched on the basic principles of the Constitution.

23. Counsel stated that since the propriety of the process for recruitment of Judges was in question, then a genuine and arguable case deserving of conservatory orders was made out. To that end, support was sourced from the Court of Appeal in *Mrao vs First American Bank of Kenya Limited & 2 Others* (2003) KLR 125 and in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, where in the latter, the Court observed: -

> *... The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.*

24. In submitting that the grant of the orders would enhance constitutional values and objects of specific rights and freedoms in the Bill of Rights under Articles 2 and 10(2) a- d, reference was

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made to *Judicial Service Commission -vs- Speaker of National Assembly & Another* (2013) eKLR.

25. Miss. Soweto was emphatic that the 1st and 2nd Respondents ought not to be allowed to proceed with actions that are the subject of pending litigation before the Court of Appeal which decision could have an implication upon the subsequent recruitment process.

26. Counsel rebutted the 1st Respondent's claim that the grant of conservatory orders would impede access to justice by stating that the 1st Respondent has absolutely no control of the time that would be taken by the President to appoint the recommended Judges and as such cannot seek to use it as a basis to hurry the recruitment along whereas there are constitutional violations that have been brought to the fore.

27. It was pointed out that, despite the foregoing, the 1st and 2nd Respondents had never instituted any proceedings to expedite the recruitment of Judges or to enforce appointments that have been made before in furtherance of Article 48 of the Constitution.

28. In the end, the Applicant submitted that it was in the interest of public that the application is allowed.

29. Since the 3rd Interested Party supported the application, I will next consider its case.

The 3rd Interested Party's case and submissions:

30. The ICJ-Kenya filed a Replying affidavit sworn by its Chairperson, one *Protas Saende,* on 5th May, 2022.

31. In line with its objective of developing, strengthening and protecting principles of the rule of law, enjoyment of human rights, independence of the Judiciary and the legal profession, it was deposed that the 2nd Respondent did not adhere to the law in light of the pending disputes surrounding the application process.

32. The Chairperson deposed that the application met the *prima-facie* criteria for it sought clarity on the constitutionality of the

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recruitment processes of Judges; which matters were pending resolution at the Court of Appeal.

33. On the nugatory nature of the application, it was deposed that once individuals ascend to their positions as Judges their removal is onerous and recourse lies with the 1st Respondent and not the Court. It, therefore, was its case that the substratum of the application and the Petition would have been lost.

34. The 3rd Interested Party argued that it was in the interest of public that that the Court intervenes and stops the process in order to preserve constitutionalism and the rule of law.

35. In its written submissions dated 11th May, 2022, the 3rd Interested Party buttressed its position in the Replying Affidavit.

The 1st & 2nd Respondents' case:

36. The JSC and the Chief Justice of the Republic of Kenya, the 1st and 2nd Respondents respectively, opposed the application through the Replying Affidavit of *Hon. Anne Amadi*, the Chief Registrar of the Judiciary and Secretary to the Commission. The Affidavit was deposed to on 28th April, 2022.

37. It was her deposition that the application was an attempt by the Applicant to compromise the constitutional mandate of the 1st and 2nd Respondents provided for under Article 172(1)(a) of the Constitution as read with Section 30 and paragraph 3 of the 1st Schedule of the Judicial Service Act.

38. She deposed that the recruitment process was aimed at realizing the constitutional right of citizens to access justice, a fact that had been impeded by the shortfall of Judges in the Judiciary who statistically were overstretched.

39. It was her case that in the High Court the number of Judges stood at 74 against the statutory requirement of 200 whereas those of the Court of Appeal stood at 20 against the required 30. She hastened to add that out of the 20 Judges in the Court of Appeal, one was a Commissioner actively involved in the Commission and

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another was at the East African Court of Justice's Appeals Chamber, hence, both were unavailable to sit full time.

40. On the foregoing numerical challenges, she stated that Courts have been unable to function optimally in the dispensation of justice.

41. She further deposed that this Court ought to take judicial notice of the looming General election which will result in a sharp rise in election disputes that have constitutional timelines and which will significantly stall the early disposal of other disputes.

42. It is on the foregoing backdrop that she deposed that the 1st Respondent proactively sought to recruit 6 and 20 Judges of the Court of Appeal and the High Court respectively.

43. In rebutting the Applicant's position that the current recruitment drive would prejudice the 6 nominee Judges pending the President's appointment, she deposed that the Commission took those cases into account before declaring the vacancies.

44. She also deposed that the advertisement was in respect of High Court Judges whereas the nominees affected by the failure of the President to appoint were in respect of 4 Judges nominated to sit in the Court of Appeal and 2 of them to sit at the Environment and Land Court. As such, it was deposed that there was no prejudice to be suffered in respect of the declaration of vacancy and advertisement of the position of Judges of the High Court.

45. In respect of the vacancies at the Court of Appeal, she deposed that the Commission took into account that there are 20 Judges therein and the maximum number allowed in law is 30 Judges and to that end, advertised for only 6 positions thus reserving the 4 positions as the ones pending Presidential appointment.

46. Mrs. Amadi further deposed that contrary to the Applicant's assertion, the Commission's mandate to recruit Judges has never been in question in any of the cases alluded to by the Applicant that are pending determination before the Court of Appeal.

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47. She urged the Court to stop the Applicant from approbating and reprobating by decrying the President's failure to appoint Judges and at the same time seek to stop recruitment of Judges.

48. Bearing in mind public interest, constitutional values and the proportionate magnitudes relevant to the case, she deposed that the Petitioner had not attained the threshold for the grant of conservatory orders.

The Submissions:

49. The 1st and 2nd Respondents further urged their case through written submissions dated 9th May, 2022.

50. Through their Counsel, *Mr. Kanjama*, it was submitted that the Petitioner was urging the Court for an untenable request of suspending the constitutional mandate of the Commission to recruit Judges on account of pending Court cases in respect of previous recruitments.

51. Counsel submitted that there is absolutely no position in law that had been demonstrated by the Petitioner to support such a drastic curtailment of the powers of the Commission under Article 172 of the Constitution and all constitutional commissions in Article 152 of the Constitution.

52. Counsel further submitted that it was improper for the Applicant to front the position that processes at constitutional commissions are frozen the moment there are in place Court cases.

53. It was their case that the Applicant was underserving of conservatory orders since prayers 2 and 3 in the application were identical with prayer G in the main Petition and as such, the Applicant was seeking final orders through an interlocutory application.

54. It was Counsel's submission that the prayers sought do not establish a *prima-facie* case with probability of success and do not support interlocutory orders.

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55. On the public interest question, Counsel reiterated that the grant of the orders will militate against the right of access to justice and fair hearing rights under Articles 48 and 50 of the Constitution respectively.

56. In the end, it was their case that failure to grant the orders at this stage will not in any way render the substratum of the main Petition nugatory. He urged the Court dismiss the application.

The 3rd Respondent's case and submissions:

57. The Hon. Attorney General opposed the application through Grounds of Opposition dated 26th April, 2022.

58. The first salvo was that the Hon. Attorney General was wrongly enjoined in the application as no orders were sought against it. It also was its case that the Hon. Attorney General could not be sued for being a member of the Judicial Service Commission since it is a body corporate as provided for under Article 253 of the Constitution.

59. It reiterated that the Commission's mandate to declare vacancies is not an issue pending litigation as alluded to by the Applicant.

60. *Mr. Bitta,* Learned Counsel representing the Hon. Attorney General associated himself with the submission made by the rest of the Respondents.

The 1st Interested Party's case and submissions:

61. The *Kenya Magistrates and Judges Association,* (hereinafter referred to as ***'the KMJA'*** or ***'the 1st Interested Party'***) opposed the application through Grounds of Opposition dated 4th May, 2022 and the Replying Affidavit of *Daniel Sepu*, the Executive Director of KMJA, deposed to an even date.

62. The KMJA's case mirrored those of the Respondents. In fact, the KMJA's position in this matter and its submissions were to a large extent a *replica* of the Respondents' cases.

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63. It was contended that the application was frivolous and an abuse of Court process for inviting the Court to interfere with the independence of the JSC under Article 172 of the Constitution.

64. It was its case and submission that the orders to suspend the implementation and or closure of the period of receiving and considering application for position of Judges, as sought by in the application had been overtaken by events and in any case, did not meet the minimum requirements for the grant of conservatory orders. To that end, reliance was placed on *Gatirau Peter Munya -vs- Dickson Mwenda Kithinji* (2014) eKLR where it was inter-alia observed: -

> *..... before a Court grants an order of stay of execution, the appellant, the intending appellant must satisfy the court that the appeal or intended appeal is arguable and not frivolous and that unless the order of stay is sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory. ...A third condition may be added that it is in the public interest the order of stay be granted.*

65. On whether failure to grant the orders would render the Petition nugatory, it was the 1st Interested Party's case that this Court has the powers to nullify the appointments of any such number of Judges that was made in contravention to the Constitution. The Court of Appeal decision in Petition No. 101 of 2011, ***FIDA-K & Others -vs- Attorney General & Another*** was relied upon where it was observed: -

> *.... If the process of the appointment is unconstitutional, wrong, unprocedural or illegal, it cannot lie for the respondents to say that the process is complete and this Court has no jurisdiction to address the grievances realised by the petitioners. In our view, even if the five appointees were sworn in, this Court has jurisdiction to entertain and deal with the matter.*

66. In the end, it stated that it does not serve any legitimate or public interest for this Court to suspend the recruitment process. It maintained the position that the application was misguided and motivated by ulterior motives divorced from promotion of constitutionalism and the rule of law.

67. In the Replying Affidavit, Mr. Sepu deposed that the recruitment will increase the membership of KMJA and consequently ensure smooth and efficient dispensation of justice and reduction of work load to individual members.

68. He deposed further that the number of Judges in various Courts has been on the decline over the years owing to death, retirement and promotion thereby burdening the remaining Judges with excessive workload at the expense of their health and to the detriment of justice seekers who have to wait for long durations of time to have their disputes finalised.

69. On the foregoing basis, he deposed that the application was frivolous and an affront to the constitutional mandate of the 1st Respondent. Additionally, it claimed that there was no live matter before the Courts in respect of the powers of the 1st Respondent.

70. He further deposed that the failure of the President to appoint persons recommended for judgeship ought not be an impediment to the 1st and 2nd Respondents to carry out their mandate under the Constitution and statute.

71. In the end, the 1st Interested Party prayed that the application be dismissed with costs.

The 2nd Interested Party's case and submissions:

72. The 2nd Interested Party opposed the application. It filed a Replying Affidavit and tendered oral submissions.

73. In basically rehashing the Respondents' submissions, it was submitted that in all the matters where the actions of the President were impugned, the JSC was never indicted.

74. *Mr. Onderi*, Learned Counsel for the Law Society of Kenya, submitted that the on-going recruitment by JSC cannot be alleged to be dependent on the matters pending at the Court of Appeal.

75. Counsel reiterated the independence of the JSC as a constitutional Commission and argued that any orders to be

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issued herein must be dependent on evidence that JSC violated the Constitution or the law.

76. The difference between this Petition and the matters before the Court of Appeal was, once again, cited.

77. It was also submitted that orders sought were against public interest and that the application should be dismissed.

Analysis:

78. From the foregoing discourse, I will deal with the following areas of discussion: -

    i. *The nature of conservatory orders.*

    ii. *The principles guiding the grant of conservatory orders.*

    iii. *The application of the principles.*

79. I will, hence, deal with the above sequentially. Even as I do so, I must point out that Counsel in this matter have elaborately dealt with the above areas of discussion. Reference was made to several relevant decisions, serious legal arguments were made and moving interpretations tendered. I am grateful to Counsel.

The nature of conservatory orders:

80. The nature and the principles guiding the grant of conservatory orders in Kenya are well settled.

81. Setting the pace, the Supreme Court in ***Civil Application No. 5 of 2014 Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others (2014) eKLR,*** the Supreme Court discussed, at paragraph 86, the nature of conservatory orders as follows: -

> *[86] "Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the*

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prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the Applicant's case for orders of stay.

82. In ***Nairobi Civil Appeal 151 of 2011 Invesco Assurance Co. Ltd vs. MW (Minor suing thro' next friend and mother (HW) [2016] eKLR*** the Court defined a conservatory order as follows: -

> *5. A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.*

83. The nature of conservatory orders was further discussed in ***Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR*** where the Court had the following to say: -

> *Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.*

84. Conservatory orders are, therefore, aimed at preserving the substratum of the matter pending the determination of the main issues in dispute.

85. Given the interlocutory nature of conservatory orders, it is argued, that there is need for a Court to exercise caution when dealing with any request for such prayers. I agree with that proposition for the reason that matters which are the preserve of the main Petition ought not to be dealt with finality at the interlocutory stage.

86. The foregoing was fittingly captured by **Ibrahim, J** (as he then was) in ***Muslim for Human Rights (Milimani) & 2 Others vs***

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Attorney General & 2 Others (2011) eKLR. The Learned Judge, correctly so, stated as follows: -

> *The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-a vis the case of either parties. The principle is similar to that in temporary or interlocutory injunctive in civil matters. This is a cardinal principle and happily makes my functions and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side.*

87. The decisions in ***Centre for Rights Education and Awareness (CREAW) & 7 Others v. Attorney General (2011) eKLR, Platinum Distillers Limited vs. Kenya Revenue Authority (2019) eKLR*** and ***Kenya Association of Manufacturers & 2 Others vs. Cabinet Secretary – Ministry of Environment and Natural Resources & 3 Others (2017) eKLR*** also variously vouch for the cautionary approach.

88. A Court, therefore, dealing with an application for conservatory orders must maintain the delicate balance of ensuring that it does not delve into issues which are in the realm of the main Petition. In this discourse, I will, therefore, restrain myself from dealing with such issues.

The guiding principles in conservatory applications:

89. As pointed out before, the principles for consideration by a Court in exercising its discretion on whether to grant conservatory orders have been developed by Courts over time. They are now well settled.

90. The *locus classicus* is the Supreme Court in ***Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others*** case (supra) where at paragraph 86 stated the Court stated as follows: -

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[86] ..... Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant courses.

91. In ***Board of Management of Uhuru Secondary School vs. City County Director of Education & 2 Others*** [2015] eKLR, the Court summarized the principles for grant of conservatory orders as: -

(i) The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.

(ii) The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.

(iii) Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.

(i) Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.

92. In ***Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board and Others Nairobi High Court Constitutional Petition No.154 of 2016 (2016) eKLR*** the Court summarized three main principles for consideration on whether to grant conservatory orders as follows: -

(a) An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.

(b) Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and

(c) *The public interest must be considered before grant of a conservatory order.*

93. The above principles are, however, not exhaustive. Depending on the nature of the matter under consideration, there may be other parameters which a Court ought to look into. Such may include the effect of the orders on the determination of the case, whether there is eminent danger to infringement of the human rights and fundamental freedoms under the Bill of Rights, the applicability of the doctrine of presumption of constitutionality and legality of statutes, whether the Applicant is guilty of laches, the doctrine of proportionality, among many others.

The applicability of the principles to the application:

(i) **A prima-facie case:**

94. A *prima facie* case was defined in ***Mrao vs. First American Bank of Kenya Limited & 2 Others*** (2003) KLR 125 to mean: -

> *.... In a civil application includes but is not confined to a 'genuine and arguable case'. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.*

95. In ***David Ndii & others v Attorney General & others*** [2021] eKLR, the Court had the following to say about a *prima-facie* case: -

> *45. The first issue for determination in matters of this nature, is whether a prima facie case has been established and a prima facie case, it has been held, is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, it has to be shown that a case which discloses arguable issues has been raised and in this case, arguable constitutional issues.*

96. What constitutes a *prima-facie* case was further dealt with by the Court of Appeal in ***Mirugi Kariuki -vs- Attorney General*** Civil Appeal No. 70 of 1991 (1990-1994) EA 156, (1992) KLR 8. The

Court, in an appeal against refusal to grant leave to institute judicial review proceedings by the High Court, stated as follows: -

> *It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant's interests without regard to the nature of his complaint. If he fails to show..... that there has been a failure of public duty, this court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables this court to prevent abuse by busy-bodies, cranks and other mischief-makers... In this appeal, the issue is whether the applicant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of this Act was brought into question.* ***Without a rebuttal to these allegations****, this appellant certainly disclosed a prima-facie case. For that, he should have been granted leave to apply for the orders sought.* (emphasis added).

97. In ***Re Bivac International SA (Bureau Veritas)*** (2005) 2 EA 43, the Court while expounding on what a *prima-facie* case or an arguable case is, stated that such a decision is not arrived at by tossing a coin or waving a magic hand or raising a green flag, but instead a Court must undertake an intellectual exercise and consider without making any findings, the scope of the remedy sought, the grounds and the possible principles of law involved.

98. The Court of Appeal in Nairobi Civil Appeal No. 44 of 2014 ***Naftali Ruthi Kinyua vs. Patrick Thuita Gachure & Another*** (2015) eKLR while dealing with what a *prima facie* case is, made reference to Lord Diplock in *American Cyanamid vs. Ethicon Limited (1975) AC 396,* when the Judge stated thus: -

> *If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities, that is the end of any claim to interlocutory relief.*

99. In sum, therefore, in determining whether a matter discloses a *prima-facie* case, a Court must look at the case as a whole. It must weigh, *albeit* preliminarily, the pleadings, the factual basis, the respective parties' positions, the remedies sought and the law. In

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so doing, a Constitutional Court must be guided by Articles 22 (1) and 258(1) of the Constitution which provisions are on the right to institute Court proceedings whenever a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened or the when the Constitution has been contravened, or is threatened with contravention.

100. The issue as to whether there exists a case raising constitutional issues in the current proceedings has already been dealt with by this Court in its Ruling No. 1. The ruling was rendered on 25th April, 2022.

101. As a result, this Court reiterates that indeed the Petition raises cardinal constitutional issues worth consideration.

(ii) Whether the grant or denial of the conservatory relief will enhance any constitutional values and principles:

102. The Constitution is comprised of values and principles which Kenyans opted to be guided by in commanding their affairs. The values and principles are diverse and are carefully provided for throughout the Constitution.

103. Some of the values and principles are provided for in Articles 10, 81, 129, 159, 160, 172, 174, 175, 201, 232, 238, 249 among others.

104. The Public Service Commission of South Africa in its ***Guide on the Constitutional Values and Principles Governing Public Administration*** defined 'values' and 'principles' as follows: -

> ***Values*** *are no different from beliefs or a belief system. Both constitute a moral code that individuals internalise. It guides one's behaviour, to distinguish what is right or wrong. We do these instinctively, without even thinking because values form part of our consciousness.*
>
> ***Principles*** *derive from a value-system. Whereas values are internalised, principles are outward instructions, more like rules or*

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laws. They are easier to follow if they arise from one's value system, as they ought to.

105. The values and principles are, therefore, at the heart of the well-being of the society. They are the cornerstone upon which the society draws direction and guidance from; for they permeate every area of life. The values and principles are so crucial in dictating the ordered affairs of the society such that the lack of or non-adherence to them translates to serious and irreparable societal breakdown.

106. It is on the foregoing background that the Constitution calls upon every person to respect, uphold and defend it in Article 3(1) and further and unequivocally states that the values and principles contained therein must apply to all and sundry.

107. The Petition in this matter contends that the totality of the actions variously undertaken by the 1st and 2nd Respondents infringe upon some values and principles set out in the Constitution.

108. They are pleaded as the values and principles in Articles 3, 10(2), 159(1), 160(1), 171 and 172(1) of the Constitution.

109. Article 3 is in respect of defence to the Constitution while Article 10(2) provides for the national values and principles of governance whereas Article 159(1) is on the vesting of the judicial authority.

110. Article 160(1) is on the independence of the Judiciary whereas Article 171 establishes the JSC and Article 172(1) vouches for JSC to promote and facilitate the independence and accountability of the Judiciary and to ensure the efficient, effective and transparent administration of justice.

111. The Petitioner is, therefore, alluding that by the 1st and 2nd Respondents sanctioning the recruitment of Judges *vide* the decisions contained in the Gazette Notices and others while there are pending proceedings which challenge *inter alia* the independence of the Judiciary, the powers of the JSC and the certainty of the constitutional process in the recruitment of Judges, then the Respondents are an affront to the various values and principles.

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112. There is no doubt that there are pending proceedings challenging the independence of the Judiciary, the powers of the JSC and the certainty of the constitutional process in the recruitment of Judges of superior Courts. Since the values and principles subject of the current proceedings are germane to the efficient, effective and transparent administration of justice, then the Petition is mounted with a view of defending and upholding the Constitution.

113. Resulting from the purpose of these proceedings, this Court finds and hold that the conservatory reliefs sought are only meant to enhance those constitutional values and principles and not otherwise.

(iii) Whether the Petitioner will suffer prejudice and the case rendered nugatory unless the conservatory orders are granted:

114. The *Black's Law Dictionary 10th Edition Thomson Reuters* at page 1370 defines '***prejudice***' as follows: -

Damage or detriment to one's legal rights or claims.

115. Will any party, therefore, suffer any damage or detriment if the conservatory orders are not granted? Generally, any contravention or threat to contravention of the Constitution or any infringement or threatened infringement of human rights and fundamental freedoms in the Bill of Rights runs contra the intentions of the people of Kenya. That is the express purport of the Preamble and Chapter 1 of the Constitution.

116. Courts must, in dealing with Petitions brought under the various provisions of the Constitution, be careful in determining the prejudice at least at the preliminary stages. I say so because, at such stages of the proceedings, the provisions of the Constitution alleged to have been infringed or threatened with infringement are yet to be subjected to legal scrutiny.

117. As such, the damage or threat thereof to the rights and fundamental freedoms or to the Constitution must be so real that

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the Court can unmistakably arrive at such an interim finding. Such a breach or threat should not be illusory or presumptive. It must be eminent.

118. The effect of the conservatory orders sought is to forestall a scenario where a recruitment exercise of Judges is undertaken by the JSC in the midst of uncertainty of not only the constitutional procedure, but also whether the values and principles enumerated above are contravened.

119. This Court remains alive to the position that entities created under the Constitution and the law ought to be accorded the latitude to discharge their functions and that any judicial intervention must be in the clearest of cases.

120. There are key issues pending determination before the Court of Appeal which have a serious bearing on the recruitment of Judges. They include the manner in which Judges in Kenya ought to be recruited and the parameters of the principle of the independence of the Judiciary and the JSC.

121. It cannot be gainsaid that any constitutional and statutory process must be clear, unambiguous and definite. At the moment, the process which has been initiated by the 1st and 2nd Respondents is devoid of such clarity and the pending matters at the Court of Appeal hold the answers on the way forward.

122. It is important for the shortlisted candidates to, at least, certainly know of what awaits them in the recruitment process. Should the successful candidates who will be recommended for appointment as Judges by JSC expect to undergo scrutiny by the Executive? How long will it take for those recommended for appointment as Judges to be appointed into office? Is JSC independent in the manner in which it arrives at its decisions on the recruitment of Judges? These, and many more questions, cannot be assumed if the sanctity of the recruitment process is to be preserved.

123. Whereas the answers to the said questions are not in the current proceedings, what awaits interrogation at the main hearing of the Petition herein, is whether, and if so, to what extent does the

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current recruitment exercise infringe upon the constitutional values and principles in issue and whether allowing a process in such circumstances to proceed will be constitutional.

124. Flowing from the foregoing, unless the Court is accorded an opportunity to determine the grave issues raised in this Petition, the Constitution and the law may be irreparably contravened in the event the Petition finally succeeds. That is eminent prejudice.

(iv) Public interest:

125. ***'Public interest'*** is defined by the *Black's Law Dictionary 10th Edition* at page 1425 as: -

> *The general welfare of a populace considered as warranting recognition and protection. Something in which the public as a whole has stake especially in something that justifies government regulation.*

126. Broadly speaking, the Constitution and the laws govern the people. As such, the Constitution remains supreme and the laws are always presumed to be constitutional until the contrary is proved.

127. Public interest demands that the Constitution and the law be respected and upheld. Since the extent of involvement, if any, of the Executive in the recruitment of Judges in Kenya is yet to be determined, it is in public interest that the nature and certainty of the recruitment process be first ascertained. It is this Petition which will, in the main, determine the constitutionality of the recruitment process in view of pending matters before the Court of Appeal.

128. Having said so, I must point out that whereas there is the need to recruit more Judges into superior Courts in order to enhance access to justice and the administration of justice, suffice to reiterate that the recruitment process must itself comply and be within the Constitution and the law otherwise it all amounts to a nullity. As said, the constitutionality or otherwise of the impugned recruitment process is at the heart of the Petition herein.

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129. In the exceptional circumstances of this matter, this Court finds that public interest tilts in favor of the Petitioner.

Disposition:

130. The above analysis yields that the Petitioner has successfully laid a sound constitutional and legal basis for the grant of the orders sought in the application.

131. Be that as it may, given the urgency and nature of the Petition herein, there is need for appropriate directions and for expeditious disposal of the Petition.

132. In the end, the following orders hereby issue: -

(a) A conservatory order be and is hereby issued suspending any further action by the 1st Respondent including invitation, consideration, evaluation, deliberation, processing, review and/or interview of Applicants and or applications for appointment to the Office of Judge of the Court of Appeal and Office of Judge of High Court pursuant to the decision contained in Gazette Notice No. 2529 and 2530 dated 4th March 2022 in the Kenya Gazette Vol. CXXVI-No. 44 dated 11th March 2022 pending the hearing and determination of the Petition.

(b) The Petition to be heard by way of reliance on the pleadings, affidavit evidence and written submissions.

(c) The Respondents and the Interested Parties shall within 7 days hereof file and serve responses to the Petition, if not yet.

(d) The Petitioner shall, thereafter, and within 14 days of service file any supplementary responses, if need be, together with written submissions on the Petition.

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(e) **The Respondents and the Interested Parties shall file and serve their respective written submissions within 14 days of service.**

(f) **Further directions to issue on a date suitable to the Court and the parties.**

Orders accordingly.

DELIVERED, DATED and **SIGNED** at **NAIROBI** this **3rd day** of **June , 2022.**

A. C. MRIMA
JUDGE

Ruling No. 2 virtually delivered in the presence of:

Miss. Julie Soweto, Learned Counsel for the Petitioner.

Mr. Kanjama and **Miss Owano,** Learned Counsel for the 1st and 2nd Respondents.

No appearance for Mr. Bitta, Learned Counsel for the 3rd Respondent.

Mr. Shadrack Wamboi, Learned Counsel for the 1st Interested Party.

Mr. Onderi, Learned Counsel for the 2nd Interested Party.

Mr. Ochieng', Learned Counsel for the 3rd Interested Party.

Jared Ouma – Court Assistant

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