



**Kioko v Amolo & 11 others; Commission for Integration & National Cohesion & 2 others (Interested Parties) (Petition E079 of 2023)
[2023] KEHC 19951 (KLR) (Constitutional and Human Rights) (30 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19951 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E079 OF 2023

M THANDE, J

JUNE 30, 2023

BETWEEN

HON. MIKE SONKO MBUVI GIDION KIOKO PETITIONER

AND

ODINGA RAILA AMOLO 1ST RESPONDENT

MUSYOKA KALONZO STEPHEN 2ND RESPONDENT

JEREMIAH KIONI 3RD RESPONDENT

MARTHA WANGARI KARUA 4TH RESPONDENT

EUGINE LUDOVIC WAMALWA 5TH RESPONDENT

AZIMIO LA UMOJA ONE KENYA COALITION 6TH RESPONDENT

WIPER DEMOCRATIC PARTY 7TH RESPONDENT

GEORGE LUCHIRI WAJACKOYA 8TH RESPONDENT

WYCLIFFE AMBETSA OPARANYA 9TH RESPONDENT

**THE CABINET SECRETARY MINISTRY OF INTERIOR & COORDINATION
OF NATIONAL GOVERNMENT 10TH RESPONDENT**

INSPECTOR GENERAL OF POLICE 11TH RESPONDENT

THE HON. ATTORNEY GENERAL 12TH RESPONDENT

AND

**THE COMMISSION FOR INTEGRATION & NATIONAL
COHESION INTERESTED PARTY**



RULING

1. By an Application dated 17.3.23 and amended on 20.3.23, the Petitioner seeks the following orders:
 1. Spent
 - 2A. Spent.
 - 3A. Pending the hearing and determination of the Petition herein, a conservatory order do issue, by way of an injunction to forthwith prohibit the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, and 9th respondents herein named, by themselves, their respective political parties and/ or coalitions, their servants, agents, employees, emissaries, or anyone acting at their behest and direction, from holding out, representing to the public and/ or any person, or otherwise declaring any day to be a Public Holiday which has not been constitutionally so declared, or gazetted by the Government of the Republic of Kenya or the Cabinet Secretary, Ministry of Interior and Coordination of National Government, and it remains an ordinary working day for all Kenyans in all parts of Kenya.
 - 4A. Spent.
 - 5A. Pending the hearing and determination of the Petition herein, in maintaining the integrity of the Nation of Kenya and in deference to the critical importance of the Rule of Law, peace and tranquillity in the Republic of Kenya, pursuant to Article 245(4) of the Constitution of Kenya, the 10th Respondent herein , The Cabinet Secretary Ministry of Interior and Coordination of National Government do issue such expedient directions to the Inspector General of Police to assist in the arrest of any such of the stated Respondents declaring or announcing any day to be a Public holiday that has not been so declared Constitutionally and/ or Gazetted by the Government of the Republic of Kenya or the Cabinet Secretary, Ministry of Interior and Coordination of National Government, convening and/ or taking part in "Azimio public demonstrations" in any part of the Republic of Kenya on the bases of such unlawful declaration of a purported public holiday, and any person acting at their behest, and/ or their direction to damage any private or public property during any and all such public gatherings, picketing, demonstrations and/ or marches organized, planned, and/ or undertaken by the 1st to 9th Respondents, and for the 10th and the 11th Respondent herein named to oversee the effectual enforcement of all Court Orders herein issued against the stated Respondents , and to use such necessary and reasonable force in the event of the stated Respondents defying compliance, in any demonstrations thereafter organized and/ or called by the 1st to 9th Respondents and / or their agents , emissaries, or persons acting under their behest and direction.
 - 5B. Spent.



- 5C. Pending the hearing and determination of the Petition herein, a conservatory order do issue, by way of an injunction prohibiting the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, and 9th respondents by themselves, their servants, agents, employees, members of their political parties in the 6th respondent, and / or by the 6th respondent, or otherwise howsoever from holding any public gathering in the Republic of Kenya without complying with the requirements of section 5(1) of the [Public Order Act](#), and any such meeting be in strict compliance with the provisions of Part III of the [Public Order Act](#), Cap 56 of the Laws of Kenya.
- 5D. Pending the hearing and determination of the Motion herein, a conservatory order do issue, by way of an injunction, that the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, and 9th respondents by themselves, their servants, agents, employees, members of their political parties in the 6th respondent, and/ or by the 6th respondent, or otherwise howsoever be prohibited and forthwith restrained from:
- a. inciting, instigating, or promoting any unlawful conduct in furtherance of, or incitement of such public gatherings convened by them at any time in compliance with section 5(1) of the [Public Order Act](#);
 - b. in any way hindering, hampering, preventing or interfering with any means of public service conveyance including the loading, transportation and delivery of any product and/ or service by any service delivery company or office of any department of the Government of Kenya. or otherwise howsoever interfering with the service delivery in any part of Kenya by any person;
 - c. placing and/ or burning tyres on the highway, road, pavement, easement, pathway, premises (whether private or public), or otherwise howsoever blocking the ingress and egress from any such stated places;
 - d. blocking, obstructing or obscuring any and all entrances, whether to public or private premises, pedestrian or vehicular on, or at any public way and any building, place or conveyance to which, for the time being, the public are entitled or permitted to have access either without any condition or upon condition of making any payment, and any building or place which is for the time being used for any public or religious meetings or assembly of the public;
 - e. attending at any department or office of the Government of Kenya's premises at any time either alone or in the company of more than 2 persons comprising a crowd of their supporters, within a radius of 5 kilometres, save for the purpose of the 1st to 9th respondents (and any of their servants, agents,



and/ or employees) presenting themselves at such premises for the execution of any request for services in accordance with the laid procedures for the respective departments for the delivery of such services.

- 5E. Pending the hearing and determination of the Petition herein, a conservatory order do issue, by way of an injunction that the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th respondents by themselves, their servants, agents, employees, members of their political parties in the 6th respondent, and/ or by the 6th respondent, or otherwise howsoever be prohibited and forthwith restrained from:
- a. inciting, instigating, or promoting any unlawful conduct in furtherance of, or incitement of such public gatherings convened by them at any time in compliance with section 5(1) of the Public Order Act;
 - b. in any way hindering, hampering, preventing or interfering with any means of public service conveyance including the loading, transportation and delivery of any product and/ or service by any service delivery company or office of any department of the Government of Kenya. or otherwise howsoever interfering with the service delivery in any part of Kenya by any person;
 - c. placing and/ or burning tyres on the highway, road, pavement, easement, pathway, premises (whether private or public), or otherwise howsoever blocking the ingress and egress from any such stated places;
 - d. blocking, obstructing or obscuring any and all entrances, whether to public or private premises, pedestrian or vehicular on, or at any public way and any building, place or conveyance to which, for the time being, the public are entitled or permitted to have access either without any condition or upon condition of making any payment, and any building or place which is for the time being used for any public or religious meetings or assembly of the public;
 - e. attending at any department or office of the Government of Kenya's premises at any time either alone or in the company of more than 2 persons comprising a crowd of their supporters, within a radius of 5 kilometres, save for the purpose of the 1st to 9th respondents (and any of their servants, agents, and/ or employees) presenting themselves at such premises for the execution of any request for services in accordance with the laid procedures for the respective departments for the delivery of such services.
- 5F. Spent.
- 5G. Spent.



- 5H. The Inspector General of Police be authorised and directed, (with all the assistance of all law enforcement officers), to ensure that the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, and 9th respondents (whether as such individual respondents or jointly) comply with the terms of the orders herein issued.
6. Spent.
7. Leave be granted to the applicant to advertise such orders as are made in these proceedings and service thereof on the cited respondents in a daily newspaper of national circulation, pursuant to Rule 23(3) of [Legal Notice 117 of 2013](#).
8. Spent.
9. Costs of this motion be borne by the 1st to 9th respondents in any event.
2. The Application is premised on the grounds on the face of it and on the Petitioner's affidavit sworn on 20.3.23. The grounds are that:
- i. On 13.3.23 at one of the Public rallies in Siaya County convened by the 1st – 9th respondents, the 1st respondent while accompanied by the 2nd to 9th respondents stated in a broadcast transmission even carried online while using public address system that Monday March 20, 2023 would be a public holiday. During the same Public Rally, the 4th respondent, made remarks in the Kiswahili language which translated in English meant that they could not demonstrate to demand their rights and still have to go to work.
 - ii. The said call, declaration and public announcement by the 1st respondent was expressly unlawful and meant to incite law abiding Kenyans into believing that March 20, 2023 was an officially declared public holiday, when it was not.
 - iii. The sole entity constitutionally- authorized and empowered to prescribe any other public holidays is Parliament via a lawfully enacted legislation. Such powers were not delegated to the 1st respondent by the Kenyan people or Article 94(5) of the [Constitution](#) and any such power to announce and declare any day which he unilaterally elects to be a national and public holiday as he purported to do in respect of 20th March 2023.
 - iv. Pursuant to Article 94(5) of the [Constitution](#), Parliament has delegated power to the 10th respondent under section 3 of the [Public Holidays Act](#) to declare such of the days as may be designated as a holiday in Kenya or a locality in Kenya. The 1st respondent therefore by declaring as he did, unconstitutionally and unlawfully arrogated to himself the powers conferred on and delegated to the Cabinet Secretary of Interior when he had no such powers.
 - v. At a Public rally on March 16, 2023, Nakuru held at Mazembe Grounds from 1 pm, the 1st respondent stated that he will be rallying Kenyans of all walks of life to March to the 2nd Interested party's county well aware that such a planned demonstration is outside the legitimate expectations of Article 37 of [the Constitution](#).
 - vi. The 1st respondent's reckless and inciting utterances are a violation of Article 34(2) (d) (i) of the [Constitution](#) which outlaws expression of utterances that constitute ethnic incitement, vilification of others, or incitement to cause harm.
 - vii. Earlier on March 15, 2023, during an event organized by the Communication Authority of Kenya to commemorate the World Consumers' Rights Day in Kisumu, a group of persons taking cue and direction of the 1st respondent's words of incitement to violence



uttered provocative anti-government slogans while invading and trespassing upon an official government department event and ate food meant for delegates. They further left the scene in a disorganized manner compelling the government department organizers of the event to end it prematurely.

- viii. The 1st respondent made utterances and publications on his official twitter handle attacking the presidency of the Republic of Kenya and while at it calling the President of the Republic of Kenya names. These publications are outlawed under Article 33(2) (a) and (b) of the Constitution and are not protected free speech.
- ix. As recognized organizers of any public demonstrations the respondents were bound to ensure that their activities throughout the said demonstrations were peaceful. Further, the Kenya Police Service has no obligation to aid and assist criminals to breach public peace and order when demonstrators opt and elect to engage in acts of hooliganism and violence while so demonstrating.
- x. The 1st to 9th respondents have demonstrated that they are unprepared, unwilling and repugnant to engage in the peaceful exercise of the Article 37, by reason of which this Court is entitled to intervene as sought.
- xi. The respondents spurned national reconciliatory efforts, necessitating the intervention of the court as now sought. A section of Kenyan Christians led by the NCCCK appealed to the 1st respondent to forego the March 20th 2023 protect March however the 1st respondent stated publicly that they would proceed with the March.
- xii. At a public baraza held in Nakuru on 16th March 2023, the 1st respondent reiterated his unlawful utterances stated above. Chants of “Ruto Must Go” rent the air as the 1st respondent (in the attendance of the 2nd to 9th respondents)- without the 1st respondent at any instance stopping, castigating or otherwise rejecting such chants. Hence, the 1st respondent as well as the 2nd to the 9th respondents encouraged, aided, and abetted the incitement of such of the Kenyans who attended the said rally made such of the persons who were watching the event on live You tube transmission and subsequently broadcast on social media platforms as well as on mainstream news channel.
- xiii. The 1st respondent is bound to uphold, protect, and defend the Constitution pursuant to Article 3 of the Constitution, yet he has not cared to ensure that the presidency is respected and upheld with dignity. The effect of the further conveying on social media and online of the stated offensive and impugned words attributed to the 1st respondent would be to promote active attrition of the respect of the presidency and hence a violation of Article 131(1) (e) of the Constitution.
- xiv. The 5th respondent while aware fully of the provisions of Article 140 of the Constitution, and that the Supreme Court had clearly resolved the presidential election contest vide the election petition following the conclusion of the 2022 presidential election posted some words on his twitter post of his political party to the effect that the Azimio victory in August was robbed and the will of Kenyans replaced with the will of election thieves.
- xv. There are established channels of resolving such of the perceives or expressed grievances advanced by the 1st to 9th respondents in their public rallies and it cannot be candid or honest of them to then incite Kenyans to storm, invade or take over forcefully state House as now threatened for March 20th 2023.



- xvi. These are overt acts by the 1st to 9th respondents clearly demonstrating their intent to fracture the Nation of Kenya under the guise that the political outcomes of the August 2022 presidential elections were not secured within the prescription of the law, which was not the case.
- xvii. No demonstrable prejudice will be suffered by the respondents by the grant of the pleas sought. Hence the prayers sought for conservatory orders are therefore warranted.
- xviii. No open-ended right to picket / demonstrates exists, outside the prescription of Article 37 of the Constitution of Kenya as read with section 5 of the Public Order Act & Part III of the Public Order Act. Further, in the aftermath of the unlawful and unregulated public demonstrations on 20th March 2023, these escalated precipitously and metamorphosed quickly into widespread unlawful behaviours and display of wanton acts of violence by the supporters of the 1st- 9th respondents.
- xix. The 1st respondent during his unlawful public demonstrations on 20th March 2023 while disguised as economic protests on the inflationary trends in Kenya are in fact in bitter political expression of disaffection at his loss in the August 2022 presidential elections evidenced by his unequivocal permitting and abetting the chants of Ruto must Go during such public gatherings. He has further stated that his stated unlawful demonstrations will be carried out on a regular weekly basis and his next demonstration was on Monday 27th March 2023 and every Monday and Thursday thereafter.
- xx. These utterances are unnecessarily creating tensions across Kenya, threatening the stability of Kenya, economic revival and the 1st to 9th respondents are clearly opening the doorway to anarchy and the spiralling erosion of governance in Kenya. It is also a violation of the Principle of Patriotism as espoused in Article 10(2) (a) of the Constitution, aimed at the unconstitutional removal from office of the lawfully elected President of Kenya in breach of Article 2(2) of the Constitution.
- xxi. The purported exercise of the right to demonstrate pursuant to Article 37 of the Constitution by the 1st to 9th respondents as expressed on 20th March 2023 has manifestly borne no fidelity to the terms and prescriptions of the law governing public processions, as those who purport to exercise it have consistently engaged in acts of hooliganism, anarchy, arson, unruly conduct, and general gratuitous violence which the 1st -9th respondents escape liability for, due to their failure to abide by section 5 of the Public Order Act.
- xxii. Following the closure of most of the businesses across Kenya and especially Nairobi City County on 20th March 2023 as a result of the said anarchy, violence, and mayhem unleashed by the followers of the 1st to 9th respondents the aggregate National loss to the economy of Kenya is approximately Kshs. 10 billion, which the 1st -9th respondents should be held responsible for.
- xxiii. The 1st to 9th respondents have taken advantage of the thin legislative framework governing picketing regulations, and have plainly exploited it for their own selfish political ends, and inflicted economic losses on the Nation of Kenya unwilling to be dragged into what is essentially a political tryst by the 1st respondent by seize the presidency from the duly elected president.
3. In his affidavit the Petitioner reiterated the grounds of the face of the application and deposed that the overt acts of violence by hooligans and vagabonds acting under the behest of the 1st -9th Respondents (the stated Respondents) during the unlawful demonstrations in diverse places in the Nairobi City



County, are painfully reminiscent of the post-election period in 2007, all in order to achieve their unlawful political ends; that the insults hurled on Kenyans not wishing to be involved in these unlawful actions were laced with taunts that these lawless acts will continue indefinitely.

4. The Petitioner further averred that outside the Public Order Act, Kenya has no readily enforceable public demonstrations/picketing legislative framework, aside from the Penal Code. It is therefore no longer feasible or tenable to permit the tyranny of unruly and lawless mobs under the provocation, direction and behest of the stated Respondents, to be permitted to displace and disrupt the critically necessary peaceful exercise of economic and social rights of Kenyans not wishing to participate in such demonstrations and to be dragged into a political tryst by the 1st Respondent to seize the presidency from the duly elected president H.E. Dr. William S. Ruto, outside the purview of Part III of the Public Order Act. Further that Article 37 of the Constitution does not in any way afford any person open-ended rights to cause mayhem, unleash violence, commit acts of arson, or otherwise engage in wanton breach of the peace for the peaceable exercise of freedoms and rights by non-participants, in the name of demonstrations as is now happening, and likely to happen at the instigation of the stated Respondents; that the primary twin pre-condition under Article 37 of the Constitution of Kenya which is constitutionally entrenched is that all such picketers must conduct themselves in a peaceful and lawful manner and must be unarmed; that this pre-condition applies to one and all such picketers otherwise Article 37 right becomes vitiated the moment any one such picketer turns out to be armed or breaches the peace in any discernible manner; that Section 6(1) of the Public Order Act expressly prohibits the carrying of weapons during public demonstrations; that following the closure of most businesses across Kenya and especially Nairobi City County on 20.3.23, as a result of the said anarchy, violence, and mayhem unleashed by the followers of the stated Respondents, the aggregate national loss to the economy of Kenya is approximately Kshs. 10 billion which the stated Respondents should be held responsible for. The Petitioner further stated that the declaration by the stated Respondents of the entire Nairobi City County as their place of picketing was in breach of Section 5(3) of the Public Order Act, which contemplates a single picketing area.
5. The Petitioner averred that the stated Respondents have not publicly or expressly condemned but endorsed and approved the violence meted by their demonstrators including the torching of the UDA Political Party Office in Kisumu, uprooting of road signage in Nairobi County and the attack on law enforcement officers, including the Central police Station OCS
6. The Petitioner urged the Court to intervene to stem the recurrence of what transpired on 20.3.23. No prejudice will be suffered by the Respondents by the grant of the plea sought.
7. The 7th Respondent opposed the Application vide a replying affidavit sworn on 5.4.23 by Shakila Abdalla, its Secretary General. It was averred that the instant Application is based on selfish interest and benefit as the Petitioner lacks the locus to bring such action on behalf of Kenyan citizens. The Application discloses no reasonable cause of action as it has already been overtaken by events and the orders sought therein serve no legal purpose at all; that the demonstrations are lawful and the same were carried out in line with Article 37 of Constitution contesting against the high cost of living, corruption and electoral injustices by the Government of Kenya; that the demonstrations are for the interest and the needs of the citizens of Kenya and centered on calling out the Government of Kenya on its shortcomings; that the citizens of Kenya have the right to fair administrative action by way of having their grievances heard and addressed by the ruling government as set out in Article 47 of the Constitution; that the protests and demonstrations have been peaceful and no demonstrator carried or used any weapons whatsoever; that the police were duly notified of the demonstrations according to the requirements of the Public Order Act; that the Application thus seeks to abrogate and limit the rights and freedoms of citizens to opinion, expression, freedom of media, association, assemble and



demonstrate. In addition, by dint of Article 24 (1) of the Constitution, the right of Kenyan citizens to assemble and demonstrate and have their grievances heard and addressed in a fair manner should not be limited without justifiable cause. The 7th Respondent denied violation of Constitution as alleged by the Petitioner. Accordingly, the Application, is frivolous, vexatious and an abuse of the Court process and should be dismissed.

8. The 9th Respondent opposed the Application in its grounds of opposition 5.4.23. The grounds are that the Application is unmerited and constitutes an abuse of the process of the court; that the orders sought concerning a declaration of a public holiday are baseless as the 9th Respondent has not declared nor does he intend to declare any public holiday; that the orders sought requiring the Court to direct the 10th respondent to issue directions to the Inspector General of the Police to arrest the Respondent for non-existent offense is fallacious and unfounded in law; that the orders sought requiring the Court to direct an independent body the National Police Service through the Inspector General of the Police on how to conduct its work is unfounded in law; that the conservatory orders sought to stop the 1st to 9th respondents from holding any public gathering in the Republic of Kenya without compliance with Section 5(1) of the Public order Act is unsupported; that the Public order Act empowers the Police to deal with compliance with the said provisions; that there is no demonstrations by the Petitioner that the police have failed and/ or will not effectively discharge their mandate under the Act; that prayers 5F and 5G are unmerited as the 9th Respondent has never engaged in any such acts nor is he about to commit such offences as projected by the Petitioner; that the Application is overtaken by events and orders sought are vitiated; that there are ongoing negotiations between the 1st Respondent and the Government concerning the petitions presented by the citizens of the Republic of Kenya through the 1st Respondent and that the demonstrations have since been stopped. The Application therefore lacks merit and should be dismissed with costs.
9. Parties filed their written submissions as directed by the Court, which I have duly considered together with the numerous authorities cited. I now proceed to consider whether the Petitioner has met the threshold for conservatory orders.
10. Article 23 of Constitution has conferred upon this Court, the authority to uphold and enforce the Bill of Rights and provide remedies as follows:
 1. The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
 2. ...
 3. In any proceedings brought under Article 22, a court may grant appropriate relief, including—
 - (a) a declaration of rights;
 - (b) an injunction;
 - (c) a conservatory order;
 - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
 - (e) an order for compensation; and



(f) an order of judicial review.

11. A conservatory order is one of the appropriate reliefs available to a party who alleges and proves denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. The purpose of conservatory orders is to preserve the substratum of the petition before Court pending the hearing and determination of the same. Rule 23 of *Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules) provides that despite any provision to the contrary, a Judge before whom a petition is presented shall hear and determine an application for conservatory or interim orders.
12. The threshold for the grant of conservatory orders was established by the Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR as follows:
 - (86) “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the 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 *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*.
13. The Supreme Court set out the test for the grant of conservatory orders in 3 limbs. A party seeking conservatory orders must demonstrate to the Court that first, the petition is arguable and not frivolous. Second that unless the orders sought are granted the suit, were it to succeed, would be rendered nugatory. The first 2 limbs though linked to injunctions in private party matters, are also applicable in public law. The Supreme Court added the third test in the context of *the Constitution*, namely, that it is in the public interest that the orders sought are granted.
14. And in the case of *Free Kenya Initiative & 6 others v Independent Electoral & Boundaries Commission & 4 others*; *Kenya National Commission on Human Rights (Interested party)* [2022] eKLR Mrima J, stated that the principles to be considered are not exhaustive and added the effect of the orders on the determination of the case, whether there is eminent danger to infringement of the human rights and



fundamental freedoms under the Bill of Rights, the applicability of the doctrine of presumption of constitutionality of statutes, whether the Applicant is guilty of laches, the doctrine of proportionality, among many others.

15. On his part, Ibrahim, J. (as he then was) added a word of caution in the case of Muslims for Human Rights (Muhuri) & 2 others v Attorney General & 2 Others [2011 eKLR where he stated:

The court must be careful for it not to reach final conclusions and to make final findings. By the time the application is decided, all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis- a-vis the case of either parties. This principle is similar to that in temporary at or interlocutory injunctions in civil matters.

This is a cardinal principle and happily makes my function and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side.

16. When considering an application for conservatory orders, the Court must be mindful to exercise caution, to avoid making final findings which would send parties away from the seat of justice without fully presenting their respective cases. At this stage, the Court must resist the temptation to make any conclusive findings of fact or law on the matter before it.

17. Similarly, in the case of Damour Florian Emmeric v Director of Immigration Services [2022] eKLR, Mrima, J. stated:

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

18. In a nutshell, the Petitioner's prayers before this Court are that the stated Respondents be prohibited from declaring any day to be a public holiday which has not been constitutionally so declared or gazetted, holding public gatherings without complying with the provisions of Section 5(1) Part III of the *Public Order Act*. The Petitioner further seeks that the stated Respondents be prohibited from inciting or promoting any violent conduct in furtherance of such public gatherings convened by them, hindering, preventing or interfering with public transportation, goods and service delivery in any part of Kenya, burning tyres on private and public roads and blocking or obstructing access to public and private premises, attending any government offices alone or in the company of more than 2 persons except for accessing services. The Petitioner further seeks that the stated Respondents be prohibited from engaging in any act that affects the rights and fundamental freedoms of others.

19. The Petitioner also seeks orders that the pursuant to Article 245(4) of the Cabinet Secretary Ministry of Interior and Coordination of National Government do issue such expedient directions to the Inspector General of Police to assist in the arrest the stated Respondents or any of them declaring a public holiday convening and/or taking part in demonstrations and any person acting at their behest, and/or their direction to damage any private or public property during such demonstrations and public gatherings.

20. At this preliminary stage, the Court must look at the case before it as a whole, weigh, the facts, the parties' positions, the reliefs sought and the law, in order to determine whether the same discloses



a prima-facie case. The Court must at the preliminary stage I have carefully looked at the prayers sought herein. I have also looked at the prayers in the Petition which are not unlike those sought in the Application. They challenge the constitutionality and legality of actions the Petitioner attributes to the 1-9th Respondents. I have also looked at the responses filed herein denying the allegations by the Petitioner. At this stage, the Court may only examine and evaluate the material placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of conservatory orders.

21. The first principle is whether the Petitioner has demonstrated a prima facie arguable case? In the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR the Court of Appeal defined a prima facie case to mean:

4. A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

22. In the case of *Free Kenya Initiative & 6 others v Independent Electoral & Boundaries Commission & 4 others; Kenya National Commission on Human Rights (Interested party)* [2022] eKLR, Mrima, J. stated:

32. In sum, therefore, in determining whether a matter discloses a prima-facie case, a Court must look at the case as a whole. It must weigh, albeit preliminarily, the pleadings, the factual basis, the respective parties’ positions, the remedies sought and the law. In so doing, a Constitutional Court must be guided by Articles 22(1) and 258(1) of *Constitution* which provisions are on the right to institute Court proceedings whenever a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened or the when *Constitution* has been contravened, or is threatened with contravention.

23. National holidays are stipulated in Article 9 of *Constitution* which also provides that Parliament may enact legislation prescribing other public holidays, and providing for observance of public holidays. The *Public Holidays Act* provides for public holidays under Section 2. These public holidays are listed in the Schedule to the Act.

24. Section 3 of the Act provides that:

The Cabinet Secretary may at any time if he thinks fit, by notice in the Gazette, declare any day to be a public holiday either in addition to the days mentioned in the Schedule or in substitution for any of those days and either throughout Kenya or in any sub-county area or part thereof, and thereupon any day so appointed shall be a public holiday in all respects as if it were a day mentioned in the Schedule, in Kenya or the locality specified in the notice; and where, in any year, any day is so declared to be a public holiday in substitution for any of the days mentioned in the Schedule such latter day shall in such year cease to be a public holiday in Kenya or the locality specified in the notice.

25. As can be seen, a clear procedure is stipulated for declaration of any day, other than those listed in the Schedule, as a public holiday. This can only be done by the Cabinet Secretary and through a notice in the Kenya Gazette. Any other declaration of a public holiday would be contrary to law. Where there



is any contravention of the law, adequate legal provisions and mechanisms have been made in both Constitution and statute for dealing with such instances.

26. As regards demonstrations, Article 37 of Constitution guarantees to every person the right to assembly, demonstration, picketing and petition as follows:

Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.

27. A key component of the right under Article 37 is that it must be exercised peaceably and participants must be unarmed. To this end, Section 5 of the Public Order Act has made elaborate provision for regulation of public meeting and processions as follows:

1. No person shall hold a public meeting or a public procession except in accordance with the provisions of this section.
2. Any person intending to convene a public meeting or a public procession shall notify the regulating officer of such intent at least three days but not more than fourteen days before the proposed date of the public meeting or procession.
3. A notice under subsection (2) shall be in the prescribed form and shall specify —
 - (a) the full names and physical address of the organizer of the proposed public meeting or public procession;
 - (b) the proposed date of the meeting or procession and the time thereof which shall be between six o'clock in the morning and six o'clock in the afternoon;
 - (c) the proposed site of the public meeting or the proposed route in the case of a public procession.
4. Where, upon receipt of a notice under subsection (2), it is not possible to hold the proposed public meeting or public procession for the reason that notice of another public meeting or procession on the date, at the time and at the venue proposed has already been received by the regulating officer, the regulating officer shall forthwith notify the organizer.
5. The notification by the regulating officer under subsection (4) shall be in writing and shall be delivered to the organizer at the physical address specified pursuant to the provisions of subsection (3).
6. Where the regulating officer notifies the organizer of a public meeting or public procession in accordance with subsection (3) that it is not possible to hold the proposed meeting or procession, such public meeting or procession shall not be held on the date, at the time and venue proposed, but may, subject to this section, be held on such future date as the organizer may subsequently notify.
7. The organizer of every public meeting or public procession or his authorized agent shall be present throughout the meeting or procession and shall assist the police in the maintenance of peace and order at the meeting or procession.



8. The regulating officer or any police officer of or above the rank of inspector may stop or prevent the holding of—
 - (a) any public meeting or public procession held contrary to the provisions of sub-sections (2) or (6);
 - (b) any public gathering or other meeting or procession which, having regard to the rights and interests of the persons participating in such gathering, meeting or procession, there is clear, present or imminent danger of a breach of the peace or public order, and may, for any of the purposes aforesaid, give or issue such orders, including orders for the dispersal of the meeting, procession or gathering as are reasonable in the circumstances, having regard to the rights and freedoms of the persons in respect of whom such orders are issued and the rights and freedoms of others.
9. Any person who neglects or refuses to obey any order given or issued under subsection (7) shall be guilty of an offence.
10. Any public meeting or public procession held contrary to the provisions of subsections (1) and (5) shall be deemed to be an unlawful assembly.
11. Any person who takes part in any public meeting or public procession deemed to be an unlawful assembly under subsection (10), or holds, convenes or organizes or is concerned in the holding, convening or organizing of any such meeting or procession shall be guilty of the offence of taking part in an unlawful assembly under Chapter IX of the Penal Code and liable to imprisonment for one year.
12. The organizer of any excluded meeting may request the regulating officer that the police be present at such meeting to ensure the maintenance of peace and order.
13. A request under subsection (12) shall be in writing and shall be delivered to the regulating officer at least three days before the proposed date of the meeting.
14. The regulating officer shall keep a public register of all notices received under subsection (2).
15. Any person may, during working hours, inspect the register kept under subsection (14).
28. It can be seen from the foregoing provision that any person engaging in a public meeting or procession in exercise of the right under Article 37, must do so in accordance with the said provisions. Key among the requirements is that a regulating officer must be informed of the intended public meeting or procession within the stipulated time. The regulating officer is defined in Section 2 of the Act as the officer in-charge of the police station in the area in which a proposed public meeting is proposed to be held, or in the case of a public procession, the police officer in-charge of the police station in the area in which the procession is proposed to start and to end.
29. Section 5 of the Act empowers a regulating officer or other officer above the rank of inspector to stop or prevent the holding of any public meeting or public procession held contrary to the law or which



- poses a clear, present or imminent danger of a breach of the peace or public order. Such officer may disperse the meeting, procession or gathering in question. This action is taken to protect the rights and freedoms of the persons in respect of whom such orders are issued and the rights and freedoms of others. The Act provides that any person who disobeys any order given by a regulating or other authorised officer shall be guilty of an offence. Further, any meeting or public procession held contrary to the provisions of the Act shall be deemed to be an unlawful assembly and any participant, convenor or organiser shall be guilty of the offence of taking part in an unlawful assembly.
30. A special feature in our Constitution is the establishment of an independent office of the Inspector-General of Police under Article 245(1). The independence of that office is stipulated in Clause 2(b) which declares that the Inspector-General shall exercise independent command over the National Police Service, established under Article 243(1), and perform any other functions prescribed by national legislation.
31. The National Police Act was enacted by Parliament to give effect to Articles 243, 244 and 245 of *the Constitution*. Section 24 of the *National Police Service Act* provides that the functions of the Kenya Police Service include inter alia to maintain of law and order, investigate of crimes prevent and detect of crime and apprehend offenders. Under Section 35 of the Act, the Directorate of the Criminal Investigations has the same mandate.
32. In the case of Republic v Commissioner of Police & Another Ex-Parte Michael Monari & Another [2012] eKLR Warsame, J (as he then was) stated that [T]he police have a duty to investigate on any complaint once a complaint is made. In deed the police would be failing in their constitutional mandate to detect and prevent crime.
33. My view therefore is that there are adequate constitutional and statutory measures put in place to counter any activity that that violates the law in exercise of the right under Article 37 of *the Constitution*. Indeed the Inspector General of Police would be failing in his constitutional and statutory mandate, were he to fail to act in the face of violation of *Constitution* and the *Public Order Act*.
34. Article 245(4) of *Constitution* provides as follows:
- The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to—
- a. the investigation of any particular offence or offences;
 - b. the enforcement of the law against any particular person or persons; or
 - c. the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.
35. As can be seen, the Cabinet Secretary is authorised to give direction to the Inspector-General of Police with respect only to matters of policy. The provision however secures the independence and autonomy of the Inspector-General with regard to the investigation of any offences, the enforcement of the law against any person and the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service. The Cabinet Secretary thus has no power to give direction to the Inspector-General with regard to the listed matters, which are insulated by *the Constitution*, from interference. Indeed, only the Director of Public Prosecution may under Article 157(3), direct the Inspector General to investigate any information or allegation of criminal conduct and he is required to comply.



36. In the case of *Law Society of Kenya v Attorney General & another* [2021] eKLR, Mrima J, considered the independence of the office of the Inspector General of Police and stated:

83. The independence of the 2nd Respondent is constitutionally-insulated from any form of interference or directional command. Apart from the Director of Public Prosecutions and only to the extent so provided, no other person, body or entity has the power to give any form of directives to the 2nd Respondent on how to discharge its functions.

84. The above is further ring-fenced in that even the power donated to the Cabinet Secretary under Article 254(4) of *Constitution* to issue any directives to the 2nd Respondent is only limited to policy issues.

85. The Supreme Court In the Matter of Interim Independent Electoral Commission [2011] eKLR, discussed the meaning and extent of the independence in relation to constitutional Commissions and independent offices. The Court emphasized the need for such entities to co-ordinate for effective service delivery, but delineated the discharge of their respective mandates as follows: -

[60] 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.

86. Applying the foregoing to this case, it therefore, follows that the Inspector General as the one in command of the National Police Service while discharging the duties of the office should not be under the direction or control of any person or authority and should not take any orders or instructions from organs or persons outside his/her ambit. As said, the only exception is what is provided for in Article 157(4) of *Constitution* relating to the powers of the Director of Public Prosecutions over the Inspector General.

37. The Petitioner is inviting this Court to do what, as can be seen above, falls within the mandate of the Inspector-General of Police through the regulating and authorised officers. He further seeks that this Court orders the Cabinet Secretary to give a direction to the Inspector-General to assist in the arrest of the stated Respondents or any of them for declaring a public holiday convening and/or taking part in demonstrations and any person acting at their behest, and/or their direction to damage any private or public property during such demonstrations and public gatherings. This not a matter of policy in respect of which the Cabinet Secretary is authorised by *the Constitution*, to give direction to the Inspector of Police. This has to do with the enforcement of the law against the stated Respondents and their supporters, a matter over which by dint of Article 245(4), the Inspector-General of Police may not be given direction by the Cabinet Secretary, or indeed any other person other than the Director of Public Prosecutions. Accordingly, such an order as sought by the Petitioner cannot be granted.

38. After considering the Application against the set parameters for grant of conservatory orders, I find that the Petitioner has not made out a prima facie case with a high possibility of success. The Petitioner has also not demonstrated that the danger looming over the realization of rights is imminent, real and



not theoretical. He has failed to satisfy the Court that whatever danger may be posed by the conduct of the stated Respondents will not be surmounted by the Inspector-General of Police invoking his powers under Constitution and the Public Order Act. In light of this, it cannot be said that the Petitioner or the public will suffer any prejudice if the orders sought are not granted nor will the Petition be rendered nugatory.

39. Additionally, public interest requires that the Court does not take away or limit the core rights of any party, more so where there exist less restrictive means to achieve an objective. It is therefore in the public interest that the right of the stated Respondents and their supporters to assemble, demonstrate, picket and petition is not curtailed. In the event that they engage in unlawful conduct in the process of exercising this right, then the Inspector-General of Police should step in to safeguard and maintain public order as required by law. I also take the view that it is in the public interest that independent offices such as that of the Inspector-General of Police, are given the space to discharge their constitutional mandate without any interference by the Court save where it is demonstrated that there has been breach of Constitution or of the law. In this regard I am guided by the holding in case of Tom Dola & 2 others v Chairman, National Land Commission & 5 others [2020] eKLR where the Court of Appeal spoke to this issue and stated:

In Pevans East Africa Ltd & Another v. Chairman, Betting Control & Licensing Board & 7 Others [2018] eKLR, this Court emphasised, and we reiterate, that where Constitution has vested specified functions in a state institution or organ, the courts will not readily interfere with the discharge of that mandate unless it is demonstrated that the institution or organ in question has acted ultra vires or in breach of Constitution or the law.

40. The Petitioner has sought leave to advertise such orders as are made in these proceedings and service thereof on the stated Respondents in a daily newspaper of national circulation, pursuant to Rule 23(3) of Legal Notice 117 of 2013. The reason advanced for this proposition is that because of the large number of persons who are members of the 6th Respondent and because of the centrality of the said political party in the matters raised in the Petition, it is imperative to have the Court grant him leave to notify these individuals of the Court orders.
41. Rule 23(3) of the Mutunga Rules provides:
- 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.
42. The Court notes that the Petitioner has all along been serving the Respondents personally or through their advocates. He has not demonstrated any difficulty in effecting personal service. There is therefore no justification for changing the mode of service.
43. In the end and in view of the foregoing I am not at this stage persuaded that the Petitioner has satisfied the test for grant of the conservatory orders sought. The upshot is that the Application 17.3.23 and amended on 20.3.23 lacks merit and is hereby dismissed. Costs in the cause.

DATED AND DELIVERED IN NAIROBI THIS 30TH DAY OF JUNE 2023

M. THANDE

JUDGE

In the presence of: -



.....for the Petitioner

.....for the 9th Respondent

.....Court Assistant

