Njiru & 20 others v Attorney General & 16 others; Azimio La Umoja Kenya One Coalition & 8 others (Interested Parties) (Petition E306 of 2024) [2024] KEHC 16204 (KLR) (Constitutional and Human Rights) (20 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16204 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E306 OF 2024

LN MUGAMBI, J

DECEMBER 20, 2024

BETWEEN

NDEGWA NJIRU ..... 1ST PETITIONER

FANYA MAMBO KINUTHIA ..... 2ND PETITIONER

PETER KOIRA ..... 3RD PETITIONER

ISHMAEL MURIITHI NGURING'A ..... 4TH PETITIONER

JACKLINE WANJIRU MWANGI ..... 5TH PETITIONER

CHARLES MABIRU ..... 6TH PETITIONER

LEMPAA SOYINKA ..... 7TH PETITIONER

MT.KENYA JURISTS ASSOCIATION ..... 8TH PETITIONER

PROF. FREDRICK OGOLA ..... 9TH PETITIONER

PROF. KINUTHIA GATHUMBI ..... 10TH PETITIONER

EZRA OKEMWA BUNDI ..... 11TH PETITIONER

SOPHIE DOLA ..... 12TH PETITIONER

BEATRICE KAMAU ..... 13TH PETITIONER

CYPRIAN ORINA NYAMWAMU ..... 14TH PETITIONER

SAMUEL MWINGA MWADZIWE ..... 15TH PETITIONER

GACHEKE GACHIHI ..... 16TH PETITIONER

WAMBUI KANYI ..... 17TH PETITIONER

MARGARET MBIRA ..... 18TH PETITIONER

ANNE NGATIA ..... 19TH PETITIONER

SEFU SANNY ..... 20TH PETITIONER

ANNE NYAMBURA ..... 21ST PETITIONER

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF FINANCE AND ECONOMIC PLANNING ..... 2ND RESPONDENT

NATIONAL ASSEMBLY OF KENYA ..... 3RD RESPONDENT

HON. KIMANI ICHUNG'WA ..... 4TH RESPONDENT

HON NDINDI NYORO ..... 5TH RESPONDENT

HON. KURIA KIMANI ..... 6TH RESPONDENT

KENYA KWANZA COALITION ..... 7TH RESPONDENT

CLERK OF THE NATIONAL ASSEMBLY ..... 8TH RESPONDENT

HE PRESIDENT WILLIAM RUTO ..... 9TH RESPONDENT

KENYA REVENUE AUTHORITY ..... 10TH RESPONDENT

SPEAKER OF THE NATIONAL ASSEMBLY ..... 11TH RESPONDENT

COMMISSION OF REVENUE ALLOCATION ..... 12TH RESPONDENT

CONTROLLER OF BUDGET ..... 13TH RESPONDENT

NATIONAL ASSEMBLY BUDGET COMMITTEE ..... 14TH RESPONDENT

INTERNATIONAL MONETARY FUND ..... 15TH RESPONDENT

JUDICIAL SERCICE COMMISSION ..... 16TH RESPONDENT

COMMISSION ON REVENUE ALLOCATION ..... 17TH RESPONDENT

AND

AZIMIO LA UMOJA KENYA ONE COALITION ..... INTERESTED PARTY

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS .... INTERESTED PARTY

THE SENATE ..... INTERESTED PARTY

KATIBA INSTITUTE ..... INTERESTED PARTY

JUBILEE PARTY OF KENYA ..... INTERESTED PARTY

LAW SOCIETY OF KENYA ..... INTERESTED PARTY

INTERNATIONAL COMMISSION OF JURISTS ..... INTERESTED PARTY

PARLIAMENTARY BUDGET OFFICE ..... INTERESTED PARTY

COUNCIL OF GOVERNORS ..... INTERESTED PARTY

RULING

Introduction

1. By a Notice of Motion application dated 3rd July 2024, the Petitioners seeks orders that:

   i. Spent.

   ii. An order of injunction be issued to stop the 3rd Respondent from conducting further debate, proceedings and voting in relation to the Finance Bill, 2024 and the Appropriation Act, 2024 pending hearing and determination of this Application and/or Petition.

   iii. By dint of Article 222(1) of *the Constitution*, an order of injunction be issued to restrain the 9th Respondent from assenting to the Finance Bill, 2024 pending hearing and determination of this Application and/or Petition.

   iv. By dint of Article 222 of *the Constitution*, this Court be pleased to issue an order of stay to stop the application/enforcement of Sections 39(1) and 39A (3) of the *Public Finance Management Act* Cap 412A pending hearing and determination of this Application and/or Petition.

   v. By dint of Article 222 of *the Constitution*, this Court be issued to issue an order of prohibition to prohibit the Government from implementing the provisions contained in the Appropriation Act, 2024 and in the Finance Bill, 2024 and any subsequent legislation pending hearing and determination of this Application and/or Petition.

   vi. By dint of Articles 221 and 222 of *the Constitution*, this Court be pleased to stay the directive of the 9th Respondent to the 2nd Respondent contained in his Statement dated 28th June, 2024 to submit a Supplementary Appropriation Bill pending hearing and determination of the Petition herein.

   vii. Pending the hearing and determination of the Petition herein a conservatory order of injunction be issued to restrain the 3rd Respondent from acting on the 9th Respondent's Referral of the Finance Bill, 2023 to the National Assembly dated 26th June, 2024.

   viii. Pending the hearing and determination of this Petition this Court be pleased to issue and order of stay, to stay the decision of the 16th Respondent contained in a Press Release dated 3rd July, 2024 to suspend the recruitment of eleven (11) Judges of the Court of Appeal.

   ix. Pending the hearing and determination of this Petition this Court be pleased to issue a conservatory order of injunction to restrain the 2nd Respondent from submitting to Parliament a bill to amend the Division of Revenue Act, 2024.

   x. Pending hearing and determination of this Petition this Court be pleased to issue a conservatory order of injunction to restrain the 3rd Respondent from amending the County Allocation and Revenue Bill 1024 in the manner proposed by the 9th Respondent's Statement dated 28th June, 2024.

   xi. Pending hearing and determination of this Petition, this Court be pleased to issue an order of stay, to stay the implementation of the 12th Respondent's Gazette Notices No. 10346 - 10352 contained in a Special issue of the Kenya Gazette dated 9th August, 2023.

xii. Pending hearing and determination of this Petition, this Court be pleased to issue a conservatory order of injunction to restrain the 2nd Respondent from entering into any agreement with the 15th Respondent in respect of the budget process for the 2024/25 Financial Year without express approval of the 3rd Respondent and the Senate through resolutions supported by at least 50% of all Members respectively.

xiii. This Court be pleased to refer this matter to the Chief Justice to appoint a Bench of Five Judges to hear and determine this Petition as a matter of national priority.

xiv. The costs of this Application be borne by the Respondents.

Background of the Case

2. The genesis of this matter is the Petition dated 25th June 2024 that was later on amended on 3rd July 2024.The Petition concerns the financial crisis that faced the budgeting process for the 2024/25 Financial Year and as such seeks to challenge the Respondents' actions in view of the Finance Bill, 2024, the Appropriation Act and Section 39(1) and 39A (3) of the *Public Finance Management Act*.

3. Consequently, the Petition seeks to address a number of issues being:the constitutionality of the budgeting process for the 2024/25 Financial Year; the abdication by the 3rd Respondent and Members of Parliament of their obligations and duties in budget-making; the constitutionality of the Appropriation Act, 2024; the legality and legitimacy of the steps taken by the National Executive to address and redress the political and legal problems in budgeting for the 2024/25 Financial Year and public finance management occasioned by the rejection of the Finance Bill, 2024 and the constitutionality of the Supplementary Estimates and attendant Supplementary Appropriation Bill, 2024 in the wake of the rejection of the Finance Bill, 2024 and the attendant dismissal of all the cabinet secretaries.

Petitioners' Case

4. The Application is supported by the 2nd Petitioner's, Fanya Mambo Kinuthia's supporting affidavit, of even date sworn on behalf of the other Petitioners and the grounds on the face of the Application.

5. On 9th May 2024, the 2nd Respondent published the Finance Bill, 2024.The Petitioners contend that both the 2nd Respondent and the 3rd Respondent in view of the budget estimate revenue for the 2024/2025 Financial Year failed to comply with Article 221(1) of *the Constitution*. It is claimed that the budget process failed to uphold the principle of meaningful public participation as the 3rd Respondent asserted its power to raise additional revenue thereafter contrary to the dictates of *the Constitution*.

6. Furthermore, it is averred that the budget making process was vitiated by the involvement and dictation of the policy preferences of foreign governments and corporations. This is as led by the 15th Respondent, to the detriment of the Kenyan People. It is proposed that the 15th Respondent's involvement should be approved by the 3rd Respondent and the Senate through a resolution supported by at least 50% of all members of each respective house.

7. The Government is as well accused of rushing the budgeting process. Moreover, seeking to implement the budgeting process in line with the *Public Finance Management Act* 2012 (PFMA), which is deemed to be unconstitutional. In the same manner, the Petitioners are aggrieved that the budget making mandate conferred on the 3rd Respondent has been willfully surrendered to the executive which is unlawful. This is said to be made manifest by the 2nd and 9th Respondent's push to pass the Supplementary Appropriation Bill.

8. Correspondingly, the Petitioners posit that the 16th Respondent's decision to suspend the recruitment of 11 Judges of the Court of Appeal based on the 3rd Respondent's directives is unlawful. This is because the 3rd Respondent can lawfully determine the expenditures, projects and the public needs that should be waived on account of the rejection of the Finance Bill, 2024. Further, since the County Allocation and Revenue Bill,2024 is based on the Financial Year 2020/2021 revenue budget, there is no basis for the reduction of the funds in view of the 2024/2025 Financial Year revenue Budget.

9. The Petitioners as well aver that owing to the dire state of the economy in the Country, the enhanced remuneration and benefits for State and public officials by the 12th Respondent set to take effect on 1st July 2024 should be stayed.

10. The Petitioners assert that the orders sought herein are imperative as this Court needs to determine the political, legal and policy questions involved in the rejection of the Finance Bill, 2024. It is argued therefore that the 3rd Respondent should not consider the 9th Respondent's Referral Memorandum until the instant Petition is heard. In equal measure, it is stressed that due to the high national interest in this matter and weighty issues raised, this matter ought to be referred to the Hon. Chief Justice for the empanelment of a Bench.

1st Respondent's Case

11. In reaction to the Application, the 1st Respondent filed its grounds of opposition dated 24th July 2024 on the basis that:

    i. The 9th Respondent has been improperly sued in the present suit and should be struck out from the proceedings pursuant to the provisions of Rule 5 (d) (i) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

    ii. The Petitioners are seeking interlocutory orders contrary to their pleaded position; at paragraph 65 (i) of their petition, the Petitioners expressly underscored that under *the Constitution* the Appropriation Act and approved Estimates are necessary to ensure implementation of the budget.

    iii. The Applicants are not seeking the enforcement of any provisions of the Bill of Rights Chapter and to that extent they have improperly invoked the jurisdiction of the Court to issue conservatory orders which is only available to claims premised on alleged violations of the Bill of Rights chapter of our Constitution.

    iv. It is apparent that the executive and the legislature operated within the constitutional scheme of their respective powers within the safeguards of the separation of powers and consequently quite legitimately outside the path of the ordinary motions of the judicial arm of state, on that basis, there is hardly any scope for deployment of the Court's Conservatory orders.

    v. The Applicants have not demonstrated any prejudice that they would suffer if the orders sought are not granted.

    vi. A consideration of proportionate magnitudes militates against the issuance of the orders sought by the Applicants.

    vii. The Appropriation Act 2024 was assented into law and is now an Act of Parliament and not a bill amenable to the orders as sought in the Petitioners motion.

    viii. The Hon. Chief Justice cannot be directed on the number of judges to be appointed to hear a case.

ix. The Petition raises no substantial question of law under either clauses (3) (b) or 3 (d) of Article 165 of *the Constitution* that would merit the case to be heard by an even number of judges, being not less than three, assigned by the Chief Justice.

x. The Petitioners have not demonstrated any basis for staying the operation of provisions of statutes that have been in force for the previous five years.

xi. The orders sought are seeking to infringe on the constitutional mandates and discretion of state offices at an interlocutory stage contrary to the doctrine of separation of powers.

xii. Issuance of the orders sought would be contrary to public interest.

xiii. Having failed to demonstrate any specific infraction of *the Constitution* or statute the Petitioners are seeking judicial prescription of law contrary to the doctrine of separation of powers at an interlocutory stage.

xiv. The application is incompetent.

2nd Respondent's Case

12. The 2nd Respondent's response to the instant application was not in the Court file. The Replying Affidavit in the Court Online Platform (CTS) was inaccessible.

3rd, 8th and 11th Respondents' Case

13. The 3rd, 8th and 11th Respondents filed their grounds of opposition dated 9th July 2024 to the Application. They opposed the application on the grounds that:

i. The Appropriation Act, 2024 was assented into law and is now an Act of Parliament, and therefore both the Parliament and the President have fully and finally executed their mandate regarding the enactment of the Act hence an order of an injunction cannot issue.

ii. The Finance Bill, 2024 is being considered in the National Assembly following the memorandum by the President. The Applicant seeks to stay a legitimate legislative process as provided under *the Constitution* without indicating how the impugned process violated *the Constitution* or their rights. It is therefore prudent that the Court allows the National Assembly to discharge its legislative mandate by considering the President's memorandum as required under Article 115 of *the Constitution*.

iii. The National Assembly has already considered, debated, and approved the budget estimates of the national government, including those of Parliament and the Judiciary as required under Article 221 and Section 39(1) of the PFMA. In any case, the provisions of Section 39(1) of the PFMA reflect the provisions of Article 221 of *the Constitution*. Therefore, the order for suspending Section 39(1) will not affect the implementation of Article 221 of *the Constitution*. To hold otherwise and grant the orders sought by the Petitioners' application will amount to suspension of Article 221 of *the Constitution* which cannot be done by this Court.

iv. The Appropriation Act, 2024 is an act of Parliament that enjoys the presumption of constitutionality after being passed through a constitutional process hence its application cannot be suspended in the interim. A suspension of the Appropriation Act, 2024 will plunge the nation into a financial crisis as it is the only legislation allowing the national government to withdraw money from the Consolidated Fund. Without it, the National Government, Parliament, and Judiciary will be unable to finance their operations.

v. The Applicants have not provided evidence showing how the implementation of the Appropriation Act, 2024 will violate *the Constitution*.

vi. The formulation and implementation of the budget is the reserve of the National Government and the National Assembly considering the financial needs of each organ, the available revenue and resources, and the fair and equitable sharing of national resources. Supplementary Appropriations are provided under Article 223 of *the Constitution* to cater for unforeseen circumstances to allow the government to accommodate revenue shortages, emerging financial needs, and government priorities. Therefore, this court cannot issue a blanket injunction against the formulation of appropriation Bills as that will amount to undue interference by this court on functions of the other arms of the based on speculations and hypothetical scenarios.

vii. The Petitioners have raised issues regarding the amendment of the PFMA, the constitutionality of the Finance Bill, 2024, and the Appropriation Act, 2024. These issues have been litigated before by superior courts in Kenya hence they are not novel or new to warrant the empanelment of a bench to determine. The issues raised concern the ordinary interpretation and application of *the Constitution* and other legislations which are questions and issues that single judges of Superior Courts deal with within their daily discharge of their Constitutional mandate under Article 165(3) of *the Constitution*.

viii. The Applicants have not demonstrated how the Petition raises a substantial question of law, a question of an immense jurisprudential moment, or a question of grave uncertainty of the law which has not been covered in previous decisions of this Court or *the Constitution* to warrant an empanelment of a bench. In any case, a decision from a single judge has equal force in law to a decision from a bench.

ix. It is within the public knowledge that judicial resources are precious and scarce, hence empanelment of a bench should be done in exceptional circumstances to save judicial time especially if the issues raised ordinarily concern the interpretation of *the Constitution* or the law which matters are within the competence of single judges.

12th Respondent's Case

14. Correspondingly, the 12th Respondent in opposition to the Application filed its grounds of opposition dated 18th July 2024 on the basis that:

i. The 12th Respondent is a Constitutional Commission established under Article 230 of *the Constitution*, operationalized by the *Salaries and Remuneration Commission Act*.

ii. In the discharge of its powers and functions, Article 230 (5) of *the Constitution* and Section 12 of the *Salaries and Remuneration Commission Act* require the 12th Respondent to take the cited principles into account.

iii. Gazette Notices No. 10346; 10347; 10348; 10349; 10350; 10351; and 10352 of 9th August, 2023 prescribe the remuneration and benefits for State officers as set by the 12th Respondent pursuant to its mandate under Article 230 (4) (a) of *the Constitution*.

iv. The Petitioners have omitted to frame their case with precision as required under the High Court's pronouncement in Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272. The petition fails the requirement as it does not state the alleged constitutional provisions violated by the 12th Respondent and the acts or omissions complained of against the 12th Respondent with reasonable precision.

v. The Petitioners have failed to establish a prima facie case or demonstrate with sufficient particularity how the 12th Respondent's Gazette Notices No. 10346, 10347, 10348, 10349, 10350, 10351, and 10352, dated 9th August, 2023, contravene any provisions of *the Constitution* or any applicable statute.

vi. In the absence of such a substantiated claim, the impugned Gazette Notices are presumed to be lawful and valid and the Petitioners have improperly invoked this Court's jurisdiction in their quest to interfere with the remuneration and benefits for State officers as duly set and gazetted by the 12th Respondent in accordance with its statutory mandate.

vii. It is a well-established principle of law that the burden of proof rests upon the party who asserts a proposition or fact. The Petitioners have failed to discharge the requisite evidentiary burden to demonstrate, on a balance of probabilities, that the 12th Respondent's actions, in setting the remuneration and benefits for State officers are ultra vires or in contravention of any constitutional provision or statutory enactment. Therefore, the presumption of regularity and legality of the 12th Respondent's actions remains unrebutted and should be upheld by this Court.

viii. It is trite law, that, for a cause of action, to be considered reasonable, it must demonstrate a justiciable controversy that warrants judicial intervention. The Amended Petition and Amended Notice of Motion, as presented before this Court, fail to disclose a reasonable cause of action against the 12th Respondent and is liable to be struck out for want of a reasonable cause of action.

ix. The Amended Petition is, therefore, scandalous, frivolous, and vexatious and abuse of the Court's process.

x. The Amended Notice of Motion Application and the Amended Petition have no merit and should therefore be dismissed with costs to the 12th Respondent.

xi. The 12th Respondent additionally filed a Replying Affidavit dated 24th July 2024 in support of the Application and the Petition that reiterated and detailed the grounds set out herein above.

16th Respondent's Case

15. In reply to the instant Application, the 16th Respondent filed grounds of opposition dated 25th July 2024 on the premise that:

i. The Petitioners have not demonstrated to this Court how the 16th Respondent has violated their constitutional rights.

ii. The prayer sought against the 16th Respondent in the Application, to wit Prayer No.8, is permanent in nature and cannot be granted at an interlocutory stage.

iii. The prayers sought against the 16th Respondent violate the doctrine of separation of powers.

iv. The Court should adopt the doctrine of constitutional avoidance with regard to the prayer sought against the 16th Respondent and decline to issue the same.

v. The impugned press release issued by the 16th Respondent on 3rd July 2024 was issued in line with its mandate as provided by Article 172 of *the Constitution* as read with the *Judicial Service Act*.

vi. By dint of Articles 248(1) (2) (e) as read with Article 249 of *the Constitution*, the 16th Respondent is an independent commission that is subject to *the Constitution* and the law. It is not subject to the direction or control of any person or authority.

vii. In light of paragraph 6 above, the Petitioners seek to violate Articles 248(1)(2)(e) as read with Article 249 of *the Constitution* by seeking to control ,direct and instruct the 16th Respondent in its lawful operations.

viii. Without prejudice to the foregoing, the impugned press release issued by the 16th Respondent on 3rd July 2024 only suspended the recruitment of 11 Judges of the Court of Appeal. The 16th Respondent did not cancel the recruitment thus the prayers sought are invalid and in any event premature and so amount to a fishing expedition.

ix. In suspending the recruitment of 11 Judges of the Court of Appeal, the 16th Respondent was exercising prudence as provided by Chapter 12 of *the Constitution* on public finance.

x. In line with Article 10 of *the Constitution* specifically Article 10(1)(c) and (2)(c), the 16th Respondent acted transparently in making a policy decision while at the same time engaging the Executive and National Assembly with a view to enhance its budget.

xi. From the foregoing, the Application dated 3rd July 2024 and the Petition is based on a clear misapprehension and misapplication of the law and violates the independence of the 16th Respondent.

xii. It is in public interest and the interest of justice to protect the rule of law by declining to issue the prayers sought and so Petition should be dismissed with costs as it is brought in bad faith and is an abuse of the court process.

4th, 5th, 6th, 7th, 10th, 13th, 14th, 15th and 17th Respondents and Interested Parties Case

16. These Respondents and Interested Parties' responses and submissions to the Application are not in the Court file or Court Online Platform (CTS).

Parties' Submissions

Petitioners' Submissions

17. The firm of Kinoti and Kibe Company Advocates on behalf of the Petitioners filed submissions dated 18th July 2024. The key issue raised is: the justification of grant of the sought orders.

18. Referring to Prayer 2, Counsel submitted that 3rd Respondent budgeting process was taken over by the Executive through the 2nd Respondent in the letter dated 19th June 2024. It is argued that if the 3rd Respondent considers the 9th Respondent's directive, the instant Petition will be rendered nugatory.

19. Turning to Prayer 4 and 5, Counsel submitted that since the Finance Bill is not necessary for the approved budget to be implemented, the said provisions should be stayed so as to deal with the issues that emerged following the rejection of the Bill.

20. Counsel submitting on Prayer 6 and 7, stated that the rejection of the Finance Bill was as a result of the 2nd and 9th Respondent's unlawful action of usurping the 3rd Respondent's mandate. This in turn caused a breakout of protests by the people due to the oppressive taxation that has caused an increase in the poverty levels and affected the economic status. Moreover, the dismissal of the Cabinet

including the 2nd Respondent is argued to have compounded the problem. Considering these factors, it was argued that the orders were necessary to preserve the subject matter of the Petition.

21. Turning to the 16th Respondent's decision and Prayer 8, Counsel submitted that, the hurried premature decision was in violation of its mandate under Article 172(1) of *the Constitution*. The 16th Respondent was also accused of aiding the schemes of the Executive.

22. Counsel on Prayer 9 and 10, submitted that the sought conservatory orders are necessary as the Executive seeks to unilaterally determine public expenditure contrary to the dictates of *the Constitution*. Accordingly, Counsel submitted that grant of this prayers was necessary.

1st and 2nd Respondents' Submissions

23. State Counsel, Emmanuel Bitta on behalf of these Respondents filed submissions undated. To begin with Counsel submitted that the 9th Respondent has been improperly enjoined in this suit as a party to the proceedings. As such, Counsel stressed that the 9th Respondent ought to be struck out from these proceedings.

24. Counsel further submitted that the Petitioners case is contradictory as at paragraph 65 of their Petition, they acknowledge the necessity of the Appropriation Act yet in the instant application seek to have its implementation prohibited. For this reason, Counsel urged the Court not to grant the order.

25. It is further stressed that the Petition does not state violation of any of the fundamental rights and freedoms in the Bill of Rights neither does it seek any relief on the same. As such, Counsel submitted that the sought conservatory orders cannot be issued without a demonstration of such violation. Nonetheless grant of these orders was stated to be against public interest.

26. Reliance was placed in Nairobi Civil Appeal No. E984 of 2023 Cabinet Secretary Ministry of Health versus Joseph Enock Aura and Others where the Court of Appeal held that:

> " 46. Turning to the merits of the appeal, in this jurisdiction, conservatory orders are a creation of *the Constitution* of Kenya 2010. Article 22 of *the Constitution* secures for every person the right to institute proceedings in the High Court to redress infringement or threatened infringement of the rights or fundamental freedoms guaranteed the Bill of Rights. Article 23 empowers the High Court, when seized of proceedings to enforce rights or fundamental freedoms, to issue a raft of reliefs, among them a conservatory order. The provision provides as follows:
>
> 47. It is quite apparent from Article 23(3) that a conservatory order may only be issued in proceedings to vindicate rights and fundamental freedoms set out in the Bill of Rights and that the choice of the most suitable relief to grant in such proceedings is at the discretion of the court, which may grant the relief it deems most "appropriate." (See Hon. Kanini Kega v. Okoa Kenya Movement & 6 Others [2014] eKLR)."

27. Like dependence was placed in Gatirau Peter Munya v Dickson Mwenda Kithinji, Independent Electoral and Boundaries Commission & Fredrick Njeru Kamundi County Returning Officer, Meru County [2014] KESC 49 (KLR).

28. It was further argued that Prayers 7, 9, 10 and 12 had not been properly invoked hence not grantable. Equally, Prayer 13 was argued to be misconceived as the Petitioners cannot seek to direct the Hon.

Chief Justice on the number of Judges to appoint if at all as it is a discretionary matter. Tying to this, Counsel argued that the Petition does not raise any novel issues to warrant empanelment of a bench.

29. Counsel similarly argued that the Petitioners' prayers on both conservatory orders and injunctions at the same time was misguided. Reliance was placed in Cabinet Secretary Ministry of Health versus Joseph Enock Aura and Others (supra) where it was held that:

> " From Article 23, it is equally apparent that an injunction and a conservatory order are separate and distinct reliefs. In Muslims for Human Rights (MUHURI) & 2 Others v Attorney General & 2 Others [2011] eKLR, the High Court held as follows on the distinction between a conservatory order and an injunction:
>
> > "What is clear to me form the authorities is that strictly a conservatory order is not an injunction as known in civil matters or generally in other legal proceedings but is an order that tends to and is intended to preserve the subject-matter or set of circumstance that exist on the ground in such a way that the constitutional proceedings and cause of action is not rendered nugatory. Through a conservatory order the court is able to give such directions as it may consider appropriate for the purpose of securing of the provisions of *the Constitution*...(A Conservatory order would enable the court to maintain the status quo or existing situation or set of facts and circumstances so that it would be still possible that the rights and freedoms of the claimant would still be capable of protection and enforcement upon determination of the petition and the trial was not a futile academic discourse or exercise."

30. Counsel relying on the 2nd Respondent's replying affidavit submitted that it was evident that the legal procedure was followed in the budgeting process and so the Petitioners' allegations are not merited. It was noted that the Appropriation Act had already been enacted into law. In this regard, the Petitioners had not met the requisite principles upon which courts suspend statutes for a number of reasons.

31. Firstly, statutes enjoy the presumption of constitutionality until proved otherwise as held in Ndyanabo v. Attorney General [2001] 2 EA 485. Secondly, making of legislation by the legislature falls under the principle of separation of powers. That is, the Court is barred from interfering with the mandate of another arm of government where due process was followed. Reliance was placed in Speaker of the Senate & Another v. Attorney General & 4 Others, [2013]eKLR where it was held that:

> " A clear inference to be drawn is that, it was the Supreme Court's stand that no arm of Government is above the law. This being a constitutional democracy, *the Constitution* is the guiding light for the operations of all State Organs. The Court's mandate, where it applies, is for the purpose of averting any real danger of constitutional violation."

32. Like dependence was placed in Mate & Another v. Wambura & Another [2017] KESC 1 (KLR), Bishop Jospeh Kimani & others v. Attorney General & Others, HC Pet. No. 669 of 2009; Susan Wambui Kaguru & others v. Attorney General & Another, [2012] eKLR; Kizito Mark Ngaywa v. Minister of State for Internal Security and Provincial Administration & Another [2011] eKLR and Hitmark Transporters Sacco Society Ltd. v. County Government of Machakos & Another [2015] eKLR.

33. Counsel in closing urged the Court to decline the Petitioners' invitation as is based on unfounded grounds. Reliance was placed in Cabinet Secretary Ministry of Health versus Joseph Enock Aura and others (supra) where it was held that:

> "74. An examination of some of the legislation whose operation the court suspended, in particular the Social Health *Insurance Act*, would have alerted the court that the new Act had repealed the public health insurance system that was previously operational in the country. In our view, it does not constitute acting with sensitivity and circumspection when the court suspends the operation of new repealing legislation, without first inquiring how the lacuna created by the repeal of the previous legislation will be filled or the implications or consequences of the lacuna for the general public."

3rd, 8th and 11th Respondents' Submissions

34. Counsel, Joshua Kiilu for these Respondents filed submissions dated 23rd July 2024.The issues highlighted for determination were: whether the Orders sought are moot and premature; whether the application satisfies the grounds for granting conservatory orders and whether the Petition satisfies the requirement for empanelment of a bench under Article 165(4) of *the Constitution*.

35. Counsel in view of the orders sought to prohibit the 3rd Respondent from considering the Finance Bill, 2024, Appropriation Act 2024 and the 9th Respondent's memorandum on the Finance Bill, 2024, submitted that the matter is moot. This is because the 3rd Respondent has already debated, voted and passed both the Finance Bill 2024 and Appropriation Bill 2024. As such there is no pending process before the 3rd Respondent to be stayed regarding the two Bills.

36. Reliance was placed in *Institute for Social Accountability & another v National Assembly & 3 others & 5 others (Petition 1 of 2018)* [2022] KESC 39 (KLR) where the Supreme Court held that:

> "A matter was moot when it had no practical significance or when the decision would not have the effect of resolving the controversy affecting the rights of the parties before it. If a decision of a court would have no such practical effect on the rights of the parties, a court would decline to decide on the case. There had to be a live controversy between the parties at all stages of the case when a court was rendering its decision. If after the commencement of the proceedings, events occurred changing the facts or the law which deprived the parties of the pursued outcome or relief then, the matter became moot. Where a new statute was enacted that unequivocally addressed the concerns that were at the heart of a dispute then such a dispute would be moot."

37. Like dependence was placed in Afriform NPC and others v Eskom Holdings SOC Limited & others 3 All SA 663 (GP).

38. Counsel further submitted that the orders sought in the application were premature as were based on speculation of what the 3rd Respondent might decide on the Finance Bill, 2024 after the 9th Respondent's referral. Moreover, that it is based on a speculation of the possible outcome thus making their case in this regard premature. Counsel stressed that the Petitioners ought to have waited for the 3rd Respondent to finish the process without undue interference but failed to do so.

39. Counsel added that the Petitioners had not demonstrated how the exercise of the 9th Respondent's constitutional power under Article 115 of *the Constitution* violated their rights.

40. On the sought conservatory orders, Counsel emphasized that the Finance Bill, not being an Act of Parliament then was incapable of being implemented as is still in the legislative stage thus the order sought is misconceived. With reference to the Appropriation Act, 2024 and the *Public Finance Management Act*, Counsel noted that the issuance of conservatory orders is anchored on the preservation of the substratum of the case in order to prevent grave violation of constitutional rights as held in Gatirau Peter Munya (supra).

41. Like dependence was placed in Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board and Others Nairobi High Court (2016)eKLR.

42. Consequently, Counsel relying on the issued principles, submitted that although the constitutional question in this matter ought to be determined, the same cannot be determined at the interlocutory stage. This is because it is based on the merit of the case hence cannot be determined on the interim.

43. Counsel further noted that the substratum of the case would not be rendered nugatory as the Petitioners had not demonstrated how the Petition would be rendered so, if implementation of the Appropriation Act and Sections 39(1) and 39A (3) of the PFMA is not stayed.

44. Likewise, Counsel stressed that the public interest in this matter tilts in favour of the Respondents. This is since public interest dictates that the Executive, Parliament, Judiciary, constitutional and independent offices be well-resourced to carry out their mandates without undue interference.

45. Lastly, Counsel submitted that although the Petition raises pertinent constitutional issues the same revolve around the interpretation of *the Constitution* which the Court regularly executes in discharging its judicial mandate. Considering this, it is argued that the issues raised herein are not novel to justify empanelment of a bench. Reliance was placed in Kinyanjui v Attorney General & another; Omollo & 18 others (Interested Parties) (Petition 74 of 2011) [2012] KEHC 5411 (KLR) where it was held that:

> "A matter may raise complex issues of fact and law but this does not necessarily imply that the matter is one that raises substantial issues of law. Judges are from time to time required to determine complex issues yet one cannot argue that it means that every issue is one that raises substantial questions of law. Thus, there must be something more to the "substantial question" than merely novelty or complexity of the issue before the court. It may present unique facts not plainly covered by the controlling precedents. It may also involve important questions concerning the scope and meaning of decisions of the higher courts or the application of well-settled principles to the facts of a case."

12th Respondent's Submissions

46. Counsel, Murakaru Wahome filed submissions for the 12th Respondent dated 24th July 2024.Counsel highlighted the only issue for determination as whether the conservatory orders sought against the 12th Respondent can issue.

47. On a starting point, Counsel submitted that the essence of a conservatory order was defined in Invesco Assurance Co v MW (Minor suing thro' next friend and mother (HW) [2016] eKLR as:

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

48. Like reliance was placed in Gatirau Peter Munya (supra) and Centre for Rights Education and Awareness (CREW) & 7 others v Attorney General (2011) eKLR.

49. Counsel submitted that these orders cannot issue in view of the remuneration and benefits of State Officers based on the impugned Gazette Notices. This is because, the Court in issuing such orders ought to bear in mind the public interest, constitutional values, the proportionate magnitudes and priority levels attributable to the relevant causes as stated by the Supreme Court.

50. Furthermore, Counsel submitted that the Petitioners had not established a prima facie case. This is since the Petitioners had not demonstrated how the 12th Respondent's impugned Gazette notices contravene the provisions of *the Constitution* as set out in Anarita Karimi Njeru v Republic (1978 – 1980) KLR 1272.

51. Equally, Counsel emphasized that the public interest in this matter does not favour grant of the sought orders. This is since in the absence of any other remuneration and benefits for State Officers other than those set in the impugned Gazette Notices, public interest dictates that the set remuneration and benefits continue to apply to avoid a vacuum.

52. In the same manner, Counsel submitted that justice necessitates a party be heard before any orders affecting their rights or interests are issued. It was noted that the State Officers addressed in the impugned Gazette Notices are not parties herein. On this premise Counsel was certain that the instant application does not meet the set threshold for conservatory orders and as such the same are not merited.

16th Respondents' Submissions

53. Counsel, Martin Machira, filed submissions dated 26th July 2024.The main issue for determination was identified as:whether the Petitioners have met the threshold for grant of orders of stay.

54. Firstly, Counsel submitted that constitutional commissions enjoy independence and thus not subject to any of the arms of the government as long as uphold their mandate in a lawful manner. To buttress this point reliance was placed In the Matter of the Interim Independent Electoral Commission (Applicant) [2011] KESC 1 (KLR) where it was held that:

> " While bearing in mind that the various Commissions and independent offices are required to function free of subjection to "direction or control by any person or authority", we hold that this expression is to be accorded its ordinary and natural meaning; and it means that the Commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit. These Commissions or independent offices must, however, operate within the terms of *the Constitution* and the law: the "independence clause" does not accord them carte blanche to act or conduct themselves on whim; their independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in *the Constitution* and the law."

55. On this basis, Counsel urged the Court to note that the order sought was an attempt to control the 16th Respondent's mandate in violation of the dictates of *the Constitution*.

56. Counsel also asserted that grant of the said prayers would be in violation of its independence and contrary to good governance. Considering this, Counsel implored the Court to be guided by the

holding in Mumo Matemu v Trusted Society Of Human Rights Alliance & 5 Others [2013] eKLR where the Court of Appeal held that:

> " "Deference is multi-directional, and we are prepared to hold that in the same way the other branches are to defer to the jurisdiction of the courts, the courts must also defer to the other branches where the constitutional design so ordains."

7th Interested Party's submissions

57. On 25th July 2024, the 7th Interested Party filed submissions through Mitullah, Shako and Associates Advocates. The issues identified for determination were: whether the Petitioners' prayer for empanelment is merited, whether the Petitioners' prayer for grant of conservatory orders merited and whether the Petitioners' prayer for grant of stay orders against the 9th Respondent's directive is merited.

58. Counsel submitted that it was undisputed that the Petition raises questions concerning a threat to *the Constitution*. Particularly, in relation to Articles 201(d) and (e) and 221 (1) of *the Constitution* among others According to Counsel these issues are raise substantial questions of law of general public importance. This can be gleaned from the various protests and demonstrations that demand for accountability. Considering this, Counsel submitted that the issues raised in the Petition satisfy the threshold of empanelment of a bench of an even number of Judges to determine the issues.

59. To buttress this point reliance was placed in Santosh Hazari vs. Purushottam Tiwari (2001) 3 SCC 179, where the Supreme Court of India held that:

> " The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not initially settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views."

60. Comparable reliance was placed in Omega Enterprises (Kenya) Limited v Kenya Tourist Development Corporation Limited & 2 others [1998] eKLR, Okoiti & 6 others vs. Cabinet Secretary for the National Treasury and Planning & 3 others; Commissioner-General, Kenya Revenue Authority & 3 others (Interested Parties) (Petition E181 of 2023) [2023] and Nubian Rights Forum & 2 others vs. Attorney General & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre for Intellectual Property & Information Technology (Proposed Amicus Curiae) Petition Nos. 56, 58 & 59 of 2019 [2019] eKLR.

61. On grant of conservatory orders, Counsel relying in Katiba Institute vs. Judicial Service Commission & 2 others; Kenya Magistrates and Judges Association & 2 others (Interested Parties) (Constitutional Petition E128 of 2022) eKLR noted that the principles were highlighted as follows:

> " a. The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he was likely to suffer prejudice.
>
> b. Whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
>
> c. Whether, if an interim conservatory order was not granted, the petition or its substratum would be rendered nugatory.

d. Whether the public interest would be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order."

62. Similar dependence was placed in Mrao Ltd vs First American Bank of Kenya and 2 Others (2003), Suleiman Said Shabhal v Independent Electoral & Boundaries Commission & 3 others [2014] eKLR and Law Society of Kenya vs. Officer of the Attorney General & another; Judicial Service Commission (Interested Party) [2020] eKLR.

63. Counsel stated that the circumstances in this case satisfy the threshold for grant of these orders. This is because the Petition raises issues that revolve around the violation of Article 222(1) of *the Constitution*, the constitutionality of the Appropriation Act, a declaration of unconstitutionality of consequential bills including the Supplementary Appropriation Bill, Division of Revenue Bill and the County Allocation and Revenue Bill. Moreover, the unlawful enactment of the Appropriation Act for the appropriation of monies for the 2024/2025 financial year.

64. Consequently, Counsel submitted that the Respondents would not suffer any prejudice if the conservatory orders are granted as *the Constitution* provides for funding of budgetary needs where there is no lawful Appropriation Act in place under Article 222 (1) and (2)(a) of *the Constitution*.

65. On the final issue, Counsel submitted that the 9th Respondent's directive was in violation of the principle of separation of powers and moreover unconstitutional. As such, it was argued that it was imperative that the 9th Respondent's be stopped from interfering with judicial and legislative processes.

66. To buttress this issue reliance was placed in Ombati v Chief Justice & President of the Supreme Court & another; Kenya National Human Rights and Equality Commission & 2 others (Interested Party) (Petition E242 of 2022) [2022] KEHC 11630 (KLR) where it was observed that:

> " The making of the impugned rules, offended *the Constitution* and the doctrine of separation of powers which requires each of the 3 arms of government to stick to its lane. In Trusted Society of Human Rights Alliance v Attorney General & 2 others; Matemu (Interested Party); With Kenya Human Rights Commission & another (amicus curiae) (Petition 229 of 2012) [2012] KEHC 2480 (KLR) (Constitutional and Human Rights) (20 September 2012) (Judgement) a 3-judge bench of this court considered the principle of separation of powers in relation to the judiciary and the legislature, observed as follows:
>
> 63. In answering these constitutional questions, it is imperative that we begin by re-stating that the doctrine of separation of powers is alive and well in Kenya. Among other pragmatic manifestations of the doctrine, it means that when a matter is textually committed to one of the coordinate arms of government, the courts must defer to the decisions made by those other coordinate branches of government. Like many modern democratic Constitutions, the New Kenyan Constitution consciously distributes power among the three co equal branches of government to ensure that power is not concentrated in a single branch. This design is fundamental to our system of government. It ensures that none of the three branches government usurps the authority and functions of the others."

Analysis and Determination

67. Following a review of the pleadings and respective parties' submissions, it is my view that the following are issues aruse for determination in this application:

i. Whether the Application meets threshold for grant of conservatory orders.

ii. Whether the Court in the light of doctrine of separation of powers should grant the interim orders sought.

iii. Whether the issues raised in the Petition satisfy the test of empanelment of a bench under Article 165(4) of *the Constitution*.

iv. Whether the 9th Respondent was improperly joined in this suit.

Whether the Petitioners have met the threshold for grant of conservatory orders.

68. The law on issuance of conservatory orders in constitutional petitions is anchored on Article 23(2)(c) of *the Constitution* as read with Rule 23 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which states as follows:

> Conservatory or interim orders.
>
> 1. Despite any provision to the contrary, a Judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim orders.
>
> 2. Service of the application in sub rule (1) may be dispensed with, with leave of the Court.
>
> 3. The orders issued in sub rule (1) shall be personally served on the respondent or the advocate on record or with leave of the Court, by substituted service within such time as may be limited by the Court.

69. The Court in Wilson Kaberia Nkunja (supra) summarized three main principles for consideration when dealing with such applications as follows:

> "
>
> "a. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*.
>
> b. Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
>
> The public interest must be considered before grant of a conservatory order."

70. Likewise, in Board of Management of Uhuru Secondary School v. City County Director of Education & 2 Others [2015] eKLR the Court stated that:

> "25. Foremost, the applicant ought to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice....
>
> 26. It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis....

28. Once the applicant has established to the court's satisfaction a prima facie case with a likelihood of success the court is then to decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights....

29. Thirdly, flowing from the first two principles, is whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is indeed the business of the court to ensure and secure so far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice....

30. The fourth principle which emerges from the various cases and is well captured by the Supreme Court of Kenya in the case of Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others [2014] eKLR is that the court must consider conservatory orders also in the face of the public interest dogma.

31. Finally, the court is to exercise its discretion in deciding whether to grant or deny a conservatory order. The court must consequently consider all relevant material facts and avoid immaterial matters. The court will consider the applicants credentials, the prima facie correctness of the availed information, whether the grievances are genuine legitimate and deserving and finally whether the grievances and allegations are grave and serious or merely vague and reckless."

71. A scrutiny of the pleadings and submissions of the parties reveal that the crux of this petition is the budgeting process which the Petitioners allege is not in sync with the Constitutional dictates. The question to be answered therefore is whether the grounds raised in the Application satisfy the threshold for grant of conservatory orders.

72. It is obvious that the Respondents' being State Organs are required in exercising their mandate to uphold and comply with the dictates of *the Constitution* and the law. Failure to do so would amount to violation of the laid down constitutional principles.

73. In this matter, it is alleged that the 3rd Respondent ceded its mandate to the 9th Respondent and as such, the Executive has usurped the 3rd Respondent's mandate. That argument if substantiated by demonstrable evidence amounts to an infringement of *the Constitution*. However, it is one thing to allege and another to actually prove the allegation. If substantiated, the matter would a raise a prima facie arguable case. At the moment though, I do not think that there is a prima facie manifestation of this fact as what was availed in support is an issue that is subject to construal which cannot be decided without further elucidation.

74. The second principle requires a demonstration of the prejudice or the real danger that the Petitioners will be exposed to, if the orders are not issued, ultimately rendering the Petition nugatory.This aspect was discussed in Martin Nyaga Wambora vs. Speaker of The County of Assembly of Embu & 3 Others (2014) eKLR as follows:

> " To those erudite words I would only highlight the importance of demonstration of "real danger". The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus,

an allegedly threatened violation that is remote and unlikely will not attract the court's attention."

75. At heart of the second principle is a demonstration there exists real prejudice thereby necessitating an immediate intervention by the Court.The Petitioners did not bring out this aspect with exactitude.

76. Lastly, is the public interest element as aptly expounded by the Supreme Court in Gatirau Peter Munya (supra); that:

> " Conservatory orders' bear a more decided public Law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the "prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the applicant's case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes …."

77. This means that the Court has the duty to balance the interests of the Petitioners and the Respondents. In this suit, the Petitioners seek to have the Court suspend the 3rd Respondent's legislative process in regard to the passing of financial statutes. On the other hand, the Respondents asserts that issuance of these orders not only violates the principle of separation of powers but will have catastrophic effects on public interest as the government organs and Commissions need these resources to carry out their functions.

78. As things stand, veracity and strength of the Petitioners assertions has to be ascertained by the Court. This can only be conclusively done after the hearing of the main trial. In the circumstances and considering that there is no real danger that has been manifested or demonstrated by the Petitioners as their allegations are yet to be interrogated by this Court, it is my considered view that public interest weighs in favour of not granting the orders sought. As such, grant of the said orders will not only be prejudicial to the Respondents but the public at large.

Whether the Court in the light of doctrine of separation of powers the Court should grant the interim orders sought.

79. The Court in Hezron Kamau Gichuru v Kianjoya Enterprises Ltd & another [2022] eKLR as follows:

> " 52. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of Giella Versus Cassman Brown (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of Nguruman Limited versus Jan Bonde Nielsen & 2 others *CA No.77 of 2012* (2014) eKLR where the Court of Appeal held that:
>
> > "in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.
> >
> > These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established

that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially".

53. Consequently, the Plaintiff ought to, first, establish a prima facie case.The plaintiff/Applicant submitted that they have established a prima facie case and relied on the judicial decision of Mrao Ltd Versus First American Bank of Kenya Ltd (2003) EKLR in which the Court of Appeal gave a determination on a prima facie case. The court stated that:

> "... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."
>
> ....

55. Secondly, The Plaintiff has to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) eKLR provides an explanation for what is meant by irreparable injury and it states;

> "Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.
>
> ....

58. Thirdly, the Plaintiffs have to demonstrate that the balance of convenience tilts in their favour. In the case of Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) EKLR which defined the concept of balance of convenience as:

> 'The meaning of balance of convenience will favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.
>
> In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".

80. Further, the Court discussing what a permanent injunction entails in Kenya Power & Lighting Co. Limited v Sheriff Molana Habib [2018] eKLR held thus:

> " 8. ...A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.
>
> 9. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties."

81. Correspondingly, the Court of Appeal in Lucy Wangui Gachara v Minudi Okemba Lore (2015)eKLR guided as follows:

> " It has been stated time and again that although the court has jurisdiction to grant a mandatory injunction at the interlocutory stage, such injunction should not be granted, absent special circumstances or only in the clearest of cases. The circumspection with which the court approaches the matter is informed by the fact that the grant of a mandatory injunction amounts to determination of the issues in dispute in a summary manner. In addition, the parties are put in an awkward situation should the court, after hearing the suit, ultimately decide that there was no basis for the mandatory injunction at the interlocutory stage."

82. The superior Court went on to state that:

> " Among the special circumstances that may justify the grant of a mandatory injunction at interlocutory stage is where the injunction involves a simple act that could be easily reversed or remedied should the court find otherwise after trial; the defendant has accelerated the development that the plaintiff seeks to retrain, with the intention of defeating the plaintiff's claim or where the defendant is otherwise bent on stealing a match on the plaintiff.
>
> On the other hand, the court will not grant a mandatory injunction if the damage feared by the plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing.
>
> Persuasive judicial pronouncements by Indian courts have also affirmed that great circumspection is called for before awarding a mandatory injunction at interlocutory stage. In BHARAT PETROLEUM CORP LTD V. HARO CHAND SACHDEVA, AIR 2003, Gupta, J. of the Delhi High Court observed as follows:
>
> > "While Courts power to grant temporary mandatory injunction on interlocutory application cannot be disputed, but such temporary mandatory injunctions

> have to be issued only in rare cases where there are compelling circumstances and where the injury complained of is immediate and pressing and is likely to cause extreme hardship. If a mandatory injunction has to be granted at all on interlocutory application, it is granted only to restore status quo and not to establish a new state of things.

Earlier in NANDAN PICTURES LTD. V ART PICTURES LTD & OTHERS, AIR 1956, CAL 428, Chakravartti, CJ. of the High Court of Calcutta set out, in the following passage, the rather limited scope in which a mandatory injunction is available at the interlocutory stage:

> "At the same time, I may point out what the accepted principles have been and what has been, according to the reported cases, the practice of the Courts. It would appear that if a mandatory injunction is granted at all on an interlocutory application, it is granted only to restore the status quo and not granted to establish a new state of things, differing from the state, which existed at the date when the suit was instituted. The one case in which a mandatory injunction is issued on an interlocutory application is where, with notice of the institution of the plaintiff's suit and the prayer made in it for an injunction to restrain the doing of a certain act, the defendant does that act and thereby alters the factual basis upon which the plaintiff claimed his relief. An injunction issues in such a case in order that the defendant cannot take advantage of his own act and defeat the suit by saying that the old cause of action no longer survived and a new cause of action for a new type of suit had arisen. When such is found to be the position, the Court grants a mandatory injunction even on an interlocutory application, directing the defendant to undo what he has done with notice of the plaintiff's suit and the claim therein and thereby compels him to restore the position which existed at the date of the suit."

83. The Petitioners seek to injunct the 3rd, 9th, 12th and 16th Respondents on a matter that involves a legislative process. That brings into consideration the principle of separation of powers which has been judicially considered extensively by the Courts. The Supreme Court in Justus Kariuki Mate & another v Martin Nyaga Wambora & another (2017)eKLR guided as follows:

> (57) The Court of Appeal, in the case of Mumo Matemu v. Trusted Society of Human Rights Alliance & 2 Others, Civil Appeal No 290 of 2012, [2013] eKLR, adopted the High Court's dicta, in the following terms:
>
> > "[Separation of powers] must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the Executive sufficient latitude to implement legislative intent. Yet, as the respondents also concede, the Courts have an interpretive role – including the last word in determining the constitutionality of all governmental actions..."

84. The Court went on to affirm as follows and set the following principles:

> "(62) A clear inference to be drawn is that, it was the Supreme Court's stand that no arm of Government is above the law. This being a constitutional democracy,

the Constitution is the guiding light for the operations of all State Organs. The Court's mandate, where it applies, is for the purpose of averting any real danger of constitutional violation.

(63) From the course of reasoning emerging from such cases, it is possible to formulate certain principles, as follows:

a. each arm of Government has an obligation to recognize the independence of other arms of Government;

b. each arm of Government is under duty to refrain from directing another Organ on how to exercise its mandate;

c. the Courts of law are the proper judge of compliance with constitutional edict, for all public agencies; but this is attended with the duty of objectivity and specificity, in the exercise of judgment;

d. for the due functioning of constitutional governance, the Courts be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interests attending each case;

e. in the performance of the respective functions, every arm of Government is subject to the law."

85. Congruently the court in In Apollo Mboya v. AG & 2 others (2018) eKLR, the court held as follows;

> " According to the doctrine of the separation of powers, one of the important functions of the judiciary is to keep the other organs of the State in check by ensuring that their actions comply with the law, including, where applicable, *the constitution*. Ouster clauses prevent courts from carrying out this constitutional function.....The primary duty of the courts is to uphold *the Constitution* and the law "which they must apply impartially and without fear, favour or prejudice." And if in the process of performing their constitutional duty, courts intrude into the domain of other branches of government, that is an intrusion mandated by *the constitution*. What courts should strive to achieve is the appropriate balance between their role as the ultimate guardians of *the Constitution* and the rule of law including any obligation that parliament is required to fulfill in respect of the passage of laws, on the one hand and the respect which they are required to accord to other branches of government as required by the principle of separation of powers, on the other hand".

86. The legislative mandate is conferred on the legislature by Article 94 of *the Constitution*. In carrying out this mandate the legislature enjoys autonomy as prescribed by the principle of separation of powers. This aspect was appreciated in Mark Obuya, Tom Gitogo & Thomas Maara Gichuhi Acting for or on Behalf of Association of Kenya Insurers & 5 others vs. Commissioner of Domestic Taxes & 2 others [2014] eKLR as follows:

> " 32. The legislature is the law-making organ and it enacts the laws to serve a particular object and need. In the absence of a specific violation of *the Constitution*, the court cannot question the wisdom of legislation or its policy object. The fact that the particular provision of the statute merely may be

difficult to implement or inconvenient does not give the court license to declare it unconstitutional."

87. It is worth noting that the 3rd Respondent mandate is outlined in law and its Standing Orders. It is manifest from a perusal of the Petitioners/Applicants prayers that they seek to stop the legislative process yet it is sanctioned by *the Constitution*. It is a legal requirement that for a Bill has to be processed through Parliament in order to assume its legal character by going through the set legislative processes. From what is before this Court, the legislative process in relation to the Finance Bill was incomplete. The intervention of the Court was thus sought prematurely and this Court has to decline that invitation.

88. In regard to the Appropriation Act and *Public Finance Management Act*, the declaration of their constitutionality has to await the merits of the case which cannot be determined at this interim stage.

89. Consequently, there is no basis for issuance of injunctive orders sought by the Petitioners/Applicants.

Whether the issues raised in the Petition satisfy the test of empanelment of a bench under Article 165(4) of *the Constitution*.

90. The law on empanelment of a bench is provided under Article 165 (4) of *the Constitution* which provides that:

> (4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

91. It is evident from the above cited provision that for a matter to be considered for empanelment, it must raise a substantial question of law under Article 165 (3)(d) of *the Constitution*.

92. The Supreme Court of India in Chunilal Mehta v Century Spinning and Manufacturing Co. AIR 1962 SC 1314, discussed the question of substantial question of law as follows:

> " A 'substantial question of law' is one which is of general public importance or which directly and substantially affects the rights of the parties and which has not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd,the question would not be substantial."

93. Likewise, in J. Harrison Kinyanjui V Attorney General & Another [2012] eKLR the Court stated:

> " 8. Therefore, giving meaning to "substantial question" must take into account the provisions of *the Constitution* as a whole and need to dispense justice without delay particularly given a specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter. It must also be remembered that each High Court judge, has authority under Article 165 of *the Constitution*, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of Article 165(4), the decision of a three Judge bench is of equal force to that of a single

judge exercising the same jurisdiction. A single judge deciding a matter is not obliged to follow a decision of the court delivered by three judges."

94. The Court went on to note that:

> " 10. A matter may raise complex issues of fact and law but this does not necessarily imply that the matter is one that raises substantial issues of law. Judges are from time to time required to determine complex issues yet one cannot argue that it means that every issue is one that raises substantial questions of law. Thus, there must be something more to the "substantial question" than merely novelty or complexity of the issue before the court. It may present unique facts not plainly covered by the controlling precedents. It may also involve important questions concerning the scope and meaning of decisions of the higher courts or the application of well-settled principles to the facts of a case."

95. Further in Philomena Mbete Mwilu vs Director of Public Prosecution & 4 Others (2018) eKLR held:

> " 24. .....a question of law would be a substantial question of law if it directly or indirectly affects the rights of parties; there is some doubt or difference of opinion on the issues raised and that the issue is capable of generating different interpretations. If, however the question has been well settled by the highest court or the general principles to be applied in determining the question before court have been well-settled, the mere application of those principles to a new set of facts presented in a case before the court would not on their own constitute a substantial question of law. There must be the possibility of the matter attracting different interpretations or opinion in its interpretation or application of the principles espoused in the matter to make it a substantial question of law. All this notwithstanding, it is up to the individual judge to decide whether the matter raises a substantial question of law for purposes of reference."

96. The Court of Appeal in Okiya Omtatah Okoiti & another v Anne Waiguru – Cabinet Secretary, Devolution and Planning & 3 others [2017]eKLR set out the principles to be applied as follows:

> " 42. There are, in our view, parallels to be drawn between certification for purposes Article 163(4)(b) of *the Constitution* and certification for purposes of Article 165(4) notwithstanding that the drafters of *the Constitution*, in providing for certification of matters for purposes of appeal to the Supreme Court under Article 163(4)(b) stipulated that a matter should be of "general public importance", The word, "substantial" in its ordinary meaning, means "of considerable importance". There is therefore wisdom to be gained from the pronouncements of the Supreme Court of Kenya respecting interpretation of Article 163(4)(b). In Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone [2013] eKLR the Supreme Court of Kenya pronounced governing principles for purposes of certification under Article 163(4)(b) some of which are relevant in the context of certification under Article 165(4). Drawing therefrom, we adopt, with modification, the following principles:
>
> "(i) For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the Court that the issue

to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;

(ii) The applicant must show that there is a state of uncertainty in the law;

(iii) The matter to be certified must fall within the terms of Article 165 (3)(b) or (d) of *the Constitution*;

(vi) The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought."

43. It is our judgment therefore, that whether a matter raises a substantial point of law for purposes of Article 165(4) of *the Constitution* is a matter for determination on a case-by-case basis. The categories of factors that should be taken into account in arriving at that decision cannot be closed."

97. Having regard to the foregoing authorities, it is crystal clear that the fact that a party considers a matter to be falling under Article 165(4) of *the Constitution* does not mean that the Court will automatically concede to the application. It is the Court which has to be satisfied the matter raises 'substantial questions for determination which must be assessed based on the principles developed through judicial precedents.

98. The Petitioners summarize the key issues deemed as substantial questions of law as follows:

i. The constitutionality of the budgeting process for the 2024/25 Financial Year.

ii. The abdication by the National Assembly and MPs of their obligations and duties in budget-making which triggered widespread protests and rejection of the Finance Bill, 2024 by millions of Kenyans culminating in the President's refusal to give his assent.

iii. The constitutionality of the Appropriation Act, 2024.

iv. The legality and legitimacy of the steps taken by the National Executive to address and redress the political and legal problems in budgeting for the 2024/25 Financial Year and public finance management occasioned by the rejection of the Finance Bill, 2024.

v. The constitutionality of the Supplementary Estimates and attendant Supplementary Appropriation Bill, 2024 in the wake of the rejection of the Finance Bill, 2024 and the attendant dismissal of all the cabinet secretaries, save one.

99. Determination of these issues require an interpretation and application of constitutional and legal principles. It is my humble and respectful view that the issues as framed by the Petitioners revolve around established constitutional principles which have been adequately be addressed by this Court before. Additionally, the Petitioners have not demonstrated that there is a state of uncertainty in the law with regards to the issues raised.

100. Consequently, I find no justification for certifying this matter for empanelment of a bench.

Whether the 9th Respondent was improperly joined in this suit.

101. The law on joinder of parties and misjoinder of parties in constitutional petitions is anchored in *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 under Rule 5. This Rule stipulates as follows:

> The following procedure shall apply with respect to addition, joinder, substitution and striking out of parties—
>
> a. Where the petitioner is in doubt as to the persons from whom redress should be sought, the petitioner may join two or more respondents in order that the question as to which of the respondent is liable, and to what extent, may be determined as between all parties.
>
> b. A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.
>
> c. Where proceedings have been instituted in the name of the wrong person as petitioner, or where it is doubtful whether it has been instituted in the name of the right petitioner, the Court may at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as petitioner upon such terms as it thinks fit.
>
> d. The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—
>
> (i) order that the name of any party improperly joined, be struck out; and
>
> (ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.
>
> (e) Where a respondent is added or substituted, the petition shall unless the court otherwise directs, be amended in such a manner as may be necessary, and amended copies of the petition shall be served on the new respondent and, if the court thinks, fit on the original respondents.

102. The essence of this principle was captured and affirmed by the Supreme Court in Ndii & others v Attorney General & others (Petition E282, 397, E400, E401, E416 & E426 of 2020 & 2 of 2021 (Consolidated)) [2021] KEHC 9746 (KLR) (Constitutional and Human Rights) (13 May 2021) (Judgment) where it was held that:

> " 537. Be that as it may, order 1 rule 9 of the Civil Procedure Rules is clear that a suit cannot be defeated for misjoinder or non-joinder and that what the court should be bothered with is the determination of the rights of the parties; that rule reads as follows: No suit shall be defeated by reason of the misjoinder or non- joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

538. To the extent that this rule is applicable to the petitions such as the one before court, we can confidently say that regardless of whether the 1st respondent has been properly joined to this suit, this court is in good stead and ideally placed to 'deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

103. Turning directly to answer the question of whether the 9th Respondent, is a proper party in these proceedings, I note that the 9th Respondent is the President of the Republic of Kenya. Under Article 143 of *the Constitution*, the President enjoys constitutional immunity from legal proceedings. This Article provides thus:

> Protection from legal proceedings
>
> 1. Criminal proceedings shall not be instituted or continued in any court against the President or a person performing the functions of that office, during their tenure of office.
>
> 2. Civil proceedings shall not be instituted in any court against the President or the person performing the functions of that office during their tenure of office in respect of anything done or not done in the exercise of their powers under this Constitution.
>
> 3. Where provision is made in law limiting the time within which proceedings under clause (1) or (2) may be brought against a person, a period of time during which the person holds or performs the functions of the office of the President shall not be taken into account in calculating the period of time prescribed by that law.
>
> 4. The immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity.

104. The Supreme Court of Kenya in the case of Attorney-General & 2 others v Ndii & 79 others; Prof. Rosalind Dixon & 7 others (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent) held as follows in relation to Article 143 of *the Constitution*:

> " 32. The immunity of the President was unlike that of the other state actors. The President not only enjoys functional immunity like all public officials who perform state duties, which protected them from civil liability for official functions, he also enjoyed sovereign immunity as the Head of State and the single representation of the sovereignty of the Republic.
>
> 33. it was only sovereign immunity that could immunize anyone against both civil proceedings and criminal liability because any other immunity would be related to official functions and therefore would inherently be a 'qualified immunity'. That was the only explanation why all other public officials would be liable to criminal prosecutions even while in office, but the President would not only not have criminal proceedings instituted against them, but also any criminal proceedings that may have been ongoing would be discontinued in the duration of the President's tenure of office.

34. It was the sovereign immunity that the Head of State, like all heads of states, enjoys that makes Article 143(4) relevant in that, the immunity should be waived by consent of the Republic through ratification of a treaty that forbade such immunity. Likewise, that was also why this immunity (from any proceedings, and especially from criminal liability) is limited to the duration during which the person represents the sovereignty of the Republic, and expires upon expiry of such term."

105. The Court further elucidated as follows:

> "...The import of Article 143(2) of *the Constitution* with respect to protection of the President was as follows:
>
> a. Immunity did not extend to acts or omission of sitting President done in purely personal capacity not connected with his office
>
> b. The immunity was only in respect to acts or omissions connected with the office and functions of that office
>
> c. Where an action or inaction/omission was in official capacity but bereft of any constitutional authority or power whatsoever or was in fact done in gross violation or serious violation of *the Constitution* then it was actionable against the President in person but only after he has left office.
>
> d. For acts and omissions falling under (c) above and which had to be questioned or challenged immediately, the President could be sued, not in his personal name, but through the Attorney General.
>
> The Superior Courts below fell in error in their interpretation and application of Article 143 (2) of *the Constitution* by holding that civil proceedings could be instituted against the President or a person of the President during their tenor of office in respect of anything done contrary to *the Constitution*. Civil proceedings could not be instituted against the President or a person performing the functions of the office of President during their tenure of office in respect of anything done or not done contrary to *the Constitution*. Such proceedings could be instituted against the President vide the Attorney General..."

106. The finding of the Supreme Court is clear, that "the President or a person performing the functions of the office of President" cannot be sued during their tenure of office for acts or omissions relating to those functions but that such actions be brought against the President through the Attorney General. The President cannot thus be joined as a party in a suit in relation to an act done in execution of official duties as President. I thus find and hold that the 9th Respondent is not a proper party in these proceedings. His name is ordered struck out from the proceedings.

107. In the overall analysis, this application is found to be without merit and is hereby dismissed.

108. Parties shall thus come for directions on the hearing of the main petition on 27/1/2025.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2024.

The Deputy Registrar is directed to electronically send this ruling to the Parties respective email addresses by close of business today, the 20th of December, 2024.

.....

L N MUGAMBI

JUDGE