



REPUBLIC OF KENYA



**Gachagua & 40 others v Speaker, National Assembly & 15 others; Law Society of Kenya & 7 others (Interested Parties) (Constitutional Petition E565 of 2024 & Petition E013 (Kerugoya), E014 (Kerugoya), E015 (Kerugoya), E550 (Nairobi), E570 (Nairobi) & E572 (Nairobi) of 2024 (Consolidated)) [2024] KEHC 13473 (KLR) (Constitutional and Human Rights) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13473 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CONSTITUTIONAL AND HUMAN RIGHTS**

**CONSTITUTIONAL PETITION E565 OF 2024 & PETITION E013 (KERUGOYA), E014 (KERUGOYA), E015 (KERUGOYA), E550 (NAIROBI), E570 (NAIROBI) & E572 (NAIROBI) OF 2024 (CONSOLIDATED)**

**EKO OGOLA, AC MRIMA & FG MUGAMBI, JJ**

**OCTOBER 31, 2024**

**BETWEEN**

**HE RIGATHI GACHAGUA ..... 1<sup>ST</sup> PETITIONER**  
**THOMAS KIMOTHU MAINGI ..... 2<sup>ND</sup> PETITIONER**  
**HON. JANE NJERI MAINA ..... 3<sup>RD</sup> PETITIONER**  
**HON. DAVID MUNYI MATHENGE ..... 4<sup>TH</sup> PETITIONER**  
**PETER GICHOBI KAMOTHO ..... 5<sup>TH</sup> PETITIONER**  
**GRACE MUTHONI MWANGI ..... 6<sup>TH</sup> PETITIONER**  
**CLEMENT MUCHIRI MURIUKI ..... 7<sup>TH</sup> PETITIONER**  
**EDWIN MUNENE KARIUKI ..... 8<sup>TH</sup> PETITIONER**  
**SHERIA MTAANI NA SHADRACK WAMBUI ..... 9<sup>TH</sup> PETITIONER**  
**FATHER EDDIE WAIGURU ..... 10<sup>TH</sup> PETITIONER**  
**ANTHONY MWITHAGA ..... 11<sup>TH</sup> PETITIONER**  
**VICTOR NGATIA ..... 12<sup>TH</sup> PETITIONER**  
**ASSUMPTA WANGUI MUIRURI ..... 13<sup>TH</sup> PETITIONER**  
**CHRISITNE MUKAMI NJUGUNA ..... 14<sup>TH</sup> PETITIONER**  
**PETER KIMANI KOIRA ..... 15<sup>TH</sup> PETITIONER**



ALICE WAMUHU MBUGUA .....	16 <sup>TH</sup> PETITIONER
MWANGI MANYEKI .....	17 <sup>TH</sup> PETITIONER
MBUGUA WA MUMBI .....	18 <sup>TH</sup> PETITIONER
KIGO KAHARI .....	19 <sup>TH</sup> PETITIONER
PRISCILLAH WAMBUI GITARI .....	20 <sup>TH</sup> PETITIONER
F. MUCHIRI NGATIA .....	21 <sup>ST</sup> PETITIONER
MARIA NJERI .....	22 <sup>ND</sup> PETITIONER
ERICK WARUI MWANIKI .....	23 <sup>RD</sup> PETITIONER
BRIAN HUNJA .....	24 <sup>TH</sup> PETITIONER
SERAH MUMBI N. ....	25 <sup>TH</sup> PETITIONER
MARGARET WANJIRA .....	26 <sup>TH</sup> PETITIONER
SAMUEL NJENGA .....	27 <sup>TH</sup> PETITIONER
HEBRON GAKIRU .....	28 <sup>TH</sup> PETITIONER
SAMWEL NGARI .....	29 <sup>TH</sup> PETITIONER
JULIET WANGARE .....	30 <sup>TH</sup> PETITIONER
JAMES NYAGA .....	31 <sup>ST</sup> PETITIONER
DERRICK MAINA .....	32 <sup>ND</sup> PETITIONER
JOHN NJOROGE .....	33 <sup>RD</sup> PETITIONER
PETER WAWERU .....	34 <sup>TH</sup> PETITIONER
BONIFACE MUNIU .....	35 <sup>TH</sup> PETITIONER
RUTH M. KAMAU .....	36 <sup>TH</sup> PETITIONER
JANE NAMU .....	37 <sup>TH</sup> PETITIONER
MERCY NKATHA .....	38 <sup>TH</sup> PETITIONER
ANN KARIMI MBAE .....	39 <sup>TH</sup> PETITIONER
DANIEL MUNGAI .....	40 <sup>TH</sup> PETITIONER
GEMA WATHO ASSOCIATION .....	41 <sup>ST</sup> PETITIONER

**AND**

SPEAKER, NATIONAL ASSEMBLY .....	1 <sup>ST</sup> RESPONDENT
NATIONAL ASSEMBLY OF KENYA .....	2 <sup>ND</sup> RESPONDENT
SPEAKER, SENATE .....	3 <sup>RD</sup> RESPONDENT
SENATE OF KENYA .....	4 <sup>TH</sup> RESPONDENT
HON ATTORNEY GENERAL .....	5 <sup>TH</sup> RESPONDENT



HE WILLIAM RUTO .....	6 <sup>TH</sup> RESPONDENT
CLERK OF THE NATIONAL ASSEMBLY .....	7 <sup>TH</sup> RESPONDENT
DEPUTY SPEAKER OF THE NATIONAL ASSEMBLY .....	8 <sup>TH</sup> RESPONDENT
HON MWENGI MUTHURE .....	9 <sup>TH</sup> RESPONDENT
UNITED DEMOCRATIC ALLIANCE .....	10 <sup>TH</sup> RESPONDENT
ORANGE DEMOCRATIC ALLIANCE .....	11 <sup>TH</sup> RESPONDENT
KENYA KWANZA ALLIANCE .....	12 <sup>TH</sup> RESPONDENT
FORD KENYA PARTY .....	13 <sup>TH</sup> RESPONDENT
AMANI NATIONAL CONGRESS .....	14 <sup>TH</sup> RESPONDENT
REGISTRAR OF POLITICAL PARTIES .....	15 <sup>TH</sup> RESPONDENT
INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ....	16 <sup>TH</sup> RESPONDENT

AND

THE LAW SOCIETY OF KENYA .....	INTERESTED PARTY
PROF KITHURE KINDIKI .....	INTERESTED PARTY
WIPER DEMOCRATIC PARTY .....	INTERESTED PARTY
JUBILEE PARTY OF KENYA .....	INTERESTED PARTY
KATIBA INSTITUTE .....	INTERESTED PARTY
MT KENYA JURISTS ASSOCIATION .....	INTERESTED PARTY
KITUO CHA SHERIA .....	INTERESTED PARTY
DR JOHN KHAMINWA .....	INTERESTED PARTY

**Granting conservatory orders that effectively bar the Deputy President Nominee from assuming office amounts to a de facto suspension of Article 147(2) of the Constitution**

*The main issue revolved around the application for conservatory orders preventing the President and the National Assembly from filling the vacancy in the Office of the Deputy President. The High Court noted that granting the conservatory orders meant that the 1st petitioner remained impeached under Article 145(7) and the Deputy President nominee could not assume office. Allowing those orders to stand would leave the office of the Deputy President vacant, resulting in what would be a de facto suspension of Article 147(2) of the Constitution.*

Reported by Robai Nasike

**Jurisdiction** – jurisdiction of the Supreme Court – original and exclusive jurisdiction of the Supreme Court – jurisdiction of the Supreme Court to determine disputes arising from an impeachment process as a court of first instance – whether the Supreme Court had original and exclusive jurisdiction to determine disputes arising from an impeachment process – Constitution of Kenya, articles 2 (1), 2 (4) and 163 (3).

**Jurisdiction** – jurisdiction of the high Court – exclusive and original jurisdiction of the High Court – jurisdiction of the High Court to determine disputes regarding the impeachment process of a Deputy President – whether the High Court had jurisdiction to determine whether the merits and procedures of an impeachment



*process of a Deputy President aligned with Constitutional requirements – Constitution of Kenya, articles 144, 145, and 165 (3).*

**Constitutional Law** – separation of powers viz-a-viz the doctrine of justiciability – political question doctrine – whether the political question doctrine should apply, thereby bar the Court from intervening in what might be considered a matter reserved for the legislative or executive branches – whether the issue of the impeachment of the Deputy President fell within the category of cases where the concept of non-justiciability would prevent the High Court from hearing and deciding the matter – Constitution of Kenya, articles 23, 160 and 165 (3) (d) (ii).

**Constitutional Law** – the Executive – the Office of the Deputy President – vacancy in the office of the Deputy President – where the impeachment of the Deputy President rendered the office vacant – where an ongoing dispute regarding the impeachment of the Deputy President could render the office of the Deputy President for a prolonged period – whether the Constitution envisioned any scenario in which the office of the Deputy President would remain vacant – Constitution of Kenya, articles 146, 147 (2) and 150 (2).

**Constitutional Law** – conservatory orders – principles considered when granting conservatory orders – whether the matter disclosed a prima facie case that raised constitutional issues that required further judicial interrogation – whether grant of conservatory orders, which prevented the Deputy President nominee from assuming office, would either serve or prejudice public interest – whether it would be impossible to remove the appointee to the Office of the Deputy President, even if the petitions were successful, if conservatory orders were not granted.

**Words and phrases** – definition – prejudice – damage or detriment to one’s legal rights or claims - Black’s Law Dictionary, 10<sup>th</sup> Edition, Thomson Reuters, page 1370.

**Words and phrases** – definitions – Public interest – 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 - Black’s Law Dictionary 10<sup>th</sup> Edition, page 1425.

**Words and phrases** – definition – justiciability – a matter that is “proper to be examined in courts of justice” or “a question as may properly come before a tribunal for decision – Black’s Law Dictionary, 10<sup>th</sup> Edition, page 943-944.

### **Brief facts**

On October 17, 2024, the Senate voted to confirm a resolution by the National Assembly and impeached the 1<sup>st</sup> petitioner. Consequently, on October 18, 2024, the National Assembly approved the President’s nomination of Prof. Kithure Kindiki to fill the vacancy in the Office of the Deputy President. On October 18, 2024, the High Court, (C. Mwita, J), granted conservatory orders to stay the implementation of the Senate’s resolution and suspend the appointment of the 1<sup>st</sup> petitioner’s replacement until October 24, 2024, when the matter was set to be mentioned before the instant Bench. By operation of law, and in the absence of any extension, that conservatory orders lapsed, leaving the conservatory orders that had been issued in Kerugoya HCPET E015/2024 on October 18, 2024 by R. Mwangi, J, still subsisting. That was the pretext against which the instant Ruling was delivered.

A second application dated October 18, 2024 was filed by the 1<sup>st</sup> petitioner, equally seeking conservatory orders against the President and the National Assembly from filling the vacancy in the Office of the Deputy President. Following directions issued by the High Court, two other applications were filed, the application dated October 18, 2024 filed in HCPET E565/2024 by the 5<sup>th</sup> respondent (supported by the 3<sup>rd</sup> and 4<sup>th</sup> respondents) and the application dated 18<sup>th</sup> October 2024 filed in HCPET E565/2024 by the 2<sup>nd</sup> respondent were treated as responses to the applications of October 18, 2024. Those applications sought to set aside, lift and vary the conservatory orders.

### **Issues**

- i. Whether the Supreme Court had original and exclusive jurisdiction to determine disputes arising from an impeachment process.



- ii. Whether the High Court had jurisdiction to determine whether the merits and procedures of an impeachment process of a Deputy President aligned with Constitutional requirements.
- iii. Whether the issue of the impeachment of the Deputy President fell within the category of cases where the concept of non-justiciability would prevent the High Court from hearing and deciding the matter.
- iv. Whether the matter disclosed a prima facie case that raised constitutional issues that required further judicial interrogation.
- v. Whether grant of conservatory orders, which prevented the Deputy President nominee from assuming office, would either serve or prejudice public interest.
- vi. Whether it would be impossible to remove the appointee to the Office of the Deputy President, even if the petitions were successful, if conservatory orders were not granted.

### **Held**

1. Article 2(1) of the Constitution was unequivocal, that no person or state organ was above the Constitution. It further affirmed that all state authority must be exercised in strict conformity with constitutional provisions. By virtue of Article 2(4), any act or omission that violated the Constitution was both unlawful and invalid. Those provisions established a clear basis on which the actions and omissions of all state organs must be scrutinized for their constitutionality.
2. The final version of the 2010 Constitution marked a clear departure from previous constitutional drafts regarding the jurisdiction of the Supreme Court. Specifically, the provision granting the Supreme Court exclusive and original jurisdiction over disputes arising from the impeachment of the President was deliberately omitted. The Supreme Court's jurisdiction was strictly re-defined under Article 163(3). Hence, the people of Kenya did not intend to grant such jurisdiction to the Supreme Court. Had that been the intent, the Constitution would have expressly conferred that authority in its final form.
3. The Supreme Court acknowledged that its jurisdiction, as outlined in the Constitution, was exhaustive. That implied that any attempt to expand its jurisdiction beyond what was expressly provided would contradict the Constitution's intent. Even with regard to the special jurisdiction previously conferred by Section 14 of the Supreme Court Act (repealed by section 15 of Act No. 26 of 2022), the Supreme Court was unequivocal in affirming that the provision did not grant Parliament the authority to extend the Court's jurisdiction beyond what was contemplated by the Constitution.
4. The jurisdiction to hear disputes arising from impeachment did not rest with the Supreme Court within the realm of original and exclusive jurisdiction. Instead, such jurisdiction was exercisable within the Supreme Court's appellate jurisdiction.
5. The High Court was vested with a broad scope of somewhat original and residual jurisdiction, under Article 165(5), which granted the court jurisdiction over all matters except those explicitly reserved for the Supreme Court or courts of equal status. That broad jurisdiction demonstrated a deliberate intent by the drafters of the 2010 Constitution to empower the High Court to address matters not expressly covered in the Constitution, ensuring that no legal issues, including impeachment proceedings, fell outside the Court's purview. By vesting the High Court with such extensive authority, the Constitution also guaranteed that gaps in constitutional coverage were filled, allowing the Court to adjudicate on significant issues that could arise within the evolving landscape of governance.
6. The jurisdiction conferred under Article 165(3) extended to adjudicating any alleged infringement of the Bill of Rights and interpreting the Constitution. In that context, Article 165(3)(d)(ii) expressly granted the High Court the authority to determine whether any act purporting to have been done under the authority of the Constitution or any law was inconsistent with, or in contravention of, the Constitution. That reinforced the High Court's pivotal role as the guardian of constitutional integrity, ensuring that all actions by state organs, or individuals, were in full compliance with constitutional dictates.



7. The drafters of the Constitution expressly intended to exclude the High Court from hearing appeals related to tribunals established under Article 144. Given that explicit exclusion, and against the foregoing discussion, if the drafters had similarly intended to bar the High Court from determining disputes under Article 145, they would have done so with equal clarity. Nothing would have been simpler than to expressly exclude such jurisdiction in the same manner. The absence of such an exclusion with respect to Article 145 strongly suggested that the drafters intended for the High Court to retain jurisdiction over those matters.
8. The impeachment of the Deputy President was a constitutional process, as outlined in Article 145 of the Constitution. The authority to determine whether the merits and procedures of such an impeachment process align with constitutional requirements fell squarely within the jurisdiction of the High Court, as provided under Article 165(3)(d)(ii). The role of the Courts in an impeachment process was reiterated by the Supreme Court in *Sonko v Clerk, County Assembly of Nairobi City & 11 others* (Petition 11 (E008) of 2022) [2022] KESC 26 (KLR). While the referenced decision pertained to the impeachment of a Governor, the same constitutional principles applied to the impeachment of a Deputy President. Accordingly, the High Court had the jurisdiction to sit and determine the matter before it.
9. It was evident from the pre-2010 Constitution drafts that the people of Kenya clearly intended for the impeachment process to be a justiciable matter. Each constitutional draft contained provisions affirming that intent. The people of Kenya sought to move beyond a past where the judiciary was often marginalized or bypassed in efforts to check governmental excesses. Instead, they envisioned a new constitutional order in which all branches of government would be held accountable and subject to comprehensive constitutional oversight. That aspiration was central to establishing a balanced system that ensured no arm of government operated beyond scrutiny.
10. The High Court was not convinced, against a wholistic reading of the Constitution, that there was any intention to deliberately place the impeachment power on the legislature with no judicial involvement. To hold otherwise would be to create an absurdity whereby the dictates of the constitution under articles 23, 160 and 165(3)(d)(ii) would be defeated.
11. Kenya's system emphasizes judicial oversight through the Judicial Service Commission which was designed to limit political influence and promote greater judicial independence. There was no textually demonstrable constitutional commitment of the issue of impeachment solely, to any political department or institution. Drawing analogies, the fact that the American context states that the Senate sits to solely try impeachment disputes was a major departure from the 2010 Constitution. Even though the requirements for the two thirds vote and the taking of an oath were identical, the procedure and provisions of the Constitution left no doubt that the Senate was not the sole determinant of the dispute. There were instances in which the Courts would and should interfere with political processes.
12. The crux of the petitioners' case centered on key questions, including whether due process was followed by the National Assembly and the Senate in the impeachment of the 1<sup>st</sup> petitioner, and whether the 1<sup>st</sup> petitioner was afforded sufficient time to prepare his defense against the impeachment charges. Those issues struck at the heart of constitutional and procedural fairness, raising concerns about the extent to which legislative bodies adhered to the standards of due process as outlined in the Constitution.
13. The High Court was called upon to examine whether the procedural safeguards required by the Constitution were observed during the impeachment process, and whether any potential lapses could render the process flawed or unconstitutional. Such an inquiry would involve a careful review of the actions taken by the National Assembly and the Senate to determine if the principles of due process and fair administrative action were upheld.
14. The political question doctrine could not oust the High Court's jurisdiction as granted under Article 165(3). Article 165(3) conferred upon the High Court the authority to hear and determine



- questions regarding the interpretation of the Constitution and the legality of any acts or omissions by State organs. That provision underscored the High Court's critical role in ensuring constitutional compliance, even in politically charged matters.
15. The judiciary's role in impeachment matters was not to take over legislative functions but to ensure that such processes were conducted in a manner that respected constitutional norms and procedural fairness. It reinforced the idea that while the doctrine of separation of powers was crucial, it did not preclude judicial oversight when fundamental constitutional principles were at risk.
  16. The Constitution of Kenya had clearly delineated independent and distinct paths for the three arms of government. Accordingly, the High Court's intervention in the matter before it was warranted, through a very narrow window that allowed for oversight in cases where constitutional infractions were alleged in the impeachment process.
  17. The three main principles for considering an application seeking conservatory orders were as follows:
    1. The need for the Applicant to demonstrate an arguable prima facie case.
    2. Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.
    3. Whether, if an interim conservatory order was not granted, the petition or its substratum would be rendered nugatory.
  18. In determining whether a matter disclosed 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 so doing, a Court must be guided by Articles 22(1) and 258(1) of the Constitution which provisions were on the right to institute Court proceedings whenever a right or fundamental freedom in the Bill of Rights had been denied, violated or infringed, or was threatened or when the Constitution had been contravened, or was threatened with contravention. Hence the consolidated petitions in Cohort No. 1 and Cohort No. 2 still raised constitutional issues that required further judicial interrogation.
  19. In the pre-2010 constitutional era, the President held immense power, including the ability to appoint and dismiss the Vice President at will and the discretion to assign—or withhold—duties for the Vice President. Consequently, the Vice President served entirely at the President's mercy. That was the framework that the 2010 Constitution sought to transform.
  20. Under the 2010 Constitution, the office of the Deputy President was fundamentally redefined. It was safeguarded from arbitrary and capricious actions by the President. Article 147(2) granted the Deputy President specific constitutional functions, in addition to any duties the President could assign. That provision was intended to address the previous situation in which a President could, for any reason, choose not to assign duties to the Deputy President, effectively side lining them. Under the 2010 Constitution, even if the President did not assign additional duties, the Deputy President still had specific, constitutionally mandated functions to perform. In that way, the Deputy President was no longer at the mercy and discretion of the President.
  21. Under the current constitutional framework, when the office of the Deputy President became vacant, two outcomes followed.
    1. First, any functions that were assigned to the Deputy President by the President automatically reverted to the President.
    2. Second, the functions expressly conferred upon the Deputy President by the Constitution did not revert to the President and could not be performed by anyone else.
  22. That was a departure from the 1963 Constitution, under which the President could appoint a Minister to act as Vice President in the Vice President's absence. The 2010 Constitution included no such provision. Therefore, if the office of the Deputy President was vacant, the specific constitutional functions assigned to that office remained unfulfilled. For clarity, not even the Speaker of the National Assembly could discharge the functions vested in the Deputy President under Article 147(2) of the



- Constitution. The current constitutional framework had not envisioned any scenario in which the office of the Deputy President would remain vacant, except during the brief period required to fill such a vacancy.
23. Another equally important provision that added credence to the position that the office of the Deputy President could not be left vacant was Article 146(3) of the 2010 Constitution. Article 150(2) of the Constitution, on the Removal of the Deputy President, stated that the provisions of Articles 144 and 145 relating to the removal of the President shall apply, with the necessary modifications, to the removal of the Deputy President.
  24. A holistic reading of Article 146 alongside Article 150(2) of the 2010 Constitution, and in relation to the filing of a vacancy in the office of the Deputy President in the instant matter, yielded the meaning that the person who assumed the office after the impeachment of the Deputy President shall, unless otherwise lawfully removed from office, hold that office until further orders of the High Court or until the prevailing term of Presidency ended, whichever came first.
  25. The structure of the Constitution, which reflected the popular will of the Kenyan citizens, envisioned a scenario in which the office of the Deputy President would always be filled, except during the brief period required to fill a vacancy.
  26. The purpose of conservatory orders was to preserve the status quo pending further orders of the Court. Maintaining the status quo meant that the 1<sup>st</sup> petitioner remained impeached under Article 145(7), which affirmed the finality of the impeachment process. Additionally, the prevailing status quo was that the Deputy President nominee could not assume office. While such an approach may seem fair, reasonable, and balanced—and one that the Court would ordinarily be inclined to adopt—the unique nature of the Deputy President’s role under the 2010 Constitution suggested a different course.
  27. Allowing those orders to stand would leave the office of the Deputy President vacant. The problem, however, was that no other person was authorized to carry out the constitutional functions specifically assigned to the Deputy President under Article 147(2), once those assigned by the President revert to the President in the absence of an officeholder. The result would be a de facto suspension of Article 147(2) of the Constitution—an outcome that no court should knowingly permit.
  28. No court should issue orders that have the effect of suspending the operation of any provision of the Constitution, as such an outcome was not envisioned by the document itself. The Constitution was not handed to Kenyans on a silver platter; it was achieved through great struggle and sacrifice. Therefore, it was the duty of the Court to uphold its provisions as intended by the framers and as demanded by the people of Kenya.
  29. Article 259 of the Constitution mandated that the document must be interpreted as always speaking. That meant that the Constitution was a living document, designed to address contemporary challenges and to be applied consistently and continuously without interruption. Suspending any provision of the Constitution, even temporarily, would undermine that principle by creating gaps in its operation and disrupting the intended balance of governance.
  30. The Constitution was structured to ensure that all its provisions were effective and operative at all times. If any provision, such as Article 147(2), was rendered dormant by a judicial order, it risked setting a precedent where parts of the Constitution could be selectively "switched off," effectively weakening the Constitution’s authority and the protections it afforded.
  31. Courts were guided by the principle of constitutional supremacy, which required that all judicial decisions aligned with the Constitution’s objectives and upheld its integrity. Issuing an order that suspended a constitutional provision would directly contravene that principle, effectively placing judicial discretion above the supreme law of the land. That would be inconsistent with the spirit of judicial restraint and the Court’s role as a protector—not a modifier—of the Constitution.
  32. The Constitution must remain fully operational at all times, and no court order should have the effect of rendering any part of it inoperative or dormant. The Court’s responsibility was to interpret



and apply the Constitution as a cohesive, functional document that served the people's enduring will and protected the structure of governance as established. Public interest favoured giving way to the Constitution, which in any event was the will of the people. That was also the dictate under Article 3 of the 2010 Constitution where every person had an obligation to respect, uphold and defend the Constitution. Public interest demanded that the office of the Deputy President should not remain vacant.

33. The consolidated petitions challenged the entire impeachment process. The fundamental issues at stake remained live, even though the parliamentary proceedings had been completed. Furthermore, should any of the petitions succeed, the Court would have no shortage of effective remedies to address that situation.
34. No individual could suffer loss or damage when the Constitution was permitted to operate as intended. Allowing the constitutional process to unfold does not, in itself, result in detriment, as it would uphold the rule of law and respects the framework agreed upon by the people.
35. The applicants expressed concern that the respondents had a history of disobeying Court orders and that, once the office of the Deputy President was filled, it would be impossible to remove the appointee even if the Petitions were successful. The High Court could not operate under the assumption that its orders would be disregarded. Kenya had legal mechanisms to address any acts of disobedience. Moreover, the Attorney General, had given an undertaking to comply fully with any orders issued by the Court in the instant matter. The applicants did not stand to suffer any prejudice in the event the conservatory orders were not granted.
36. The matter held significant public interest. The High Court remained committed to an expeditious determination of the petitions.

*Application disallowed.*

#### **Orders**

- i. *The applications for conservatory orders were disallowed;*
- ii. *The conservatory orders issued on October 18, 2024 in Kerugoya HCCP E015/2024 were discharged and/or set aside;*
- iii. *Costs shall be in the cause;*
- iv. *Leave to appeal was granted. Typed proceedings and certified copies of the ruling to be availed to parties at cost or as the case may be;*
- v. *Mention for further directions on the way forward in respect of pending applications and the petitions, on November 7, 2024 at 2:30pm in open court;*
- vi. *The Ruling shall be forthwith uploaded in the Court Tracking System (CTS).*

#### **Citations**

##### **Cases**

##### **Kenya**

1. *Adega & 2 others v Kibos Distillers Limited & 5 others* Petition 3 of 2020; [2020] KESC 36 (KLR) - (Followed)
2. *Attorney-General & 2 others v Ndiu & 79 others; Dixon & 7 others (Amicus Curiae)* Petitions 12, 11 & 13 of 2021; [2022] KESC 8 (KLR) (Consolidated) - (Explained)
3. *Ethics and Anti-Corruption Commission v Tom Ojienda & Associates & 2 others* Civil Application 21 of 2019; [2020] KESC 56 (KLR) - (Explained)
4. *Githunguri, Stanley Munga v Republic* Miscellaneous Criminal Application 180 of 1985; [1985] KEHC 6 (KLR) - (Explained)



5. *Governor, County Government of Kisii & 4 others v Clerk, Kisii County Assembly & 4 others* Civil Appeal E101 of 2024; [2024] KECA 1538 (KLR) - (Explained)
6. *Kenya Airports Authority v Mitu-Bell Welfare Society, Attorney General & Commissioner of Lands* Civil Appeal 218 of 2014; [2016] KECA 432 (KLR) - (Explained)
7. *Kirera v Senate & 8 others* Petition 4 of 2024; [2024] KEHC 7490 (KLR) - (Explained)
8. *Kiriro Wa Ngugi & 19 others v Attorney General, Cabinet Secretary, Foreign Affairs & Kenya International Boundaries Office* Petition 254 of 2019; [2020] KEHC 8819 (KLR) - (Explained)
9. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR) - (Followed)
10. *Mate & another v Wambora & another* Petition 32 of 2014; [2017] KESC 1 (KLR) - (Explained)
11. *Mohamed & 6 others v County Assembly of Wajir & 9 others* Constitutional Petition E009 & E017 of 2021 (Consolidated); [2022] KEHC 169 (KLR) - (Explained)
12. *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* Civil Appeal 39 of 2002; [2003] KECA 175 (KLR); [2003] KLR 125 - (Explained)
13. *Munya v Kithinji & 2 others* Application 5 of 2014; [2014] KESC 30 (KLR) - (Followed)
14. *Owners of the Motor Vessel "Lillian S v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] KECA 48 (KLR); [1989] KLR 1 - (Followed)
15. *Ramogi, William Odhiambo & 2 others v Attorney General & 6 others* Constitutional Petition 159 of 2018; [2018] KEHC 9718 (KLR) - (Explained)
16. *Republic v Chengo & 2 others* Petition 5 of 2015; [2017] KESC 15 (KLR) - (Explained)
17. *Sonko v County Assembly of Nairobi City & 11 others* Petition 11 (E008) of 2022; [2022] KESC 76 (KLR) - (Followed)
18. *Wambora, Martin Nyaga & 2 others v Speaker of the Senate & 6 others* Civil Appeal 21 of 2014; [2014] KECA 377 (KLR) - (Explained)

### **South Africa**

*Economic Freedom Fighters and others v Speaker of the National Assembly & others* (21471/2014) [2018] ZAWCHC 4; [2018] 2 All SA 116 (WCC) (29 January 2018) - (Explained)

### **United States**

1. *Marbury v Madison* 5 US 1 Cranch 137 (1803) - (Explained)
2. *Nickson v United States* 506 US 224 (1993) - (Explained)

### **Texts**

1. Baron De Montesquieu (Ed) (1750), *L'Esprit Des Lois (The Spirit of Laws)* Michigan: Lonang Institute
2. Franceschi, LG., Lumumba, PLO., (Eds) (2019), *Constitution of Kenya: Commentary* Nairobi: Strathmore University Press 2nd Ed p 453
3. Garner, BA., Black, HC., (Ed) (2014), *Black's Law Dictionary* St Paul, Minnesota: Thomson Reuters 10th Edn

### **Statutes**

#### **Kenya**

1. Constitution of Kenya articles 1, 2(1); 2(4); 3; 10; 23(3); 25(1)(c); 35; 47; 50(1); 73(1); 88(4); 99; 118; 130; 131; 137; 144; 145(2); 145(3); 145(7); 146(2); 147(2); 149; 150(2); 160; 163(3); 165(3); 165(3)(d)(ii); 165(5); 168(8); 179; 186; 201; 259 - (Interpreted)
2. Constitution of Kenya (Repealed) sections 4; 6; 15 - (Interpreted)
3. Independent Electoral and Boundaries Commission Act (cap 7C) section 7(3) - (Interpreted)
4. Supreme Court (Amendment) Act, 2022 (Act No 26 of 2022) section 15 - (Interpreted)
5. Supreme Court Act (cap 9B) section 14 - (Interpreted)

#### **United States**



Constitution of the United States article 1; section 3; clause 6 - (Interpreted)

### **Advocates**

*Paul Muite*, Senior Counsel, for the 1<sup>st</sup> petitioner.

*Mr Elisha Ongoya, Mr macharia, Mr Kibe Mungai, Mr Ogada, Mr Njeru, Mr Wambui Shadrack, Ms Waitthera Wangila, Mr Omari, Mr Omoke* and *Mr Wathutta* for the petitioners.

*Mr Gumbo* for the 2nd respondent.

*Prof Ojienda* , Senior Counsel, for the 4th respondent.

*Prof Githu Muigai*, Senior Counsel, for the 5th respondent.

*Mr Mahat Somane* for the 16th respondent.

*Mr Muthomi Thiankolu* for the 2nd interested party.

## **RULING**

### **Background**

1. On October 17, 2024, the Senate voted to confirm a resolution by the National Assembly and impeached the 1<sup>st</sup> petitioner. Consequently, on October 18, 2024, the National Assembly approved the President's nomination of Prof Kithure Kindiki to fill the vacancy in the Office of the Deputy President vide gazette notice No Vol CXXV1-No. 171.
2. On October 18, 2024, this court, (C Mwita, J), granted conservatory orders to stay the implementation of the Senate's resolution and suspend the appointment of the 1<sup>st</sup> petitioner's replacement until October 24, 2024, when the matter was set to be mentioned before this Bench. By operation of law, and in the absence of any extension, the above conservatory orders lapsed on October 24, 2024, leaving the conservatory orders that had been issued in Kerugoya HCPET E015/2024 on October 18, 2024 by R Mwongo, J, still subsisting. That is the pretext against which this ruling is delivered.
3. A second application dated October 18, 2024 was filed by the 1<sup>st</sup> petitioner, equally seeking conservatory orders against the President and the National Assembly from filling the vacancy in the Office of the Deputy President.
4. Following directions issued by this court, two other applications were filed, the application dated October 18, 2024 filed in HCPET E565/2024 by the 5<sup>th</sup> respondent (supported by the 3<sup>rd</sup> and 4<sup>th</sup> respondents) and the application dated October 18, 2024 filed in HCPET E565/2024 by the 2<sup>nd</sup> respondent were treated as responses to the above applications of October 18, 2024. These applications sought to set aside, lift and vary the conservatory orders.
5. The following is a summary of the case presented by both sides, which, for clarity and ease of reading, has been organized into the petitioners' and respondents' arguments.

### **The Petitioners' Case**

6. The petitioners argue that the petitions filed before this court demonstrate a *prima facie* case with a likelihood of success. They contend that the petitions raise significant questions about the basis on which the Senate substantiated the charges for the 1st petitioner's removal, the lack of public participation, and the infringement of the 1st petitioner's rights under article 50(1).
7. They take issue with the impeachment process having contravened the standards set out by the Court of Appeal in *Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others* (2014) eKLR. More



particularly, they view the rush and unprecedented speed with which the process was carried out as a ploy to deny the 1<sup>st</sup> petitioner a fair process. The other particularized grounds averred by the petitioners are that the National Assembly relied on new grounds that were not in the special motion before it and that article 145(2) and (3) were not complied with.

8. They contend further that there will be no prejudice suffered by the respondents or any other person if conservatory orders are granted, so as to preserve the substratum and enable this court to determine the substantive issues. It is their case that the conservatory orders would also sustain and preserve the court's judicial mandate as well as ensure that the substratum of the petitions is not rendered nugatory, as was appreciated by this court when the *ex parte* orders were issued.

### **The Respondents' Case**

9. The respondents oppose the petitioners' applications on grounds that the conservatory orders are greatly prejudicial to the citizens of Kenya as the public interest tilts to the nation having a substantive holder in the position of Deputy President. They term it inconceivable under the [Constitution](#) for there to be a vacuum and uncertainty in the Office.
10. The respondents also argue that in any case, the impeachment process had followed due process as laid out in the [Constitution](#) and respective Standing Orders and that adequate measures were taken to ensure public engagement within the required timeframe as per articles 10 and 118 of the [Constitution](#).
11. The respondents are also aggrieved by the *ex parte* orders, which they argue have caused them significant prejudice by denying them the right to a hearing. They contend that, in cases where public interest conflicts with private interest, the scales of justice should tip in favor of the public interest. This principle is supported by article 1 of the [Constitution](#), which states that sovereign power belongs to the people of Kenya.
12. They argue that the conservatory orders contravene the legal principle that presumes the legality and regularity of all government actions under the doctrine of *omnia praesumuntur rite et solemniter acta*, which means that all acts are presumed to be done rightly and regularly. They also contend that there would be no irreparable harm to the petitioners that cannot be remedied through the ordinary judicial process.
13. The respondents deny the claims of inadequate public participation and alleged constitutional and procedural flaws in the impeachment process which they state have not been substantiated and that they are unfounded and unsupported by evidence.
14. For these reasons it is averred that the applications have not met the test set out for the grant of conservatory orders according to the Supreme Court decision in [Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others](#) (2014) eKLR.
15. In addition to the responses above, the 16<sup>th</sup> respondent contends that the IEBC, which is established by the [Constitution](#), retains its legality even with vacancies, as per section 7(3) of the [Independent Electoral and Boundaries Commission Act](#). It was clarified that the IEBC commissioners handle policy and strategy, while the Secretariat, led by the CEO, manages daily administration and policy implementation.
16. The 16<sup>th</sup> respondent further argues that it is not legally required to clear nominees under article 149 of the [Constitution](#) even though article 99 and article 137 stipulate that presidential candidates must be registered voters, a function overseen by the 16<sup>th</sup> respondent per article 88(4) and the [IEBC Act](#). This voter information is accessible under article 35 of the [Constitution](#).



17. Finally, in response to the application for conservatory orders, the 2<sup>nd</sup> respondent filed a notice of preliminary objection dated October 21, 2024. The objection argues that the jurisdiction of this court was improperly invoked on the grounds that the petitions and the applications concern matters beyond the scope of judicial intervention. As such, the 2<sup>nd</sup> respondent contends that the dispute as outlined is non-justiciable and violates the political question doctrine. In the alternative, the 2<sup>nd</sup> respondent further contends that in so far as the petitions and applications pertain to issues related to the election, removal, and eligibility to hold or occupy the office of the Deputy President, jurisdiction to hear and determine the dispute if at all, lies in the Supreme Court.

### **The Petitioners' Submissions**

18. We have summarized the written and oral submissions by the parties, which largely reflect the respective cases outlined above, to avoid unnecessary repetition. For clarity and ease of reading, we highlight the main points of the submissions from both sides.
19. Senior Counsel Paul Muite for the 1<sup>st</sup> petitioner reminded court that the purpose of conservatory orders is to preserve the substratum of the petition, which seeks to quash the impeachment of the Deputy President by the Senate.
20. Counsel Mr Elisha Ongoya submitting on the same emphasized on the need for an extension of the conservatory orders to halt the resolution of the senate made on October 17, 2024. He cited the decision in *Githunguri v R* emphasizing on this opportunity for the Judiciary to raise up and right the wrongs that had been committed by the respondent and not to perpetuate the wrongs.
21. Counsel noted that although article 179 of the *Constitution* prescribes 74 days to fill a vacancy in the office of the Deputy President, there was an unusual rush to fill the position noting that IEBC cleared the nominee at night without adequate transparency and accountability. Counsel also argued, citing article 149(1) of the *Constitution*, that the public was not given an opportunity to comment on the suitability of Prof Kindiki Kithuri.
22. Counsel cited article 23(3) of the *Constitution* to argue that this court has the authority to grant appropriate relief to enforce a fundamental right. He submitted that the case raises significant public interest issues, which is why the judge referred it to the Chief Justice for the empanelment of a bench. Therefore, he contended that the matter has inherent merit and that the conservatory orders should be extended.
23. Mr Macharia argued for fair administration of justice and administrative action, stating that adequate notice was not given, in violation of rules of natural justice. He emphasized that, under the *audi alteram partem* doctrine, a party cannot be condemned unheard. He cited the cases of *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* and *Mike Mbuvi Sonko v County Assembly of Nairobi City & 11 others* (Petition 11 (E008) of 2022) [2022] KESC 76 (KLR) (5 December 2022) (hereinafter 'Martin Wambora case' and 'Sonko case' respectively).
24. He further argued that swearing in another Deputy President would render their actions unconstitutional and result in public funds being spent. He referenced the *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR case (hereinafter 'The Peter Munya case').
25. Mr Kibe Mungai argued in addition, that swearing in the nominee for Deputy President would be a mockery of justice. He maintained that instead, the court must confirm the validity of the process, which is why the conservatory orders should be extended to preserve the case's subject matter. Counsel further asserted that in order to achieve substantial justice, the law must be interpreted and applied in



- a way that upholds public interest and ensures that the integrity of the presidential succession is not undermined.
26. Mr Ogada argued that legislation reflects the will of the majority and that the political doctrine applies within the context of the 2010 *Constitution of Kenya*. He cited *Attorney-General & 2 others v Ndiir & 79 others; Dixon & 7 others (Amicus Curiae)* (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR), in concurrence with the submission that conservatory orders are intended to protect the subject matter.
  27. Counsel further submitted that if the nominee is sworn in, the court's proceedings would become an academic exercise. He referenced *Ethics and Anti-Corruption Commission v Tom Ojienda & Associates & 2 others* (Civil Application 21 of 2019) and argued that the *Constitution* is the highest embodiment of public interest, which favours in this case, that the conservatory orders be confirmed.
  28. Mr Njeru concurred with these submissions, further noting that IEBC, in giving approval to the Deputy President Nominee, had no capacity to do so by dint of article 99 of the *Constitution*. He further emphasized the legitimate expectation that the electorate had, that the Deputy President will remain in office until the next election arguing that there were pertinent issues for consideration.
  29. Mr Wambui Shadrack and Ms Waithera Wangila submitted that the court should arrest the threat to the violation of fundamental freedom noting that the doctrine of separation of powers is not an absolute concept and that the court should retain the conservatory orders so as to determine whether there was a wrong committed.
  30. Mr Omari challenged the public participation purportedly held, especially for having been conducted on a Saturday and therefore adequate. Mr Omoke supported this position, informing the court that he personally attended a public participation event at Kiambu Social Hall and found the process insufficient, which led to his decision to join the petition.
  31. Mr Wathutta emphasized that in any case, there is no vacancy in the executive office and that clear constitutional provisions are provided for to take care of any such lacuna.
  32. Dr Eboso, a petitioner acting in person submitted that lifting of the orders will limit the right of the petitioners to a fair trial and would be an exercise in futility, referring to the circumstances in the *Wajir case* where the impeachment of the Governor was found to be unlawful, leading to his reinstatement. He warned of similar circumstances in this case. The argument for *status quo* was equally supported by Mr. Musungu who reiterated the need for a fair trial as a constitutional right.

### **The Respondents' Submissions**

33. Prof Githu Muigai, Senior Counsel, for the Attorney General, argued that when the Speaker of the Senate gazetted the removal of the Deputy President on October 17, 2024, the office became vacant under article 145(7). He noted that on October 18, 2024, Prof Kithure Kindiki was confirmed as Deputy President by the National Assembly after being nominated by the President, making the conservatory orders issued by the High Court in Kerugoya and Nairobi redundant.
34. Counsel contended that these orders were effectively mandatory injunctions, not recognized as conservatory orders under the *Constitution*, since the Senate's decision was final, and the Deputy President no longer held office. He also emphasized that the President acted within the law when appointing a nominee, with the process protected by legal provisions.



35. Senior Counsel highlighted that impeachment is a *sui generis* process that is political and not civil or criminal, and occurs within the Senate. He referred to *Kiriro Wa Ngugi & 19 others v Attorney General & 2 others* [2020] eKLR, stressing that not all disputes are fit for constitutional resolution.
36. He also argued that leaving the Deputy President's office vacant would be unconstitutional, citing the decision in *County Government of Kisii & 2 others v The IEBC* 2024 eKLR, where the court held that delays in filling such vacancies are unacceptable. Lastly, he referred to *Mohammed & 6 others v County Assembly of Wajir & 9 Others* (Constitutional Petition No E009 & E017 of 2021) to show that the *Constitution* has self-correcting mechanisms, ensuring certainty and stability when an official is wrongly impeached.
37. Prof Ojienda Senior Counsel, representing the Senate, rebutted claims that the impeached Deputy President was denied a fair hearing. He argued that after the Speaker received the notice on October 9, 2024, the 1<sup>st</sup> Petitioner was given adequate notice to submit documents and defend himself, in compliance with articles 47 and 25(1)(c) on fair trial and administrative action. Hearing dates were publicized, and all parties were informed of the two-day proceedings, during which the 1<sup>st</sup> Petitioner was given the opportunity to present his case, supported by his legal team.
38. Counsel emphasized that the Senate, acting as a trial chamber, allowed the 1<sup>st</sup> petitioner to cross-examine witnesses and actively participate. He noted that although the 1<sup>st</sup> petitioner claimed illness on October 17, 2024, without providing a medical report, he was represented by his Advocates and was granted an adjournment. The Senate followed its Standing Orders, and the 1<sup>st</sup> petitioner's actions were seen as self-sabotage.
39. Prof Ojienda argued that public interest requires the Deputy President's position to be filled at all times and that conservatory orders would contradict this principle. He asserted that an interregnum was not permissible under the *Constitution*. Citing the *Peter Munya Case*, he stated that avoiding an interregnum was essential for stability, supporting the swearing-in of Prof Kithure Kindiki.
40. Counsel further posited that the appropriate remedy for the 1<sup>st</sup> petitioner would be compensation, as litigation could paralyze the country. Referencing the *Sonko* case, he highlighted that the court had upheld the Senate's impeachment decision, showing that the process was justifiable if procedurally correct. Prof Ojienda concluded by urging the court to lift the conservatory orders, emphasizing that the greater public interest favored confirming Hon Prof Kithure Kindiki as Deputy President.
41. Mr Muthomi Thiankolu representing the 2nd interested party, Prof Kithure Kindiki, argued that under articles 23 and 165 of the *Constitution*, this court lacks jurisdiction over impeachment disputes involving the President and Deputy President. He maintained that, even if his primary argument was incorrect, only the Supreme Court could potentially have jurisdiction, as indicated in articles 186 and 201 of earlier constitutional drafts, such as the Bomas and Harmonized Drafts.
42. He noted that the Wako Draft, which envisioned the Supreme Court's jurisdiction over impeachment, was rejected by the public, reflecting their decision against judicial intervention in impeachment processes. The final 2010 *Constitution* omitted any clause granting jurisdiction to either the High Court or the Supreme Court for impeachment, implying that the people of Kenya did not intend for courts to intervene.
43. Counsel emphasized that jurisdiction must be explicitly conferred and cannot be implied through interpretation. He cited article 165(3)(c) alongside article 144 to show that the High Court's jurisdiction does not extend to presidential removal matters. He argued that without express jurisdiction, this court cannot preside over impeachment cases.



44. He referred to the US case *Nickson v. United States*, noting its relevance due to Kenya's adoption of similar impeachment procedures. He pointed out that, as per that decision, an issue is non-justiciable when it is constitutionally committed to another branch of government, such as impeachment being committed to the Senate under article 145 of the Kenyan *Constitution*.
45. In conclusion, Mr Thiankolu urged the court to find that it lacks jurisdiction and to dismiss the conservatory orders. Alternatively, if jurisdiction were inferred, he argued that it would belong to the Supreme Court to resolve the matter definitively.
46. Mr Gumbo, representing the National Assembly, argued that the only relevant issue before the court pertains to the swearing-in of the Deputy President designate, as no live prayer remains regarding the conservatory orders. He highlighted article 145(7) of the *Constitution*, asserting that the Senate's decision to remove the Deputy President is self-executing, and thus the High Court lacks the authority to issue an order stopping it.
47. Counsel stated that the Deputy President, once impeached, acquires a constitutional blemish under chapter 6 on leadership and integrity, rendering them unsuitable for office as per article 73(1). He argued that the Deputy President effectively loses the capacity to hold office after impeachment.
48. On public interest, Mr Gumbo cited article 146(2), noting that in case of a presidential vacancy, Kenyans expect continuity of leadership through the Deputy President or, in their absence, the Speaker to guide the country toward elections. He emphasized that constitutional principles operate in a political context with inherent competition, where the court's role is to ensure a stable transition.
49. Counsel concluded by urging the court to apply the concept of utilitarianism to maintain national stability and facilitate the country's progression.
50. On his part, learned counsel Paul Nyamodi argued that the primary beneficiary of the conservatory order is the court itself, as it ensures that the final orders made by the court are effective. He asserted that reviewing the merits of the impeachment process is outside the court's scope, as the current petition pertains to a completed process.
51. Counsel noted that the Senate confirmed 5 out of 11 impeachment grounds, focused on the "shareholder argument," which the Deputy President did not contest. This admission, he argued, weakens the 1<sup>st</sup> petitioner's position to challenge the Senate's decision. Citing the case of *Kirera v Senate & 8 others* [2024] KEHC 7490 (KLR), he emphasized that similar proceedings support the case's context. He mentioned that in the impeachment of the Deputy Governor of Kisii County, conservatory orders required all conditions to be met conjunctively and that the same had not been met in this case.
52. Mr Nyamodi highlighted that the impeachment process had run its full course and argued that compensation or reinstatement would be adequate remedies for wrongful removal, referencing the *Mohammed & 6 others v County Assembly of Wajir & 9 others* (Constitutional Petition No E009 & E017 of 2021). He concluded that public interest supports having the Deputy President's office occupied, reflecting the people of Kenya's right to continuous leadership.
53. Mr Wanyama argued that conservatory orders under article 23 of the *Constitution* are discretionary and require sufficient evidence from the petitioner. He noted that the test for granting such orders is flexible and involves balancing inherent merits and proportionality. Citing the *Sonko case*, he submitted that the applicants had not met the minimum threshold and urged the court to exercise restraint.



54. Mr Muchemi, focusing on public interest, highlighted that the position is crucial as the Deputy President chairs the Inter-Governmental Budget and Economic Council. This, he stated, is an essential member of the National Security Council, which cannot function properly without the Deputy President. He argued that allowing the Deputy President's office to remain vacant contradicts constitutional provisions under articles 130 and 131, where the President is deputized by the DP. He referenced Executive Order No of 2023, which mandates the Deputy President to lead cabinet committees and coordinate budget issues, emphasizing that these responsibilities are currently unfulfilled.
55. Mr Mahat Somane, representing the IEBC, stated that while the conservatory orders being enjoyed are in *personam*, their impact is in *rem*. He urged the court to follow the standard for conservatory orders set in The *Munya case*. Regarding the consideration of whether the case would be rendered nugatory, he noted that the IEBC has no constitutional role to play under article 149.

### Analysis and Determination

56. Mr Wanyama argued that conservatory orders under article 23 of the *Constitution* are discretionary and require sufficient evidence from the petitioner. He noted that the test for granting such orders is flexible and involves balancing inherent merits and proportionality. Citing the *Sonko Judgment*, he claimed that the applicants had not met the minimum threshold and urged the court to exercise restraint.
57. Mr Muchemi, focusing on public interest, highlighted that the Deputy President is crucial for chairing the Inter-Governmental Budget and Economic Council and is an essential member of the National Security Council, which cannot function properly without the DP. He argued that allowing the Deputy President's office to remain vacant contradicts constitutional provisions under articles 130 and 131, where the President is deputized by the DP. He referenced Executive Order No of 2023, which mandates the DP to lead cabinet committees and coordinate budget issues, emphasizing that these responsibilities are currently unfulfilled.
58. Mr Mahat Somane, representing the IEBC, stated that while the conservatory orders being enjoyed are in *personam*, their impact is in *rem*. He urged the court to follow the standard for conservatory orders set in The *Munya Case*. Regarding the consideration of whether the case would be rendered nugatory, he noted that the IEBC has no constitutional role under article 149. Having carefully considered the applications, the responses, the submissions and the decisions referred to, we hereby distil the following issues for determination: -
- i. Whether this court has jurisdiction over the consolidated petitions;
  - ii. If (i) above is answered in the affirmative, whether the matters raised in the consolidated petitions are justiciable;
  - iii. If (ii) above is also answered in the affirmative, whether the conservatory orders in place should be confirmed.
59. In dealing with the above issues, we remain mindful that we are primarily engaged in a constitutional interpretation process and that we must stay true to the established principles of interpretation. We have thoroughly examined and rendered ourselves on the appropriate approach to constitutional interpretation in ruling No. 1, issued in Petition No E522 of 2024 [as consolidated in Cohort No. 1 Petitions and hereinafter referred to as 'ruling No 1']. We, therefore, adopt that analysis as part of this ruling by way of reference as we see no need to rehash the discussion herein.
60. We will now deal with the issues for determination in seriatim.



**(i) Whether this court has jurisdiction over the consolidated petitions;**

61. The first preliminary issue that was raised before us is the jurisdiction of this bench. While it has been argued that the court has already determined this matter, rendering it *res judicata*, we believe it is necessary to revisit the issue due to the new arguments that have emerged during the submissions, and in light of the unprecedented nature of the case before us. We find it prudent to further clarify our jurisdiction, so as to ensure that the issue receives the comprehensive and careful consideration it deserves.
62. In determining this preliminary issue, we are reminded of the authoritative words of Nyarangi JA in the widely celebrated case of *Owners of the Motor Vessel "Lillian S" v. Caltex Oil Kenya Limited* [1989] KLR 1, reminding us that without jurisdiction a court has no power and must down tools in respect of the matter in question. This principle has since been reaffirmed in numerous landmark decisions by the Supreme Court, underscoring its centrality to the exercise of judicial authority.
63. In *Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] KESC 8 (KLR), the Supreme Court was unequivocal in its holding that: -
- “A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law”.
64. Likewise, in *Adega & 2 others v Kibos Distillers Limited & 5 others* (Petition 3 of 2020) [2020] KESC 36 (KLR) the court again emphasized as follows: -
- “A court, even this court, cannot arrogate itself jurisdiction through crafts of interpretation ... and a court ought to exercise its powers strictly within the jurisdictional limits”.
65. We find it necessary to address the issue of jurisdiction by examining the historical context of Kenya’s constitutional drafting process, as highlighted by learned counsel Dr Thiankolu in his submissions. Counsel presented the court with excerpts from earlier drafts of the Constitution, tracing the evolution that led to the promulgation of the 2010 Constitution.
66. Notably, in all these earlier drafts, express jurisdiction was conferred on the Supreme Court to hear and determine disputes arising from the impeachment process. However, in the final promulgated 2010 Constitution, this specific provision was deliberately omitted. Based on this historical backdrop, counsel submits that, even if this court were to find that the dispute is justiciable (a matter we address under the second preliminary issue), jurisdiction should lie with the Supreme Court, not this court.
67. We have carefully considered this argument, which the petitioners opposed. Article 2(1) of the Constitution is unequivocal, that no person or state organ is above the Constitution. It further affirms that all state authority must be exercised in strict conformity with constitutional provisions. By virtue of article 2(4), any act or omission that violates the Constitution is both unlawful and invalid.



68. This establishes a clear basis on which the actions and omissions of all state organs must be scrutinized for their constitutionality. The bone of contention is whether that jurisdiction can be exercised by this court or the Supreme Court in the case before us.
69. As we have already noted, the final version of the 2010 *Constitution* marks a clear departure from previous constitutional drafts regarding the jurisdiction of the Supreme Court. Specifically, the provision granting the Supreme Court exclusive and original jurisdiction over disputes arising from the impeachment of the President was deliberately omitted. The Supreme Court’s jurisdiction is now strictly re-defined under article 163(3).
70. This leads us to the firm conclusion that the people of Kenya did not intend to grant such jurisdiction to the Supreme Court. Had that been the intent, the *Constitution* would have expressly conferred this authority in its final form.
71. The Supreme Court has itself acknowledged that its jurisdiction, as outlined in the *Constitution*, is exhaustive. This implies that any attempt to expand its jurisdiction beyond what is expressly provided would contradict the *Constitution*'s intent. In *Macharia & another v Kenya Commercial Bank Limited & 2 others* [supra] the court firmly held that:
- “Article 163 of the *Constitution* provides for the jurisdiction of the Supreme Court in exhaustive terms, though leaving room for Parliament to prescribe further appellate jurisdiction in terms of article 163(3)(b)(ii), which stipulates that the Supreme Court shall have appellate jurisdiction to hear and determine appeals “from any other court or tribunal as prescribed by national legislation.” the *Constitution* also confers jurisdiction upon the Supreme Court to hear and determine an appeal from a judge who has been recommended for removal under article 168(8). As far as we are aware, Parliament has yet to confer any further appellate jurisdiction upon the Supreme Court in terms of article 163(3)(b)(ii) above”.
72. Even with regard to the special jurisdiction previously conferred by section 14 of the *Supreme Court Act* (repealed by section 15 of *Act No 26 of 2022*), the Supreme Court was unequivocal in affirming that this provision did not grant Parliament the authority to extend the court’s jurisdiction beyond what is contemplated by the *Constitution*. The court expressed its position clearly in *Macharia & another v Kenya Commercial Bank Limited & 2 others* [supra] as follows:-
- “What is the proper province of article 163(9) of the *Constitution*? Does the article contemplate a situation where Parliament can confer further jurisdiction upon the Supreme Court? We hold that it doesn’t. The Act contemplated by article 163(9) is operational in nature. Such an Act was intended to augment the rules made by the Supreme Court for the purpose of regulating the exercise of its jurisdiction. It is an Act that must confine itself to the administrative aspects of the court. It is a law that addresses the manner in which the Supreme Court exercises its jurisdiction as conferred by the *Constitution* or any other legislation within the meaning of article 163(3)(b)(ii). Such an Act was never intended to create and confer jurisdiction upon the Supreme Court beyond the limits set by the *Constitution*”.
73. From this analysis, we have come to the conclusion that the jurisdiction to hear disputes arising from impeachment does not rest with the Supreme Court within the realm of original and exclusive jurisdiction. Instead, such jurisdiction is exercisable within the Supreme Court’s appellate jurisdiction.



74. We now turn to the jurisdiction conferred on the High Court under article 165(3) of the *Constitution*. Notably, the High Court is also vested with a broad scope of somewhat original and residual jurisdiction, under article 165(5), which grants the court jurisdiction over all matters except those explicitly reserved for the Supreme Court or courts of equal status.
75. This broad jurisdiction demonstrates a deliberate intent by the drafters of the 2010 *Constitution* to empower the High Court to address matters not expressly covered in the *Constitution*, ensuring that no legal issues, including impeachment proceedings, fall outside the court's purview. By vesting the High Court with such extensive authority, the *Constitution* also guarantees that gaps in constitutional coverage are filled, allowing the court to adjudicate on significant issues that may arise within the evolving landscape of governance.
76. Within this framework, the jurisdiction conferred under article 165(3) extends to adjudicating any alleged infringement of the Bill of Rights and interpreting the *Constitution*. In this context, article 165(3)(d)(ii) expressly grants the High Court the authority to determine whether any act purporting to have been done under the authority of the *Constitution* or any law is inconsistent with, or in contravention of, the *Constitution*. This reinforces the High Court's pivotal role as the guardian of constitutional integrity, ensuring that all actions by state organs, or individuals, are in full compliance with constitutional dictates.
77. A closer examination of the *Constitution* confirms that the drafters expressly intended to exclude the High Court from hearing appeals related to tribunals established under article 144. Given this explicit exclusion, and against the foregoing discussion, if the drafters had similarly intended to bar the High Court from determining disputes under article 145, they would have done so with equal clarity. Nothing would have been simpler than to expressly exclude such jurisdiction in the same manner. The absence of such an exclusion with respect to article 145 strongly suggests that the drafters intended for the High Court to retain jurisdiction over these matters.
78. This approach to interpretation, whereby jurisdiction is said to be unlimited in the absence of any explicit limitation, is supported by the Supreme Court's decision in *R v Karisa Chengo* [2017] eKLR. The court stated as follows: -
- “The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.”
79. It is undisputed that the impeachment of the Deputy President is a constitutional process, as outlined in article 145 of the *Constitution*. The authority to determine whether the merits and procedures of such an impeachment process align with constitutional requirements falls squarely within the jurisdiction of the High Court, as provided under article 165(3)(d)(ii).
80. The role of the courts in an impeachment process was reiterated by the Supreme Court in *Sonko v Clerk, County Assembly of Nairobi City & 11 others* (Petition 11 (E008) of 2022) [2022] KESC 26 (KLR). The court rendered itself as follows: -
- “It is quite clear to us that a constitutional mandate, which embodies the remit of impeachment, vests in the legislative branches of Government. In the instant case in the County Assembly and the Senate. It is in these two constitutional organs' exclusive spheres



of jurisdiction, that the impeachment of a County Governor is reposed. In discharging this function, they must live by the edict of the *Constitution*. Where it is alleged that any of them has failed to act in accordance with the *Constitution*, then the courts are empowered by article 165(3)(d)(ii) to determine that allegation. Similarly, the court may interfere where it has been demonstrated that there has been a failure to abide by the Standing Orders of either the County Assembly or the Senate, because these Standing Orders have a constitutional underpinning in article 124.”

81. The court went on to state as follows: -

“The impeachment architecture in the *Constitution*, the law and the standing orders leaves no doubt that removal of a Governor relates to accountability, political governance and personal responsibility and not necessarily about criminal responsibility. It follows that in so far as the process of removal of a Governor from office is concerned, the court’s role is confined to deciding whether the Governor’s constitutional rights and fundamental freedoms have been breached in the process and whether the procedures for removal from office have been followed, without the court constituting itself into any of the two constitutional organs in whose hands the power to remove is vested”.

82. While we acknowledge that the referenced decision pertains to the impeachment of a Governor, we maintain that the same constitutional principles apply to the impeachment of a Deputy President.

83. Accordingly, we hereby find and hold that this court has the jurisdiction to sit and determine the matter before it.

**(ii) Whether the matters raised in the consolidated Petitions are justiciable;**

84. Ordinarily, an application for conservatory orders concerning the subject matter of a suit is relatively straightforward, as the law in this area is well established. However, the current applications before the court are far from routine. These applications are imbued with political maneuvering between the applicants and the respondents. In essence, power struggles involving other constitutional organs have been brought before this Court for a legal resolution. As a result, this court has become the stage upon which political excesses are to be examined and resolved. Inevitably, such cases evoke intense emotions.

85. The impeachment case of the 1st petitioner currently before this court exemplifies the dilemma faced by the judiciary when handling cases that straddle the line between legal and political domains. There is no doubt that many are watching to see how the court will navigate this delicate issue, one that has significant implications for the doctrine of separation of powers among the three arms of government.

86. Answering this issue requires a brief analysis of the doctrine of separation of powers in relation to the doctrine of justiciability. French political philosopher Montesquieu first formulated the doctrine of separation of powers through his seminal work, *L’Esprit Des Lois (The Spirit of Laws)* published in 1748. Montesquieu argued that such separation limits the possibility of arbitrary excesses by the government since the sanction of all three branches is required for the making, executing and administering of laws.

87. The *Constitution of Kenya* 2010 clearly delineates the three arms of government, each with its own distinct personnel and roles, as set out under chapters 8, 9, and 10. Chapter 8 establishes the Legislature, and details its composition, functions, and powers as the law-making body of the government. Chapter 9 outlines the structure and functions of the Executive, whose primary role is implementing and enforcing laws and policies. Chapter 10 focuses on the Judiciary. It defines the structure of the courts



and lays out the Judiciary's mandate as the arbiter of disputes and the guardian of the Constitution, tasked with interpreting and applying the law impartially.

88. While the provisions regarding judicial power under chapter 10 of the Constitution are clearly defined, the political question doctrine (also referred to as the non-justiciability doctrine) highlights the limitations on the judiciary's role in adjudicating matters that fall within the purview of other branches of government. This doctrine essentially asserts that certain issues are not suitable for judicial determination because they are better addressed by the legislative or executive branches, which have the constitutional mandate and expertise to handle them.
89. The Black's Law Dictionary, 10th Edition, at page 943-944 defines justiciability as a matter that is  
“proper to be examined in courts of justice” or “a question as may properly come before a tribunal for decision”.
90. There is an abundance of judicial pronouncements expounding on the doctrine of the political question. For instance, in Marbury v Madison, 5 US (1 Cranch) 137 (1803), Chief Justice John Marshall established the principle that while the courts have the authority to interpret the law, certain political questions are outside the scope of judicial review. The case underscored that where the Constitution assigns duties to the other branches of government and does not provide standards for the judiciary to assess those duties, the matter is deemed non-justiciable.
91. Closer home, in William Odhiambo Ramogi & 2 others v Attorney General & 6 others, Mombasa High Court Petition No 159 of 2018 [2018] eKLR, the five-judge bench observed as follows:  
“[79] ... The “justiciability” doctrine is rooted in both constitutional and prudential considerations and evinces respect for the separation of powers, including a properly limited role of the courts in a democratic society. One justiciability concept is the “political question” doctrine—according to which courts should not adjudicate certain controversies because their resolution is more proper within the political branches.  
[80] In Baker v Carr 369 US 186 (1962) the United States Supreme Court outlined six matters that could present political questions as follows:  
(1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or  
(2) a lack of judicially discoverable and manageable standards for resolving it; or  
(3) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or  
(4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due to coordinate branches of government; or  
(5) an unusual need for unquestioning adherence to a political decision already made; or  
(6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”



92. Additionally, the Court of Appeal in *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* held that:

“With this in mind, the role of the legislature is to make laws and policy and that of the executive is to implement those laws and policies. The role of the judiciary is to interpret the policies and laws as enacted and approved by the legislature and executive. Generally, courts have no role to play in policy formulation; formulation of government policy is a function best suited for the executive and legislature”.

93. In *Kiriro wa Ngugi & 19 others v Attorney General & 2 others* [2020] eKLR a three-judge bench stated as follows: -

“A court must satisfy itself that the case before it is not caught up by the bar of non-justiciability. The concept of non-justiciability is comprised of three doctrines: Firstly, the Political Question Doctrine; secondly, the Constitutional-Avoidance Doctrine; and, thirdly, the Ripeness Doctrine. The doctrines are crosscutting and closely intertwined. We shall however endeavour to as far as possible delimit the operation of each doctrine in isolation.”

94. This bench is tasked with determining whether the issue of the impeachment of the Deputy President falls within the category of cases where the concept of non-justiciability would prevent this court from hearing and deciding the matter. The essence of this question lies in assessing whether the political question doctrine should apply, thereby barring the court from intervening in what might be considered a matter reserved for the legislative or executive branches under the *Constitution*.

95. Learned counsel Dr Thiankolu relied on the U.S decision in *Nixon v United States* to argue the case that the dispute before the court is a political question and hence non-justiciable.

96. We have given due consideration to this decision, noting that it pertained to a dispute involving the impeachment of a Chief Judge of a Federal District Court in the United States. In resolving the matter, the District Court held that it lacked jurisdiction to hear an appeal from the Senate regarding the impeachment of the Chief Judge, deeming the claim non-justiciable.

97. In determining whether a dispute is non-justiciable the court held that the test depends on whether

“There is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it”.

98. The question to ask, in simple terms, is whether the 2010 *Constitution* specifically assigns the sole responsibility for resolving disputes arising from the impeachment of the Deputy President (as in our case) to another branch of government. Additionally, are there clear legal rules or standards that a court can apply to reach a fair and just decision on such matters?

99. Within the context of the American system, and as articulated by the court, the learned judges answered the first question in the affirmative. They held that article 1, section 3, clause 6 of the *U.S. Constitution* demonstrates a clear textual commitment of the impeachment process to the Senate. For clarity, this clause, known as the Impeachment Trial Clause, states:

“The Senate shall have the sole power to try all impeachments.”



100. We previously referenced the pre-2010 Constitution drafts that were brought to our attention by Dr Thiankolu. What is evident from these texts is that the people of Kenya clearly intended for the impeachment process to be a justiciable matter. This conclusion is supported by the fact that each constitutional draft contained provisions affirming this intent.
101. This position is unsurprising when considering the historical context in which the Constitution was created. The people of Kenya sought to move beyond a past where the judiciary was often marginalized or bypassed in efforts to check governmental excesses. Instead, they envisioned a new constitutional order in which all branches of government would be held accountable and subject to comprehensive constitutional oversight. This aspiration was central to establishing a balanced system that ensured no arm of government operated beyond scrutiny.
102. We are therefore not convinced, against a wholistic reading of our Constitution that there was any intention to deliberately place the impeachment power on the legislature with no judicial involvement. To hold otherwise would be to create an absurdity whereby the dictates of the Constitution under articles 23, 160 and 165(3)(d)(ii) would be defeated.
103. In our view, this decision is further distinguishable by the fact that the appointment of judges in the United States and Kenya differs significantly due to the unique political structures and systems of government. Judicial appointments in the U.S. are more overtly political, with the President and Senate playing direct roles. In contrast, Kenya’s system emphasizes judicial oversight through the Judicial Service Commission which is designed to limit political influence and promote greater judicial independence.
104. Going back to the question that we posed previously, it is clear that unlike the US position, there is no textually demonstrable constitutional commitment of the issue of impeachment solely, to any political department or institution. Drawing analogies, the fact that the American context states that the Senate sits to solely try impeachment disputes is a major departure from the 2010 Constitution. Even though the requirements for the two thirds vote and the taking of an oath are identical, the procedure and provisions of the Constitution as we have spelt out, leave no doubt that the Senate is not the sole determinant of the dispute.
105. We have already expressed ourselves succinctly on the jurisdiction that has been conferred to this court under the Constitution in our previous decision. It is now well settled that there are instances in which the courts will and should interfere with political processes. A few decisions suffice to demonstrate this position.
106. The Court of Appeal in Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others [2014] eKLR stated as follows:
- “[62] ... The political question doctrine and the concept of separation of powers cannot oust the jurisdiction of courts to interpret the Constitution or to determine the question if anything said to be done under the authority of the Constitution or any law is consistent with or in contravention of the Constitution as per article 165(3)(d)(iii)”
107. Equally, in William Odhiambo Ramogi & 2 others v Attorney General & 6 others case, the learned judges stated as follows:
- “... there are constitutionally permissible situations where this court may interfere in the policy decisions of the Government, and particularly if a policy decision is in actual



or threatened violation of the fundamental rights guaranteed under the *Constitution*, or in violation of other provisions of the *Constitution*. The necessity of vindicating constitutionally secured personal liberties and fundamental freedoms is the principal justification for the anti-majoritarian power that judicial review confers upon the courts, and we are therefore reluctant to find that a claim of fundamental rights, such as the one presented by the petitioners is non-justiciable, even though it may concern the political process, or the internal workings of other government branches.”

108. The crux of the petitioners’ case centers on key questions, including whether due process was followed by the National Assembly and the Senate in the impeachment of the 1st petitioner, and whether the 1st petitioner was afforded sufficient time to prepare his defense against the impeachment charges. These issues strike at the heart of constitutional and procedural fairness, raising concerns about the extent to which legislative bodies adhered to the standards of due process as outlined in the *Constitution*.
109. The petitioners contend that the impeachment process must align with the constitutional principles of fairness and justice, ensuring that any officeholder facing such proceedings is provided with a reasonable opportunity to respond and defend against the charges.
110. This court is therefore called upon to examine whether the procedural safeguards required by the *Constitution* were observed during the impeachment process, and whether any potential lapses could render the process flawed or unconstitutional. Such an inquiry would involve a careful review of the actions taken by the National Assembly and the Senate to determine if the principles of due process and fair administrative action were upheld.
111. We take the view that, based on a holistic reading of the 2010 *Constitution*, the political question doctrine cannot oust this court’s jurisdiction as granted under article 165(3). Article 165(3) confers upon the High Court the authority to hear and determine questions regarding the interpretation of the *Constitution* and the legality of any acts or omissions by state organs. This provision underscores the High Court’s critical role in ensuring constitutional compliance, even in politically charged matters.
112. The Supreme Court of Kenya, in *Sonko v. County Assembly of Nairobi City & 11 others* [*supra*], supports this position in its holding that impeachment proceedings are inherently political, they do not fall beyond the scope of judicial review. The court stated as follows:

“The context of the instant case presented an opportunity for the Supreme Court to settle fundamental questions of law surrounding impeachment proceedings in the framework of the *Constitution of Kenya*, 2010. Impeachment being a remedy for breaching the public trust entrusted to State Officers. The instant case was an opportunity to provide high-yielding interpretive guidance on the *Constitution* that the court had an obligation and duty to seize.”
113. In *Martin Nyaga Wambora v Speaker of the Senate & others* (2014) eKLR The Court of Appeal also held that judicial intervention in impeachment must be exercised cautiously. While conservatory orders may be issued to protect constitutional rights, they should not encroach upon the legislative process unless clear evidence of constitutional or procedural violations exists. The court underscored that judicial intervention should respect the separation of powers, ensuring that the judiciary does not undermine the functions of elected bodies.
114. South African courts have similarly addressed the scope of judicial intervention in impeachment processes, emphasizing the balance between constitutional oversight and respect for the separation of powers. A notable example is *Economic Freedom Fighters v Speaker of the National Assembly & others* (2018) eKLR, which involved impeachment proceedings against former President Jacob Zuma. In



this case, the Constitutional Court affirmed that while the judiciary has the authority to ensure that impeachment proceedings comply with constitutional requirements, it must exercise restraint to avoid encroaching on the disciplinary functions of the legislature.

115. The court made it clear that judicial intervention is warranted only when necessary to correct procedural irregularities or constitutional violations. The ruling highlighted that conservatory orders should be applied with caution to prevent unwarranted intrusion into the legislature's domain. The court stated:

“Courts must be careful not to impose themselves in a manner that disrupts the legislative processes or undermines the authority of Parliament. Judicial oversight is essential to safeguard constitutional rights and ensure procedural fairness, but it should not extend to directing how the legislature carries out its internal disciplinary proceedings unless there is clear evidence of procedural defects or breaches of the *Constitution*.”

116. This decision underlines the principle that the judiciary's role in impeachment matters is not to take over legislative functions but to ensure that such processes are conducted in a manner that respects constitutional norms and procedural fairness. It reinforces the idea that while the doctrine of separation of powers is crucial, it does not preclude judicial oversight when fundamental constitutional principles are at risk.
117. It is therefore our finding, based on the above, that the *Constitution of Kenya* has clearly delineated independent and distinct paths for the three arms of government. Accordingly, this court's intervention in the matter before it is warranted, through a very narrow window that allows for oversight in cases where constitutional infractions are alleged in the impeachment process. This position is reinforced by our previous determination that the petitioners have established a *prima facie* case in the petitions before the court.

**(iii) Whether the conservatory orders in place should be confirmed.**

118. We reiterate that we dealt at length with the nature and principles for consideration in applications seeking conservatory orders in Ruling No. 1. We adopt that discussion as part of this ruling by way of reference. Suffice to say that the three main principles for consideration are as follows: -
- i. The need for the applicant to demonstrate an arguable *prima facie* case.
  - ii. Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.
  - iii. Whether, if an interim conservatory order is not granted, the Petition or its substratum will be rendered nugatory.
119. We will now consider the said principles as they apply in this matter.

**(a) Whether a *prima facie* case has been demonstrated;**

120. The discussions in Ruling No 1 also dealt with the definition and nature of a *prima facie* case. We held that such 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". [See [Mrao v First American Bank of Kenya Limited & 2 others](#) (2003) KLR 125].

121. This court then stated in the Ruling No. 1 as follows:

“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 so doing, a 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”.

122. Upon satisfaction, the court rendered itself as follows:

“Applying the above in this matter, and without much ado, we are satisfied that the consolidated Petitions raise constitutional issues that require further judicial consideration”.

123. This court has not deviated from the above position. We reaffirm that the consolidated petitions in Cohort No 1 and Cohort No 2 still raise constitutional issues requiring further judicial interrogation.

**(b) Public interest considerations:**

124. ‘Public interest’ is defined by the [Black’s Law Dictionary](#) 10<sup>th</sup> 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.”

125. In Ruling No 1, we found and held that

“... public interest tilts in favour of allowing the constitutional process to proceed unhindered .....

To understand how public interest factors into this matter, it is necessary to examine the historical context of the Office of the Deputy President. Naturally, the starting point is the [retired 1963 Constitution](#) [hereinafter referred to as ‘the 1963 Constitution’].

126. Chapter II of the 1963 [Constitution](#) addressed the Executive, with Part I focusing on the President and the Vice-President. Section 4 thereof established the Office of the President as follows: -

“There shall be a President of Kenya, who shall be the Head of State and Commander-in-Chief of the armed forces of the Republic”.

127. Section 6 addressed a vacancy in the office of the President. It provided as follows: -

(1) Vacancy in office of President:

- a. If the office of President becomes vacant by reason of the death or resignation of the President, or by reason of his ceasing to hold office by virtue of [section 10](#) [election petition] or [section 12](#), [removal on grounds of incapacity] an election of a President shall be held within the period of ninety days immediately following the occurrence of that vacancy, and shall be held in the manner prescribed by section 5(5).



- b. While the office of President is vacant as aforesaid, the functions of that office shall be exercised: -
- i. (a) by the Vice-President; or
- (2) If there is no Vice-President, or if the Vice-President considers that he is for any reason unable to discharge the functions of the office of President, by such Minister as may be appointed by the Cabinet.
- (3) Where the Vice-President or any other Minister is exercising the functions of the office of President by virtue of this section or of section 11, he shall not act, except in accordance with a resolution of the Cabinet, in the exercise of the powers relating to ..... [Emphasis added].
128. Section 15 of the 1963 Constitution dealt with the office of the President of Kenya. It provided as follows: -
- (1) There shall be a Vice-President of Kenya, who shall be appointed by the President.
- (2) The President shall appoint the Vice-President from among the Ministers who are elected members of the National Assembly:
- Provided that no appointment to the office of Vice-President shall be made at any time when the functions of the office of President are being exercised by any person other than the President.
- (3) The Vice-President shall be the principal assistant of the President in the discharge of his functions.
- (4) The Vice-President shall not enter upon the duties of his office unless he has taken and subscribed the oath of allegiance and such oath for the due execution of his office as may be prescribed by Parliament.
- (5) During his tenure of office, the Vice-President shall not hold any office of profit other than those of Vice-President, Minister and member of the National Assembly.
- (6) The office of the Vice-President shall become vacant –
1. if the President so directs; or
  2. if the holder of the office ceases to be an elected member of the National Assembly otherwise than by reason of the dissolution of Parliament; or
  3. upon the election of a person to the office of President.
129. It follows that under the 1963 Constitution, the Vice President served solely as the principal assistant to the President in the discharge of presidential functions. The Vice President had no other duties and could be dismissed by the President at will.
130. After a lengthy and arduous 20-year pursuit for constitutional reform, Kenyans ultimately adopted a new Constitution in August 2010 (hereinafter referred to as "the 2010 Constitution"). The 2010 Constitution has been widely praised as transformative, particularly for its fundamental restructuring of the country's constitutional and governance framework.



131. The 2010 *Constitution* establishes the Executive in chapter 9. Article 131 outlines the authority of the President, while article 132 details the functions of the President. Article 147 provides for the functions of the Deputy President as follows: -

“The Deputy President shall be the principal assistant of the President and shall deputise for the President in the execution of the President’s functions”.

The Deputy President shall perform the functions conferred by this Constitution and any other functions of the President as the President may assign”.

Subject to article 134, [temporary incumbency] when the President is absent or is temporarily incapacitated, and during any other period that the President decides, the Deputy President shall act as the President.

(4) The Deputy President shall not hold any other State or public office. [emphasis added]

132. It is, therefore, beyond peradventure that the role of the President’s principal assistant changed significantly in the 2010 *Constitution* compared to the position of Vice President under the 1963 *Constitution*. Some of the notable changes include: -

- a. Whereas the Vice-President was solely the principal assistant of the President, the Deputy President is both the principal assistant of the President and also deputizes the President in the execution of the President’s functions;
- b. The Deputy President performs specific functions conferred by the *Constitution*;
- c. The Deputy President may perform any other functions of the President as the President may assign.
- d. Unlike the Vice-President who was appointed by the President from among the Cabinet Ministers who were elected members of the National Assembly, the Deputy President is elected together with the President and holds no other public office.

133. The above changes were not without reason. Luis G. Franceschi and PLO Lumumba in the *Constitution of Kenya: Commentary, Second Edition*, Strathmore University Press, 2019 at page 453 had the following to say: -

“With the other arms of government considerably weakened, the Executive personified in the President, exercised unchecked powers. Indeed, during the Constitution review process the CKRC noted that the powers granted by the Constitution and ordinary laws to the elected President seemed to share characteristics with those of the colonial governor. It then resolved during the constitutional making process to divest some powers from the President with the aim of avoiding an ‘imperial President’”.

134. The above cannot be far from the truth. In the pre-2010 constitutional era, the President held immense power, including the ability to appoint and dismiss the Vice President at will and the discretion to assign—or withhold—duties for the Vice President. Consequently, the Vice President served entirely at the President’s mercy. This was the framework that the 2010 *Constitution* sought to transform.

135. Under the 2010 *Constitution*, the office of the Deputy President has been fundamentally redefined. It is now safeguarded from arbitrary and capricious actions by the President. Article 147(2) grants the Deputy President specific constitutional functions, in addition to any duties the President may



- assign. This provision was intended to address the previous situation in which a President could, for any reason, choose not to assign duties to the Deputy President, effectively side lining them.
136. Thanks to the 2010 Constitution, even if the President does not assign additional duties, the Deputy President still has specific, constitutionally mandated functions to perform. In this way, the Deputy President is no longer at the mercy and discretion of the President.
  137. Under the current constitutional framework, when the office of the Deputy President becomes vacant, two outcomes follow. First, any functions that were assigned to the Deputy President by the President automatically revert to the President. Second, the functions expressly conferred upon the Deputy President by the Constitution do not revert to the President and cannot be performed by anyone else.
  138. This is a departure from the 1963 Constitution, under which the President could appoint a Minister to act as Vice President in the Vice President's absence. The 2010 Constitution includes no such provision. Therefore, if the office of the Deputy President is vacant, the specific constitutional functions assigned to that office remain unfulfilled. For clarity, not even the Speaker of the National Assembly may discharge the functions vested in the Deputy President under article 147(2) of the Constitution.
  139. In light of the above, we are convinced and hereby find that the current constitutional framework does not envision any scenario in which the office of the Deputy President would remain vacant, except during the brief period required to fill such a vacancy.
  140. Another equally important provision that adds credence to the above position that the office of the Deputy President cannot be left vacant is article 146(3) of the 2010 Constitution. However, before we interrogate the said provision, suffice to note that article 150(2) of the Constitution, which is on the Removal of the Deputy President, has it that the provisions of articles 144 and 145 relating to the removal of the President shall apply, with the necessary modifications, to the removal of the Deputy President.
  141. Back to article 146 which deals with vacancy in the office of the President], sub-articles (1), (2) and (3) states as follows: -
    - (1) The office of President shall become vacant if the holder of the office-
      - (a) dies;
      - (b) resigns, in writing, addressed to the Speaker of the National Assembly; or
      - (c) otherwise ceases to hold office under article 144 [Removal of President on grounds of incapacity] or 145 [Removal of President by impeachment] or under any other provision of this Constitution.
    - (2) When a vacancy occurs in the office of President-
      - i. the Deputy President shall assume office as President for the remainder of the term of the President; or
      - ii. if the office of Deputy President is vacant, or the Deputy President is unable to assume the office of President, the Speaker of the National Assembly shall act as President and an election to the office of President shall be held within sixty days after the vacancy arose in the office of President.
    - (3) A person who assumes the office of President under clause (2)(a), or following an election required by clause (2)(b), shall, unless otherwise removed from office under this Constitution,



hold office until a newly elected President is sworn in following the next regularly scheduled election under article 136(2)(a).

142. A holistic reading of article 146 alongside article 150(2) of the 2010 *Constitution*, and in relation to the filing of a vacancy in the office of the Deputy President in this matter, yields the meaning that the person who assumes the office after the impeachment of the Deputy President shall, unless otherwise lawfully removed from office, hold that office until further orders of this court or until the current term of Presidency ends, whichever comes first.
143. The foregoing demonstrates that the structure of the *Constitution*, which reflects the popular will of the Kenyan citizens, envisions a scenario in which the office of the Deputy President will always be filled, except during the brief period required to fill a vacancy.
144. Based on the foregoing, we now turn to the nature of conservatory orders. It is widely accepted that the purpose of conservatory orders is to preserve the status quo pending further orders of the court. [See *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* (2014) eKLR. In this case, maintaining the *status quo* means that the 1st petitioner, H.E. Rigathi Gachagua, remains impeached under article 145(7), which affirms the finality of the impeachment process with the following provision:
- “If at least two-thirds of all members of the Senate vote to uphold any impeachment charge, the [Deputy President] shall cease to hold office.”
145. Additionally, the prevailing status quo is that the Deputy President nominee, Prof Abraham Kithure Kindiki, does not assume office.
146. While such an approach may seem fair, reasonable, and balanced—and one that this court would ordinarily be inclined to adopt—the unique nature of the Deputy President’s role under the 2010 *Constitution* suggests a different course.
147. Allowing these orders to stand would leave the office of the Deputy President vacant. The problem, however, is that no other person is authorized to carry out the constitutional functions specifically assigned to the Deputy President under article 147(2), once those assigned by the President revert to the President in the absence of an officeholder. The result would be a de facto suspension of article 147(2) of the *Constitution*—an outcome that no court should knowingly permit.
148. For clarity, this court firmly holds that no court should issue orders that have the effect of suspending the operation of any provision of the *Constitution*, as such an outcome is clearly not envisioned by the document itself. the *Constitution* was not handed to Kenyans on a silver platter; it was achieved through great struggle and sacrifice. Therefore, it is the duty of the court to uphold its provisions as intended by the framers and as demanded by the people of Kenya.
149. Furthermore, article 259 of the *Constitution* mandates that the document must be interpreted as “always speaking.” This means the *Constitution* is a living document, designed to address contemporary challenges and to be applied consistently and continuously without interruption. Suspending any provision of the *Constitution*, even temporarily, would undermine this principle by creating gaps in its operation and disrupting the intended balance of governance.
150. The *Constitution* is structured to ensure that all its provisions are effective and operative at all times. If any provision, such as article 147(2), is rendered dormant by judicial a order, it risks setting a precedent where parts of the *Constitution* could be selectively “switched off,” effectively weakening the *Constitution*’s authority and the protections it affords.



151. Additionally, we are mindful that courts are guided by the principle of constitutional supremacy, which requires that all judicial decisions align with the Constitution's objectives and uphold its integrity. Issuing an order that suspends a constitutional provision would directly contravene this principle, effectively placing judicial discretion above the supreme law of the land. This would be inconsistent with the spirit of judicial restraint and the court's role as a protector—not a modifier—of the Constitution.
152. For these reasons, we take the position that the Constitution must remain fully operational at all times, and no court order should have the effect of rendering any part of it inoperative or dormant. The court's responsibility is to interpret and apply the Constitution as a cohesive, functional document that serves the people's enduring will and protects the structure of governance as established.
153. Drawing from the above, we hereby find and hold that public interest in this matter favours giving way to the Constitution, which in any event is the will of the people. That is also the dictate under article 3 of the 2010 Constitution where every person has an obligation to respect, uphold and defend the Constitution. We choose to abide by that calling. As such, public interest demands that the office of the Deputy President should not remain vacant.

**(c) Whether the consolidated petitions will be rendered nugatory:**

154. As we stated in Ruling No 1, because the consolidated petitions challenge the entire impeachment process, the fundamental issues at stake remain live, even though the parliamentary proceedings have been completed. Furthermore, as previously noted, should any of these petitions succeed, this court will have no shortage of effective remedies to address the situation.

**(d) Whether the applicants will be prejudiced if the orders are not granted:**

155. The Black's Law Dictionary 10<sup>th</sup> Edition Thomson Reuters at page 1370 defines 'prejudice' as follows: Damage or detriment to one's legal rights or claims.
156. Regarding whether the applicants will suffer any harm if the conservatory orders are not granted, we find that no individual can suffer loss or damage when the Constitution is permitted to operate as intended. Allowing the constitutional process to unfold does not, in itself, result in detriment, as it upholds the rule of law and respects the framework agreed upon by the people.
157. The applicants also urged this court to grant the conservatory orders, expressing concern that the respondents have a history of disobeying court orders and that, once the office of the Deputy President is filled, it would be impossible to remove the appointee even if the Petitions were successful.
158. However, this court takes the view that it cannot operate under the assumption that its orders will be disregarded. This country has legal mechanisms to address any acts of disobedience. Moreover, the Hon. Attorney General, through senior counsel Githu Muigai, has given an undertaking to comply fully with any orders issued by this court in this matter.
159. As such we find that the applicants do not stand to suffer any prejudice in the event the conservatory orders are not granted.

**Disposition:**

160. As we conclude, we reiterate that this matter holds significant public interest, and we remain committed to an expeditious determination of the petitions. Therefore, we will provide further directions within this ruling. Consequently, the following orders are hereby issued:



- a. The applications for conservatory orders are hereby disallowed;
- b. The conservatory orders issued on 18/10/2024 in Kerugoya HCCP E015/2024 are hereby discharged and/or set aside;
- c. Costs shall be in the cause;
- d. Leave to appeal is hereby granted. Typed proceedings and certified copies of this ruling to be availed to parties at cost or as the case may be;
- e. Mention for further directions on the way forward in respect of pending applications and the petitions, on November 7, 2024 at 2:30pm in open court;
- f. This ruling shall be forthwith uploaded in the court Tracking System (CTS).

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 31<sup>ST</sup> DAY OF OCTOBER 2024**

.....

**E.O. OGOLA**

**JUDGE**

.....

**A. MRIMA**

**JUDGE**

.....

**DR. F. MUGAMBI**

**JUDGE**

