



**Azimio La Umoja One Kenya Coalition Party v The President of
Kenya & 9 others (Petition E153 of 2023) [2023] KEHC 17926 (KLR)
(Constitutional and Human Rights) (29 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17926 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E153 OF 2023
LN MUGAMBI, J
MAY 29, 2023
IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF THE CONTRAVENTION OF ARTICLES:
1(1), 10, 59, 95,106, 157, 159, 160, 161, 162(2), 169(1)
(D), 232, 233, 234, 242, 245(2)(B) AND 249
AND
IN THE MATTER OF THE CONTRAVENTION OF ARTICLES 1,
10, 59, 95, 106, 157, 159, 160, 161, 162, 169, 232, 233,
234, 242, 245 AND 249
AND
IN THE MATTER OF THE CONTRAVENTION OF SECTION 10,
24 AND 35 OF THE NATIONAL POLICE SERVICE ACT, NO 11A
OF 2011
AND
IN THE MATTER OF THE CONTRAVENTION OF SECTION 65
OF THE PUBLIC SERVICE ACT, NO. 10 OF 2017
AND
IN THE MATTER OF THE CONTRAVENTION OF SECTION 7(1)
(A) THE INDEPENDENT POLICING OVERSIGHT AUTHORITY
ACT, NO.35 OF 2011



AND

1

IN THE MATTER OF THE CONSTITUTIONALITY OF THE
COMMISSION OF INQUIRY ACT, NO.11 OF 1962

AND

IN THE MATTER OF THE CONTRAVENTION OF SECTION 8 OF
THE COMMISSION ON ADMINISTRATIVE JUSTICE ACT, NO.
23 OF 2011

AND

IN THE MATTER OF THE CONTRAVENTION OF SECTION 65
OF THE NATIONAL INTELLIGENCE SERVICE ACT, NO. 205 OF
2012

BETWEEN

AZIMIO LA UMOJA ONE KENYA COALITION PARTY PETITIONER

AND

THE PRESIDENT OF KENYA 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

THE SPEAKER OF THE NATIONAL ASSEMBLY 3RD RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 4TH RESPONDENT

THE INSPECTOR GENERAL OF POLICE 5TH RESPONDENT

THE NATIONAL INTELLIGENCE SERVICE 6TH RESPONDENT

THE KENYA NATIONAL COMMISSION OF HUMAN
RIGHTS 7TH RESPONDENT

THE PUBLIC SERVICE COMMISSION 8TH RESPONDENT

THE COMMISSION FOR ADMINISTRATIVE JUSTICE 9TH RESPONDENT

THE INDEPENDENT POLICE OVERSIGHT AUTHORITY 10TH
RESPONDENT

RULING

Background

1. This Notice of Motion application dated 9/5/2023 was filed together with the Petition on the even date.



2. The Presiding Judge of this Division, Lady Justice H.I. Ongudi, certified the matter urgent and directed that the notice of motion application be served on all the Respondents by 11th May, 2023; Responses to both the Petition and the Application be filed by 18th May, 2023 and a mention on 22/5/2023 to confirm compliance; further, assigned this matter to this Court for hearing and determination.
3. On 15/5/2023, the Applicant/Petitioner presented a fresh certificate of urgency dated 12th May, 2023 before the duty court (H.I. Ongudi, J). The Judge directed that the file be placed before this Court for directions in respect of the certificate dated 12th May, 2023 on the 17th May, 2023 at 9.00 a.m. having noted that the Petitioner had served the notice of motion together with the petition as confirmed by the affidavit of service which was on record. The Petitioner was directed to serve the said mention notice.
4. All the Parties appeared virtually before me through their respective counsels on 17/5/2023. Mr. Paul Mwangi for the Petitioner articulated the reason for the mention. He explained that the Judge had certified the matter urgent but had omitted to address prayer 2 thus invited this Court now seized with the matter to consider the same so to preserve the substratum of the petition.
5. The Court heard Respondents viewpoint on the matter. The collective position of the Respondents was that this was mention and not hearing, further that they had not filed their responses which as per previous directions was to be accomplished by the following day, the 18th of May, 2023.
6. The Court reconfirmed the directions issued on 9/5/2023 which required the Respondents to file their responses to the Notice of Motion application by 18/5/2023 but on the Respondents request, extended the time for filing responses to the main petition by 14 days. The Court also directed that the hearing of the Notice of Motion application dated 9/5/2023 be on 22/5/2023.
7. The Notice of Motion application was heard on 22/5/2023 as directed hence this ruling. After the hearing of the application, the Court ordered that the status quo to remain pending delivery of this ruling.
8. The Petition subject of this application stems from the Kenya Gazette Notice Number 5660 of 4th May, 2023 by which the President of the Republic of Kenya established the ‘Commission of Inquiry into Shakahola Tragedy’ in the following terms:

“Gazette Notice No. 5660

The Constitution Of Kenya The Commission Of Inquiry Act (cap. 102) In The Matter Of A Commission Of Inquiry Into The Shakahola Tragedy Whereas, the mass deaths, cruelty, maiming, other inhumane and degrading acts perpetrated on members and other persons who were linked to the Good News International Church have been uncovered; Whereas, the scale of the death toll and the depravity of the actions committed against our fellow citizens has shocked the consciousness of the nation; Whereas, the Shakahola Tragedy has brought to the fore the issue of existence of religious extremist organizations, sects, cults, and other similar outfits in Kenya that have occasioned death or serious harm to Kenyans; and Whereas, the unprecedented nature of crimes committed and the complexities of evidence gathering in such circumstances necessitates the establishment of a framework to document the circumstances of the Tragedy and to probe into the matter: Now Therefore, in exercise of the powers conferred by section 3 (1) of the *Commissions of Inquiry Act* (Cap. 102), I, William Samoei Ruto, President and Commander-in-Chief of the Kenya Defence Forces, do direct as follows:

1. A Commission to inquire into the Shakahola Tragedy is appointed.



2. The Commission of Inquiry Appointed to Inquire into the Shakahola Tragedy shall be constituted as follows:

Commissioners:

Hon. Lady Justice Jessie W. Lesiit — Chairperson,

Lady Justice (Rtd.) Mary Muhanji Kasango,

Eric Gumbo,

Bishop Catherine Mutua,

Jonathan Lodompui (Dr.),

Frank Njenga (Dr.),

Wanyama Musiambu,

Albert Musasia,

Joint Secretaries: Oliver Kipchumba Karori,

Rachel Maina,

Lead Counsel: Kioko Kilukumi,

Assisting Counsel: Vivian Janet Nyambeki,

Bahati Mwamuye,

3. The mandate of the Commission of Inquiry shall be to—

- (a) Inquire into the matter of the deaths, torture, inhumane and degrading treatment of members and other persons linked to the Good News International Church in Kilifi County within the Republic of Kenya;
- (b) Establish the circumstances under which the deaths, torture, inhumane and degrading treatment occurred;
- (c) Inquire into the legal, institutional, administrative, security, and intelligence lapses that may have contributed to the occurrence of the Shakahola Tragedy;
- (d) Identify, based on evidence laid before the Commission, the persons and organizations who bear the greatest responsibility for the Shakahola Tragedy; and to recommend specific actions that should be taken against them including admonition, regulatory actions, reparations, or recommendation for criminal investigation;
- (e) Recommend legal, administrative, or other forms of accountability action against any public official whose actions or omissions are established to have willfully or negligently contributed to the occurrence of the Shakahola Tragedy;
- (f) Inquire into the factors that lead to the rise of that particular religious extremist institution; as well as the factors that give rise to such religious extremist institutions, cults, or occultist groups, and other formations that foster negative religion-based activities generally;
- (g) Recommend legal, administrative, institutional, and regulatory reforms aimed at preventing the occurrence of future situations of deaths or gross violations of the rights



and welfare of persons by religious extremist institutions, cults, or occultist groups, and other formations that foster negative religion-based activities; and

- (h) Consider, perform, or advise on any other matter or subject ancillary to the above.
4. In the discharge of its functions, the Commission shall:
- (a) Receive views from members of the Public;
 - (b) Receive oral or written statements from any person with relevant information and may —
 - (i) Use official reports of previous investigations;
 - (ii) Use any investigation report by any institution or organization;
 - (iii) Carry out or cause to be carried out such studies or research in any relevant areas.
 - (c) Summon any person concerned to testify on oath and to produce any books or documents that the commission of inquiry may require;
 - (d) Hold any inquiry in public but may hold private hearings if necessary; (e) Form such committees and working groups as may be required in the furtherance of its terms of reference;
 - (f) Hold such number of meetings in such places and at such times as may be necessary for the proper discharge of its functions; (g) Co-opt any other person as may be necessary to assist in the achievement of the terms of reference; and
 - (h) Exercise all powers conferred on it by law for the proper execution of its mandate, including the power to require cooperation from public officers and institutions.
5. The commission of inquiry shall prepare and submit a report and its recommendations to the President within six (6) months from the date hereof.

Dated the 4th May, 2023.

William Samoei Ruto, President.”

The Application

9. The operationalization of the above gazette notice is the subject of this Notice of Motion.
10. This Notice of Motion thus sought the following orders pending the hearing and determination of the Petition:
- a. Spent;
 - b. That an interim conservatory order be and is hereby issued suspending the decision of the President of Kenya made on the 4th of May, 2023 through Kenya Gazette No. 5660 purportedly to establish a Commission of Inquiry called ‘Commission of Inquiry into Shakahola Tragedy’ pending inter partes hearing and the determination of this instant application;
 - c. That a conservatory order be and is hereby issued suspending the decision of the President of Kenya made on the 4th of May, 2023 through Kenya Gazette No. 5660 purportedly to establish



a Commission of Inquiry called ‘Commission of Inquiry into Shakahola Tragedy’ pending inter partes hearing and the determination of this Petition;

- d. That the costs of this Application be borne by the Respondents;
 - e. Any other remedy that this Honourable Court deems appropriate in the circumstance.
11. The Application is supported by the affidavit of Raila Amolo Odinga, A Supplementary Affidavit Deposited By Paul Mwangi And The Following Grounds:
- a. That the President has usurped the sovereignty of the Kenyan people by creating, establishing and mandating the Commission of Inquiry into the Shakahola Tragedy and by attempting to transfer authority that was rightfully granted by the Kenyan Constitution to constitutional institutions, state organs and state officers to his own personal nominees who were chosen, appointed given authority and mandate at his complete whim and discretion;
 - b. That the establishment of the Commission of Inquiry usurps judicial authority indicated in Article 159(1) of *the Constitution* of Kenya, 2010 as solely granted to the Judiciary and Independent Tribunals;
 - c. That the National Police Service’s authority to conduct investigations is usurped by the President who also undermines the command of the Inspector General of Police, who is not only required to carry out investigations but is also forbidden from taking orders from anyone regarding who or what to investigate;
 - d. That the Commission of Inquiry constituted by the President undermines the authority of the Director of Public Prosecutions since it is the office mandated to receive recommendations for prosecutions;
 - e. That the Commission of Inquiry established by the President usurps and undercuts the authority of the Director of Public Prosecutions to bring criminal charges against anyone in any court in relation to any alleged offense;
 - f. That the Public Service Commission, which had the sole authority to deliberate on matters pertaining to public servant discipline is usurped by the Commission of Inquiry;
 - g. That only Parliament has the authority to oversee the National Intelligence Service, section 65 of the *National Intelligence Service Act*, states that Parliament shall exercise oversight over the service through the appropriate Committee in accordance with Article 238(2) of *the Constitution*;
 - h. That Commission of Inquiry usurps Independent Policing Oversight Authority’s authority whose role is to provide for civilian oversight over the work of the police in Kenya;
 - i. That the formation of the Commission of Inquiry on 4th May, 2023 by the President of Kenya usurps the powers and undermines the authority of the Kenya National Commission on Human Rights;
 - j. That section 3 of the Commission of Inquiry Act of 1962(revised in 2010) is unconstitutional and the entire Act is null and void as it gives the President power to determine who will carry out judicial duties. This undermines judicial authority and judicial independence;
 - k. That since Senate has established an ad hoc committee led by Senator Dunson Mungatana whose mandates are identical to those of the purported Commission of Inquiry, this will be an overreach, usurpation of power and undermining the Senate’s authority;



- l. That due to the fact that the primary suspects have already been detained, charged and appeared in court, there is a risk of double jeopardy if the Commission of Inquiry is given permission to proceed;
 - m. That therefore, it is against *the Constitution* of Kenya to have established a Commission of Inquiry into the Shakahola Tragedy;
 - n. That it is in the interest of justice that the instant application and petition be admitted, heard and determined on a priority basis.
12. In the affidavits by Petitioner dated 9th May, 2023 and 11th May, 2023 respectively, the Applicant reiterates that the formation of the Commission of Inquiry into the Shakahola Tragedy usurps and undermines the authority of various constitutional institutions, state organs, as well as judicial independence.

Responses to the Application

13. The 2nd Respondent opposed the application on the following GROUNDS filed on the 16th of May, 2023:
- a. That pursuant to the binding decision of the Supreme Court in Petition No. 12 of 2021 as consolidated with Petitions No. 11 and 13 of 2021: Attorney General and 2 others vs. David Ndi & 79 others (the BBI Case) His Excellency the President's immunity from the current proceedings was affirmed and therefore cannot be a Respondent as proposed by the Petitioner herein;
 - b. That the Application is not maintainable because it contravenes the legal principle of 'omnia presumuntur rite et solemniter esse acta, donec probetur in contrarium'; all acts are presumed to be rightly done unless proven to the contrary, which proof may only be established after a full hearing;
 - c. That the President acted as provided in the *Commissions of Inquiry Act* (Chapter 102 of the Laws of Kenya) buttressing the legal presumption on regularity and propriety of His Excellency the President's action;
 - d. That at the time of the President's action and institution of the present proceedings, the *Commissions of Inquiry Act* is the obtaining law as provided in section 7(1) of the Sixth Schedule to *the Constitution*;
 - e. That the Honourable Court having declined issuance of an interim conservatory orders in the first instance, the same is not available as it would constitute a review of the decision of the Honourable Court when such review has not been properly sought;
 - f. That issuance of orders against parties who are not privy to the proceedings would contravene the fundamental principles of natural justice;
 - g. That as provided under Article 1(2) of *the Constitution*, sovereign power may be exercised through the people's elected representatives including Parliament and the President;
 - h. That the establishment of the Commission of Inquiry and the terms thereof are compatible with the constitutional principles on the exercise of executive authority provided in Article 129 (2) of *the Constitution* that the same shall be exercised with the principle of service to the people and for their well-being and benefit;



- i. That the establishment of the Commission of Inquiry and the terms thereof are in consonance with the Constitutional authority of the President provided in Article 131(2) (e) of the Constitution;
 - j. That further as provided in Article 132(4) of the Constitution the President is vested with authority to perform any other executive function as provided in the Constitution or national legislation which includes the Commissions of Inquiry Act;
 - k. The Petitioner has not demonstrated a prima facie case in his petition;
 - l. The Petitioner has not demonstrated any real prejudice that he will suffer if the orders sought are not granted;
 - m. That inquiry into the Shakahola tragedy enhances constitutional values and principles;
 - n. That it is in the greater public interest for the Commission of Inquiry to inquire into the Shakahola tragedy as opposed to there being no inquiry as proposed by the Petitioner;
 - o. That the Petitioner has not demonstrated in any way how the Commission of Inquiry's action will prevent any of the enumerated public bodies in the petition from conducting or carrying out their respective functions.
14. The 3rd Respondent opposed the application on the following grounds dated 17th May, 2023:
- a. The Petitioner has not met the threshold for grant of conservatory orders as set by the Supreme Court of Kenya in the case of *Gitirau Peter Munya vs. Dickson Mwendwa Kithinji & 2 Others (2014) eKLR* as against the operationalisation of the Commission of Inquiry into the Shakahola Tragedy;
 - b. That it is in the greater public interest for the Commission of Inquiry to inquire into the Shakahola tragedy as opposed to there being no such inquiry as proposed by the Petitioner;
 - c. The grant of conservatory orders as sought by the Petitioner will have irreversible consequences on the quality of the findings in the final Report such that even if the Petition is eventually dismissed, any inquiry will not be the same as it will now be from a historical perspective and material facts and information may be distorted. On the other hand, nothing would stop this Court from staying the implementation of any recommendations made by the Commission of Inquiry.
 - d. The Petitioner has not demonstrated any real prejudice that maybe suffered if the orders sought are not granted;
 - e. Time being of essence into the inquiry, conservatory orders at this stage are not appropriate;
 - f. The President of the Republic of Kenya is obliged to exercise executive authority in a manner that puts the wellbeing of the Kenyan citizens at the fore front as guaranteed under Article 129(2) of the Constitution and the same shall be exercised with the principle of service to the people;
 - g. That the Petitioner has not demonstrated in any way how the Commission of Inquiry's actions will in any way prevent any of the stated public bodies in the petition from conducting or carrying out their respective functions.
15. The 4th Respondent filed the following grounds of opposition on the 17th of May, 2023:



- a. That the 4th Respondent is an independent office holder under Article 157(10) as read with Article 248(1) of *the Constitution* of Kenya, 2010 and consequently, does not require consent of any person or authority for the commencement of any proceedings and in the exercise of his powers and functions act under the directions and/or control of any person or authority;
- b. That the Petition and the application are an abuse of the court process and are incompetent in law for misjoinder.
- c. That the subject matter of the Application and the Petition are a grave misapprehension of the law, as the Commission of Inquiry as set up by His Excellency, the 1st Respondent is designed to gather information on the administrative failures that occurred in government as numerous Kenyans died under horrible circumstances and disappeared without any public official charged with security in either national government or the County government noticing their disappearance;
- d. That this Honourable Court take judicial notice of Kenya Gazette Legal Notices number 5660 title “In the matter of a Commission of Inquiry into the Shakahola tragedy” published on 4th May, 2023 and take note of the ambit and scope of the Commission of Inquiry as established therein;
- e. That the Commission of Inquiry into the Shakahola Tragedy is not a usurpation of the powers of either the Director of Criminal Investigations of the 4th Respondents or the powers of any other constitutional entity;
- f. That the purpose of the Commission as outline in the gazette notice I for the Commission to “establish the circumstances under which the deaths and inhumane torture occurred;”
- g. That the purpose of the Commission is also captured as to recommend legal administrative or other forms of accountability action against any public official whose actions or omissions are established to have wilfully or negligently contributed to the Shakahola tragedy;
- h. That the Petitioner is mistaken in its understanding of the law, as a commission of inquiry can exist in a separate plane as the criminal justice process without usurping the powers of actors in the criminal justice sector;
- i. That the completion of the investigations being conducted by the Directorate of Criminal Investigations, the results thereof shall be forwarded to the 4th Respondent for perusal, analysis and advise in accordance with the relevant laws;
- j. That the criminal justice actors especially the 4th Respondent herein shall not be influenced in any way by the work done by the Commission of Inquiry into the tragedy;
- k. That it is improper of the Petitioner to include the 4th Respondent as a Respondent as it as nothing to respond to in the petition and neither he nor his officers are part of the impugned Commission of Inquiry;
- l. That the only interaction between the 4th Respondent and the Shakahola tragedy has been that the 4th Respondent and some of his officers have been offering prosecution guided investigational advice to the Directorate of Criminal Investigation tea. This is an action steeped within the law and in furtherance to the public good;
- m. That the 5th Respondent is properly versed with investigative powers by *the Constitution* of Kenya, 2010 and that after concluding their investigations a criminal file with



recommendations will be forwarded to the office of the 4th Respondent for perusal and recommendations as to whether further police action is required or the matter will be prosecuted;

- n. That it is in the public interest that the investigations being conducted by the Directorate of Criminal Investigations and the separate inquiry into how the tragedy occurred and was not noticed or stopped by public officials is investigated by the commission of inquiry both continue;
 - o. That the Petitioner will not be prejudiced in any way if the orders sought are not granted.
16. Similarly, the 10th Respondent opposed the application on the following grounds filed on the 17th of May, 2023:
- a. That the 10th Respondent has been wrongfully enjoined in the Notice of Motion application and the Petition;
 - b. That the Notice of Motion application and the Petition do not disclose any cause of action against the 10th Respondent as no adverse claims have been made against him;
 - c. That the Notice of Motion and the Petition is about the Applicant's opposition to the actions of the 1st Respondent in establishing a commission of inquiry;
 - d. That the 10th Respondent has no oversight mandate over the 1st Respondent neither does it have any role in the establishment or otherwise of a commission of inquiry;
 - e. That there is no claim made that the 10th Respondent has violated any constitutional rights and fundamental freedoms of the Petitioner or anyone else in any way shape or form;
 - f. That the Notice of Motion application and the Petition therefore simply serve to embarrass the 10th Respondent;
 - g. That the 10th Respondent will therefore at the earliest instance in accordance with *the Constitution* of Kenya (protection of rights and fundamental freedoms) Practise and Procedure Rules 2013, seek to be struck off from the Application and Petition;
 - h. That the Petitioner had not demonstrated any prima facie case with a likelihood of success;
 - i. That the Petitioner has failed to demonstrate any prejudice that he will suffer if interim conservatory orders are not granted;
 - j. That the application does not meet the threshold for the grant of the orders sought
17. The application was canvassed by way of submissions with only the Applicant filing written submissions. The parties highlighted their submissions orally on the 22nd of May, 2023.

Submissions by the Applicant

18. The Applicant's advocate submitted only on one issue for determination: whether this Court should issue interim conservatory orders pending the inter partes hearing of the Petition. While relying in the Supreme Court Case of Gitirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others, (2014) eKLR the Applicant submitted that the said orders ought to be issued because there is a clear violation of *the Constitution* in that the President's action undermines the ordered functioning of constitutional agencies, usurps their powers and undermines their authority and if the action is not suspended



there will be irreparable harm to the respect and authority of these constitutional organs and to the Constitution of Kenya.

19. The reasons expended by the Applicant in support of the issuance of the conservatory orders were that:

a. Respect of the judiciary will be harmed;

The Applicant relying on the Report of the Judicial Commission of Inquiry Goldenberg Affair chaired by the Hon. Justice S.E.O Bosire, JA submitted that the appointment of a sitting Judge of the Court of Appeal as the Chairperson of the Commission of Inquiry conducting the inquiry without the authority of the Chief Justice and/or the Judicial Service Commission is improper. That acceptance of that appointment places the Judge, her authority and her mandate under the supervision and jurisdiction of the High Court which is a lower court than the one she is constitutionally mandated to sit on. That the Judge will work under the direction and control of the President who will determine her remuneration and allowance and further that she will have to compromise her independence as the Commission of Inquiry Act, Chapter 102, Laws of Kenya does not grant the Honourable Judge the independence otherwise granted to her by the Constitution of Kenya.

That the report by the Honourable Judge will embarrass the Judiciary and compromise its independence by making recommendations for some people to be prosecuted then return to sit as a Judge in the Judiciary where those people will be prosecuted.

b. The respect and authority of the Senate will be undermined:

That the Senate has already commenced its sittings and is summoning witnesses and taking their testimony yet the Commission is to carry the same exercise, call the same witnesses to retake the same testimonies with the possibility of contradictions arising. That the two bodies will be operating simultaneously, as such one of the bodies must stand down, and the statutory organ must give precedence to the Constitutional State organ.

c. The authority of National Police Service will be undermined and criminal suspects will be twice jeopardized and denied protection;

Under this head, the Applicant submitted that the Commission's mandate to: identify, based on evidence laid before the Commission, the persons and organisations who bear the greatest responsibility for the Shakahola Tragedy; and to recommend specific actions that should be taken against them including admonitions, regulatory actions, reparations, or recommendations for criminal investigations. That this mandate is similar to the responsibility given to the Cabinet Secretary responsible for Police Services under Article 245(4) of the Constitution. That consequently, the person investigated by the National Police Service and found not culpable are still subject to further investigation by the Commission.

d. The authority of the Public Service Commission will be undermined and the protection of public officers compromised:

The Applicant submitted that the Commission's mandate is contrary to Article 234 of the Constitution because the mandate given to it is already assigned to the Public Service Commission and it is contemplated by the Constitution that if the power is delegated, that delegation will be performed by the Public Service Commission and not the president.

e. The authority of the Kenya National Human Rights and Equality Commission shall be undermined:



The Applicant submitted further that the Commission’s mandate contravenes the Article 59(2) of *the Constitution* which establishes the Kenya National Human Rights and Equality Commission as the principal organ of the State in ensuring compliance with obligations under treaties and conventions relating to human rights. That the duplicity is clear and as the question as to who should stand down, then it is the Statutory body.

- f. Whether the principle of constitutionality applies to the Commission of Inquiries Act:

The Petitioner submitted that the principle of presumption of Constitutionality of statutes does not apply to the impugned Commission of Inquiries Act for the reason that the Act dates back to 1961 before the promulgation of *the Constitution* of Kenya, 2010 and that the drafters did not have in mind the new constitutional dispensation.

The Applicant relied on section 7 of the Sixth Schedule of *the Constitution* and the case of Timothy Njoya & 17 other vs. Attorney General & 4 others (2013) eKLR where Justices Warsame J.A and Justice W.K. Korir stated that:

“...this legislation was enacted before the promulgation of the current Constitution. The Act must by virtue of section 7 of schedule 6 be brought into conformity with Constitution...”

That this was also the holding of the Supreme Court in the case of Communications Commission of Kenya & 5 others vs. Royal Media Services Limited & 5Others (2014) eKLR.

That the unconstitutionality of statutes passed before the promulgation of *the Constitution* of Kenya, 2010 is envisaged under schedule 6 section 7(1) of the said Constitution. Therefore, the President’s decision on the appointees of the Commission of Inquiry into the Shakahola tragedy in accordance to section 3 of the Commission of Inquiries Act, 1962 was not in conformity of *the Constitution* as it violates the doctrine of Separation of Powers.

20. The Petitioner concluded by submitting that the Attorney General cannot defend the actions of the President without demonstrating to this Court how in constitution of a Commission of Inquiry, the Commission of Inquiries Act, 1962 was altered, adapted and qualified to be in conformity with *the Constitution* of Kenya, 2010 and further that section 7 of schedule 6 was not applied by the 2nd Respondent.

7th Respondent Submissions

21. During its submissions, the 7th Respondent’s advocate aligned itself with the Petitioner’s submissions and submitted that Article 59(2) of *the Constitution* as read with the *Kenya National Commission on Human Rights Act* gives the 7th Respondent, the exclusive mandate to deal with the issues of torture. That the *Prevention of Torture Act* also names the 7th Respondent as the implementing body. The 7th Respondent submitted that the Commission of Inquiry’s terms of reference are similar to its terms and supported the suspension of the proceedings.

2nd Respondent Submissions

22. While submitting, the 2nd Respondent relied on Petition Number 165 of 2021 in which he quoted the remarks of Justice W. Korir. He submitted that although the application was for conservatory orders, the Applicant had failed, under Article 23 (1) of *the Constitution*, to invoke any of the Articles under the Bill of Rights. He submitted that under A. 131(2), *the Constitution* gives the President the express function to ensure protection of human rights. That the applicant has not stated what specific provisions of the Commission of Inquiry Act have been breached.



23. He responded to the Applicant's submissions on the constitutionality of the Commission of Inquiry Act and submitted that under section 7 of schedule 6 of *the Constitution* incorporates the instances that the Petitioner alleges. The Respondent submitted further that the schedule enables the application of the *Commissions of Inquiry Act*. That the unconstitutionality or otherwise of an Act of Parliament can be only be determined after a full hearing.
24. The 2nd Respondent submitted further that the Applicant had failed to demonstrate the prejudice that may be suffered if the conservatory orders are not granted. That the issue of public interest should and can only be balanced against the provisions of accountability.
25. He faulted the Applicant for not including the Commission of Inquiry as a party in the proceedings and argued that the omission makes the application void because of the possible difficulty in implementing the Court orders against a person who is not a party to the proceedings. The 2nd Respondent concluded by stating that Justice W. Korir in the aforementioned case stated that it is a drastic order for a court to stay the implementation of an Act of Parliament and as such the application should be dismissed because it is devoid of merits.

3rd Respondent Submissions

26. The 3rd Respondent relied on the submissions by the 2nd Respondent and stated that the Applicant has not demonstrated sufficient grounds for grant of the orders sought. He urged this Court to find that the petition and the application are speculative as no specific provisions of the Act have been challenged. He relied on the principle of presumption of the constitutionality and stated that all Acts of parliament are presumed constitutional unless found otherwise. He relied on the case of Gitirau Peter Munya (*supra*) and stated that the petitioner could not prove to this Court how the petition will be rendered nugatory if the orders sought are not granted.

4th Respondent Submissions

27. The 4th Respondent also relied on the Attorney General's submissions and stated that A. 157(10) of *the Constitution* gives the 4th Respondent decisional independence when deciding whether or not to charge and that those powers can not be usurped. He stated that despite the Commission of Inquiry's mandate, the criminal investigative process by the Directorate of Criminal Investigation is well under way and that the 4th Respondent has been instrumental in offering its assistance in the process. He urged the Court to dismiss the application because no prejudice will occasion to the Applicant.

10th Respondent Submissions

28. The 10th Respondent submitted that it has been embarrassed by the said petition and will at the first instance make an application for a misjoinder as no adverse claim has been made against it. That the 10th Respondent is granted independence under section 4 of the Independent Policing and Oversight Authority Act, and there is no way the functions can be usurped. He relied on the case of Owira & 23 Others vs. Attorney General & Another (2020) eKLR where the Court at paragraph 42 addressed the importance of Commissions of Inquiry.

Applicant's Rebuttal

29. During his rebuttal, the Applicant's advocate reiterated that the petitioner seeks conservatory orders and that contrary to the aversions of the Attorney General, Article 23 of *the Constitution*, only lists the orders that can be issued by a Court. He defended his position that the derogation of *the Constitution* and public interest amounts to sufficient prejudice to warrant grant of the conservatory orders.



30. On the issue of non-joinder of the Commission of Inquiry, the Applicant explained that the Commission was not a body corporate capable of suing or being sued and that at the time of filing the application, the respective Commissioners were yet to be sworn in.
31. He urged this Court to look at paragraph 10 of the Commission of Inquiry Report on the Goldenberg Scandal especially when it came to the issue of the independence of a judge and submitted that a judge should not be made to worry about being exposed suits and being condemned to costs in their personal capacity.
32. The Applicant faulted the 4th Respondents submissions that there were various bodies carrying out independent investigations on the matter and stated that the fact that the said bodies were public bodies meant that taxes were being spent in carrying out the same mandate.

Analysis and Determination

33. After careful perusal of the application and listening to the submissions by the parties, it is apparent that the only issue for determination in this application at the moment is: ‘whether a conservatory order should be issued suspending the decision of the President of the Republic of Kenya made on 4th May, 2023 through Kenya Gazette Number 5660 establishing Commission of Inquiry into Shakahola Tragedy pending hearing and determination of the Pettition’.
34. At this stage, the Court has to be cautious and refrain from expressing any view on the issues that can only be properly determined on merits after hearing the entire petition.
35. The jurisprudence on issuance of conservatory orders in this country is now well settled following the Supreme Court’s decision in *Gatirau Peter Munya Vs. Dickson Mwenda Kithinji & 2 Others* (2014) eKLR where Supreme Court held:

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

(87) The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

- i. the appeal or intended appeal is arguable and not frivolous; and that
- ii. unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.



- (88) These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of *the Constitution* of Kenya, 2010, a third condition may be added, namely:
- (iii) that it is in the public interest that the order of stay be granted.
- (89) This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through *the Constitution...*”
36. His Lordship Justice W. Korir, in *Adrian Kamotho Njenga vs. Selection Panel for the Appointment of Commissioners of the Independent Electoral and Boundaries Commission (2021) & 2 others; Independent Electoral and Boundaries Commission [2021] eKLR* attempted to articulate the principles in the Supreme Court’s decision of *Gatirau Munya* case (*supra*) when he stated that the Court was to consider if the following had been fulfilled by the Applicant:
- a. Whether a prima facie case has been established;
 - b. Whether the substratum of the petition will be rendered nugatory if the orders sought are not granted; and
 - c. whether the public interest lies in granting the orders sought by the Applicant.
37. Guided by the above case law, the question then becomes, has the applicant fulfilled all the necessary conditions for grant of conservatory relief pending the hearing of this petition?
38. On the question of threshold/conditions to be met by the applicant, I slightly want to depart from the formulation by W.Korir J on first condition, that is, ‘whether a prima facie case has been established’; If by prima facie case, the Judge meant that the applicant is expected to ‘demonstrate that the case is more likely to succeed than not.’ Taking that route means the court will be involved in making a detailed analysis of the case instead of conducting a preliminary appraisal of the matter. An ‘arguable case’ is what I find desirable since what is needed at this stage is to demonstrate that there are substantial points of fact or law raised by the Petition. The measure therefore is not that a case is more likely than not to succeed but whether it ‘raises a serious question for determination’ as opposed to a ‘merely arguable one’, for in reality, anything can attract an opposite view but the degree, quality and the intensity of the argument is what distinguishes the wheat from the chaff.
39. The Petitioner pleaded that the decision to form the Commission of Inquiry into the Shakahola Tragedy is a contravention of *the Constitution* as its terms of reference show it will it is usurping the mandate National Assembly, the National Intelligence Service, the Independent Police Oversight Authority, the Kenya National Commission on Human Rights, the Commission for Administrative Justice and the Senate.
40. Indeed, during the hearing of this application, the 7th Respondent, Kenya National Commission on Human Rights, a creation of Article 59 (1) of *the Constitution*, expressed its intention to change its character from being a Respondent and become a Co-Petitioner on the basis that it is aggrieved by the 1st Respondent’s action of giving away its constitutional and the statutory mandate to the said Commission of Inquiry. It argued that under provisions of *Prevention of Torture Act*, No. 12 of 2017, the *Kenya National Commission on Human Rights Act* and article 59 (2) of *the Constitution*, the mandate to investigate or research on any matter in respect of human rights violations and to make recommendations thereof is exclusively vested on the Kenya National Commission on Human Rights yet this key function has been assigned to the Commission of Inquiry into Shakahola Tragedy through the gazette notice that is the subject of these proceedings. The Kenya National Commission



on Human Rights submitted that it was already on the ground executing that constitutional mandate. Mr. Abdikadir for the 7th Respondent submitted:

“... the Commission is equally investigating human rights violations surrounding the Shakahola issue and therefore allowing the Commission of Inquiry will be undermining our authority as codified in [the Constitution](#) and [Prevention of Torture Act...](#)”

41. The Attorney General (2nd Respondent) submission was that under article 131(1) (e) of [the Constitution](#), the President of the Republic is conferred with the express function to ensure the protection of human rights and fundamental freedoms and the rule of law. Further, that article 132 (4) [the Constitution](#) empowers the President to perform executive functions provided for in [the Constitution](#) or in the national legislation.
42. Is question therefore is, does this issue raise a substantial constitutional question? I think so. This Court will be required to extensively examine the specific Constitutional and Statutory functions of the named Constitutional Institutions and determine if there is any duplication of their roles vis-à-vis the functions assigned to the Commission of Inquiry by the 1st Respondent. It will then consider whether the 1st Respondent in exercise of the powers alluded to both in [the Constitution](#) and the Commission of Inquiry Act, could assign those functions to the Commission of Inquiry which he created and, if so, if it impedes the execution of their constitutional and statutory mandate or the generally, the constitutional implication of the action. This is an important constitutional discourse hence in my assessment it brings out a serious arguable point or case.
43. The other substantial question relates to the constitutionality of the provisions of the Commission of Inquiry Act, Cap 102 vis-vis the constitutional principle of separation of powers and protection of judicial independence.
44. The Petitioner submitted that the Chairperson of the Commission that was picked for the job by the President of the Republic is a Judge of Appeal, Lady Justice Jessie Lesiit. The Petitioner contended that the President’s act of directly picking a sitting Judge and assigning her the roles to perform undermines the Constitutional principle of separation of powers and the independence of the Judiciary. He argued the provisions of the [Commissions of Inquiry Act](#) in their current state do not conform with the constitutional values as this act is a violation of the principle of separation of powers and protection of judicial independence and exposes the Judiciary to embarrassment. The Petitioner referred this Court to the sentiments expressed by Justice Bosire in the Judicial Commission of Inquiry into Goldeberg Affair where the learned Judge expressed reservations on Executive appointing sitting Judges into Commissions of Inquiry.
45. The Respondents submissions on this point was that pursuant to Schedule six of [the Constitution](#), section 7; ‘all law in force immediately before the effective date continued to be in force’ hence the Commission of Inquiry Act, Cap 102 is lawfully in force and the President appointment under the said Act is thus valid. It was further submitted by the Respondents the principle of constitutionality of legislation applies to Statutes and that the applicant did not demonstrate prima facie case that the Commission of Inquiry Act is unconstitutional.
46. Section 3 of the Commission of Inquiry Act under which the President made the appointment will be the pivotal point at the time when this Petition is ultimately decided. Section 3 provides interalia that: “The President, whenever he considers it advisable so to do, may issue a Commission under this Act appointing a commissioner or commissioners and authorizing him or them, or any specified quorum of them, to inquire into any public officer or the conduct or management of any public body, or into any matter into which an inquiry would, in the opinion of the President, be in public interest...”



47. As can be seen from the above, the President has the exclusive and discretionary mandate on what is to be inquired into, when and the people to do the job.
48. It is important note from the outset that Commissions of Inquiry play an important role especially in investigating matters of public concern that require thorough and impartial investigation particularly when the matters are considered too grave to be addressed within the normal legal processes.
49. It is also accepted that the Judiciary and the Executive as well as Legislature branches cannot be completely divorced from each other as they are arms of the same Government but where they interact, a system of checks and balances is maintained through legislation to regulate their operational arrangements and ensure that the constitutional objectives are not compromised. This Court will thus be interrogating whether the legislation in question has embodied these constitutional values. That again is an important constitutional question that the Petition raises which I consider as a demonstration that the Petition is not frolicsome.
50. The second condition that the applicant is required to demonstrate as a precondition for issuance of conservatory order is that the substratum of the Petition will be rendered nugatory if the conservatory order is not granted. The applicant argued a threat to derogate from *the Constitution* is serious enough to warrant the Court to issue a conservatory order. The Respondents on the other hand submitted that the petitioner was duty bound to demonstrate specific prejudice that would be suffered in the event that the conservatory order is not granted.
51. Any functioning democracy is sustained by stringent adherence to the rule of law. My humble view is that the intervention of the Court can invoked where it is demonstrated a particular action or decision is a potential threat to values and principles of a Constitutional democracy for that is what sustains a Nation. A situation where a Constitutional Commission is openly wailing that with the stroke of a pen, its constitutional mandate has been taken away and assumed by an appointed entity pursuant to a statutory provision is by no means a flippant grievance. Further, it should prick the conscience of the Court when a citizen or group of citizens stream to the corridors of justice to defend judicial independence. The situation that has contributed to that sought of apprehension should not be treated dismissively as the authority of the courts' rests on the public confidence in their independence. Further, that under article 159 (1) of *the Constitution*, all judicial power is derived from the people and vested on the Courts and Tribunals, meaning that Judges and other Judicial Officers perform a delegated function on behalf of the people. A citizen, as reasonable observer, has a right to bring to the court's attention concerns that makes him reasonably apprehend that the independence of the courts is under threat. This is because courts' independence exists, not to benefit the Judges as many mistakenly belief, but largely for the benefit of the citizenry, as it guarantees constitutional values such as the rule of law and good governance flourish. The Petitioner has reasonably demonstrated that the prejudice that is likely to be suffered is hinged on the concept of the rule of law which I consider significant.
52. Is it therefore prudent to allow this Commission of Inquiry to start its sittings amid the lingering contention that it will hijack other Constitutional institutions mandates and also, at a time when its existence is being confronted on the basis that the manner of its creation exemplifies a blatant invasion of our cherished constitutional value of judicial independence? I do not think so. The Supreme Court in Gatirau Munya case (supra) stated that "... Conservatory orders.... should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes..."
53. On the final issue of whether public interest lies in granting the orders sought, the Applicant cited the cost implication. Already, there are various State Institutions represented in these proceedings on the ground conducting the investigations if their representations in this case is anything to go by. The



National Police Service is carrying out Prosecution guided investigations according to the submissions by the Director of Public Prosecutions. Mr. Oliver Mureithi who appeared for the DPP submitted thus:

“...There has been interaction between 4th Respondent and 5th Respondent Officers, where DPP and some of his officers went to guide DCI in Prosecution guided investigation. The criminal investigation process is well underway within the ambit of the law...”

54. The Kenya National Commission on Human Rights is also there.

Mr. Abdikadir for the 7th Respondent stated:

“... The Commission is equally investigating human rights violations surrounding Shakahola issue and therefore allowing the inquiry will be undermining authority as codified in *the Constitution* and *Prevention of Torture Act...*”

55. It is also public knowledge that the Senate Committee is also undertaking investigations on the same matter.

56. All these bodies are using public resources. The Commission of Inquiry is also funded from public resources. Is it public interest to allow the Commission of Inquiry to start its sittings at the public expense before resolution of the Constitutional challenges to its existence? My considered view is that this will not be in public interest. The submission by the Respondents that there is danger that evidence may be lost or no longer become available if the sittings are suspended flies in the face in view of the revelation that evidence is being collected and preserved by the other State bodies already on the ground. If it happens that this Petition fails and the Commission of Inquiry is ultimately allowed to sit, it can still access the evidence that has been collected by other state bodies and use it as appropriate. On the flip side, if I allow it to sit and the Petition succeeds, the resources that will have been expended on it will not be recovered. Public interest thus is in favour of not allowing the Commission of Inquiry sittings until this Petition is heard and determined.

57. Consequently, the Applicant’s Notice of Motion dated 9th May, 2023 is allowed and the following specific orders issued:

- a. Pending the hearing and determination of this Petition, a conservatory order is hereby issued suspending the decision of the President of the Republic of Kenya made on 4th May, 2023 through Kenya Gazette Notice Number 5660 establishing the Commission of Inquiry into Shakahola Tragedy.
- b. Costs in the cause.

DATED, SIGNED AND DELIVERED AT MILIMANI THIS 29TH DAY OF MAY, 2023.

L.N MUGAMBI

JUDGE

