REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

CONSTITUTIONAL PETITION NO. E160 OF 2022

BETWEEN

1. **FREE KENYA INITIATIVE**
2. **BOB NJAGI**
3. **NICHOLAS OYOO**
4. **MULIALIA OKUMU**
5. **FELIX WAMBUA**
6. **JEREMIAH NYAGAH**
7. **JAMES KAMAU..... PETITIONERS**

VERSUS

1. **INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION**
2. **OFFICE OF THE REGISTRAR OF POLITICAL PARTIES**
3. **NATIONAL ASSEMBLY**
4. **SENATE OF THE REPUBLIC OF KENYA**
5. **THE ATTORNEY GENERAL..... RESPONDENTS**

AND

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

RULING NO. 1

Introduction:

1. The Petitioners herein variously challenged *the Election (General) Regulations, 2012* (hereinafter referred to as '***the impugned Regulations***') in respect to the participation of independent candidates in elections in Kenya.

2. The Petitioners filed a Petition and a Notice of Motion. Both are evenly dated 13th April, 2022. I will hereinafter refer to the Notice of Motion as '***the application'***.

3. On the directions of this Court, the application was orally heard yesterday, hence, this ruling.

The Application:

4. The following orders are sought for in the application: -

> *1. THAT the instant Application and Petition be certified as urgent and the same be heard Ex-Parte in the first instance.*
>
> *2 THAT in the interim and pending the hearing and determination of this application, this Honourable Court be and is hereby pleased to issue an order temporarily suspending regulation 24 (2) (c), 28 (2) (c), 32 (2) (c) and 36 (2) (c) of the Election (General) Regulations, 2012 requiring independent candidates to submit copies of identification documents of their supporters to the 1 Respondent clearance purposes to vie for elective posts.*
>
> *3. THAT in the interim and pending the hearing and determination of this petition, this Honourable Court be and is hereby pleased to issue an order temporarily suspending regulation 24(2) (c) , 28 (2) (c) 32 (2) (c) and 36 (2) (c) of the Election (General) Regulations, 2012 requiring independent candidates to submit copies of identification documents of their supporters to the 1st Respondent for clearance purposes to vie for elective posts.*
>
> *4. THAT in the interim and pending the hearing and determination this Application, this Honourable Court be and is hereby pleased to allow the Petitioners/Applicants herein together with other Independent Candidates vying for elective posts to form coalitions and associations as envisaged under Article 36 of the Constitution to advance their Political Interests.*
>
> *5. THAT in the interim and pending the hearing and determination this Petition, this Honourable Court be and is hereby pleased to allow the Petitioners/Applicants herein together with other Independent Candidates vying for elective posts to form coalitions and associations as envisaged under Article 36 of the Constitution of Kenya, 2010 to advance their Political Interests.*
>
> *6. Any other Order that this Honourable Court may deem fit and just in circumstance.*
>
> *7. Costs of this Application be provided for.*

5. The application was supported by the Affidavit of *Bob Njagi*, the 2nd Petitioner, sworn on even date. It was further supported by the Petitioners' written submissions and a List of Authorities both dated 26th April, 2022

6. The Interested Party herein, *Kenya National Commission on Human Rights,* supported the application. It tendered oral submissions.

7. The application was opposed by all the Respondents. The 1st Respondent filed Grounds of Opposition dated 20th April, 2022 and written submissions dated 26th April, 2022.

8. The 2nd Respondent relied on the Replying Affidavit sworn by one *Joy Onyango* on 20th April, 2022 and written submissions dated 27th April, 2022.

9. The 5th Respondent filed Grounds of Opposition dated 26th April, 2022.

10. The 3rd and 4th Respondents did not appear in the matter despite service.

Analysis:

11. I have carefully considered the application, the pleadings, the responses thereto, the parties' submissions and the decisions referred to and I, hereby, discern the following areas of discussion:

(i) The nature of conservatory orders;

(ii) The guiding principles in conservatory applications; and

(iii) The applicability of the principles to the applications.

12. I will deal with the above sequentially.

13. Before I do so, I must state that due to time constraints, I will not reproduce the parties' cases and submissions v*erbatim*, but will definitely take into account all what is on record. Needless to say, the parties' submissions were well researched, extensive and captured all parameters of the application. The submissions have greatly assisted the Court and I remain grateful.

The nature of conservatory orders:

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

[86] "Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the Applicant's case for orders of stay.

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

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

16. In ***Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR*** the Court had the following to say about the nature of conservatory orders: -

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

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

18. 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.

19. The foregoing was fittingly captured by **Ibrahim, J** (as he then was) in ***Muslim for Human Rights (Milimani) & 2 Others vs Attorney General & 2 Others (2011) eKLR***. The Learned Judge, correctly so, stated as follows: -

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

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

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

The guiding principles in conservatory applications:

22. The principles for consideration by a Court in exercising its discretion on whether to grant conservatory orders have been developed by Courts over time. They are now well settled.

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

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

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

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

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

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

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

order.

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

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

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

The applicability of the principles to the application:

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

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

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

28. In a ruling rendered on 8th February, 2021 in ***David Ndii & others v Attorney General & others*** [2021] eKLR, the Court had the following to say about a *prima-facie* case: -

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

29. What constitutes a *prima-facie* case was further dealt with by the Court of Appeal in ***Mirugi Kariuki -vs- Attorney General*** Civil Appeal No. 70 of 1991 (1990-1994) EA 156, (1992) KLR 8. The Court, in an appeal against refusal to grant leave to institute judicial review proceedings by the High Court, stated as follows: -

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

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

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

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

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 the Constitution which provisions are on the right to institute Court proceedings whenever a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened or the when the Constitution has been contravened, or is threatened with contravention.

33. In the Petition, the Petitioners sought the following prayers: -

a. A declaration that regulation 24 (2) (c), 28 (2) (c), 32 (2) (c) and 36 (2) (c) of the Elections General Regulations is inconsistent with the Constitution and therefore void and invalid in terms of Article 2(4) of the Constitution.

b. A declaration that regulation 24 (2) (c), 28 (2) (c), 32 (2) (c) and 36 (2) (c) of the Elections General Regulations is wholly unconstitutional and it accordingly stands to be struck out from the regulation.

c. An order does issue to the 3rd Respondent to amend the Political Parties Act, 2011 to provide for the formation of a Liaison Committee for independent candidates with similar functions to that of the Political Parties Liaison Committee.

d. An order does issue to the 3rd Respondent to amend the Political Parties Act, 2011, to allow independent candidates to form coalitions in order to further their civic and political rights.

e. An order does issue to the 34 Respondent to amend the political Parties Act, 2011, to create an office of the Registrar of Independent candidates.

f. This Honourable Court be pleased to issue an order that each party should bear its own costs on the grounds that each party should bear its own costs on the grounds that this Petition is in the Interest of the Public.

g. The Honourable Court be pleased to issue any other or further remedy that the Honourable Court shall deem fit to grant in the interests of justice in the circumstances of this Petition:

34. The Petition challenged the constitutionality of some of the impugned regulations. Going by the responses so far filed and what a *prima-facie* case has been defined to mean, there is no doubt that the Petition raises several constitutional issues which are worth attending to.

35. Without much ado, it is this Court's finding that the matter raises a *prima facie* case.

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

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

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

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

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

39. As such, the damage or threat thereof to the rights and fundamental freedoms or to the Constitution must be so real that the Court can unmistakably arrive at such an interim finding. Such a breach or threat should not be illusory or presumptive. It must be eminent.

40. One of the effects of the conservatory orders sought in the application is to suspend a legislation. There is the doctrine of presumption of constitutionality and legality of statutes. The doctrine generally fronts that unless proved otherwise, statutes are deemed constitutional and valid and may only be suspended in the clearest of cases and where the statute is a threat to life and limb or to the Bill of Rights.

41. In ***Kizito Mark Ngaywa v. Minister of State for Internal Security and Provincial Administration & Another*** [2011] eKLR, the High Court (*Mohamed, J* (as he then was) had the following to say on the issue: -

I have considered the application for adjournment and that for temporary suspension of the regulations and the submissions by Counsel. When considering the matter, I recalled my decision in PETITION NO. 669 OF 2009, MOMBASA BISHOP JOSEPH KIMANI & OTHERS –V- ATTORNEY GENERAL, COMMITTEE OF EXPERTS AND ANOTHER which I delivered on 6-10-2010. In the said case I was guided by the decisions of the Constitutional Court in Tanzania in NDYANABO –V- ATTORNEY GENERAL (2001) 2 EA 485 in which the said court presided over by the Hon. Chief Justice Samatta stated as follows: -

Thirdly; until the contrary is proved, a legislation is presumed to be Constitutional. It is a sound privilege of Constitutional construction that if possible, a legislation should receive such a construction as will make it operative and not inoperative.

Fourthly, since, as stated, a short while ago, there is a presumption of Constitutionality of legislation, the onus is upon those who challenge the Constitutionality of the legislation, they have to rebut the presumption. Fifthly where those supporting a restriction on a fundamental right rely on a claw back or exclusion clause in doing so, the onus is on them, they have to justify the restriction."

I am still persuaded by the above-mentioned principles of Constitutional interpretation. In the BISHOP JOSEPH KIMANI case,

the court observed as follows: -

> ***It is a very serious legal and Constitutional step to suspend the operation of statutes and statutory provisions. The courts must wade with care, prudence and judicious wisdom. For the High Court to grant interim orders in this regard, I think one must at the interlocutory stay actually show that the operation of the legislative provision are a danger to life and limb at that very moment.***

It is my view that the principle of presumption of Constitutionality of Legislation in imperative for any state that believes in democracy, the separation of powers and the Rule of Law in general. Further the courts to be able to suspend legislation during peace times where there is no national disaster or war, would in my view be interfering with the independence and supremacy of Parliament in its Constitutional duty of legislating law.

42. The applicability of the doctrine of presumption of constitutionality and legality of a statute was further dealt with by the Court of Appeal alongside the aspect of public interest. That was in ***Attorney General & another v Coalition for Reform and Democracy & 7 others*** [2015] eKLR.

43. In the matter, the High Court had suspended some provisions of the Security Laws (Amendment) Act. The State appealed the decision. In dismissing the appeal, the Court of Appeal had the following to say:

> *We agree with Prof. Muigai that in an application of this nature, which is not seeking entirely private law remedies, the Court must also consider where the public interest lies. In* **PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES** *case, (supra), it was held that when the State is the appealing party in an appeal where the constitutionality of a statute is the subject matter for determination, the State interest and harm merges with that of the public. There is also the doctrine of presumption of constitutionality which must be borne in mind. The impugned Act is intended to serve the public.*
>
> *While the Court appreciates the contextual backdrop leading to the enactment of the* **SLAA**, *it must also be appreciated that it is not in the interest of justice to enact or implement a law that may violate the Constitution and in particular the Bill of Rights. Constitutional supremacy as articulated by* **Article 2** *of the* **Constitution** *has a higher place than public interest. When weighty challenges against a statute have been raised and placed before the High Court, if, upon exercise of its discretion, the Court is of the view that implementation of various sections of the impugned statute ought to be suspended pending final determination as to their constitutionality, a very strong case has to be made out before this Court can lift the conservatory order.* ***The State would have to demonstrate, for example, that suspension of the statute or any part thereof has occasioned a lacuna in its operations or governance structure which, if left unfilled, even for a short while, is likely to cause very grave consequences to the general populace.***
>
> *We do not think that the applicant has made out such a case. The Court was not told that the grant of the conservatory orders has brought about a vacuum in our laws which makes it impossible or difficult to investigate and prosecute terror suspects or such other persons who may be targeted by the* **SLAA**. *Apart from the eight (8) sections of the* **SLAA** *whose operationalization has been temporary suspended, all other laws of Kenya are still in full operation. We entertain no doubt that as we await either the hearing of the appeal before this Court, or, the finalization of the petitions before the High Court, the country's security agents and law enforcement organs can still make full use of the existing laws to keep the country and its people safe.*

44. In this case, the Respondents contended that the Petitioners have not demonstrated any irreparable prejudice which they stand to suffer neither have they demonstrated a case for the suspension of the law.

45. Have the Petitioners demonstrated a real threat to life and limb or infringement of the Bill of Rights at this point in time?

46. It is the Petitioners' contention that if the application is not allowed, persons intending to vie in the forthcoming general election as independent candidates will *inter alia* be subjected to discrimination, great financial hardship and inconvenience as opposed to those who will be vying through political parties. Of particular concern to the Petitioners is the requirement to provide copies of identity cards of their supporters as a condition precedent to nomination.

47. It was the Petitioners' further contention that the demand for provision of copies of the identity cards of the supporters is a threat to the security of those cards since the copies thereof may be used for other illegal purposes. The Petitioners also pointed out that the requirement posed a serious hardship to those vying as independent candidates since it was not readily possible to get copies of identity cards in some marginalized parts of the country. The Petitioners also argued that there are other modes of identification other than by way of identity cards.

48. This Court remains alive to the provision of **Article 99(1) (c)** of the Constitution. It is also conscious of the fact that the impugned regulations have been in place since 2012; a period of around 10 years, before the filing of the current Petition. Without venturing into the heart of the Petition, suffice to say that the Court of Appeal in Civil Appeal No. 51 of 2015, ***Willy Kimutai Kitilit v Michael Kibet*** [2018] eKLR dealt with the doctrine of laches as a constitutional imperative. Further this Court in Nairobi High Court Constitutional Petition No. 33 of 2020 ***Peter Odoyo & Stanley Kinyanjui*** **(Suing on behalf of the Outdoor Advertising Association of Kenya) v.** ***Kenya National Highways Authority & 2 others*** (2021) eKLR contoured the need for giving reasons on any delay in challenging infringement of the Bill of Rights and/or the Constitution.

49. This Court is also alive to the truism that those who vied as independent candidates in the previous elections duly complied with the impugned regulations.

50. In this matter, I have struggled to perceive demonstration of any threat to life and limb in vain. The contended threat to the Bill of Rights in respect to Articles 27(1) and 38 of the Constitution cannot be alleged to be plain and in the clearest of cases. Serious objections thereto

have been raised which call for further interrogation. In fact, the matters raised herein call for an in-depth analysis at the hearing of the main Petition. (See the Court of Appeal in ***Civil Application Nai. 31 of 2016 Alfred N. Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 others*** [2016] eKLR).

51. On the fear that the copies of identity cards may be used for illegal purposes, it is this Court's initial position that this country is governed by the rule of law and there are sufficient laws in place to deal with any aspects of criminality. On the possibility of using other means of identification other than the use of identity cards, there is no *prima-facie* evidence that all the registered voters have such other modes of identification, for instance passports, such that no one will be prejudiced. Furthermore, being an evidential issue, it ought to be dealt with at the hearing of the Petition.

52. This Court is, therefore, not persuaded that the Petitioners have laid a basis to unseat the doctrine of presumption of constitutionality and legality of statutes in this matter. The Court is also not persuaded that unless the application is allowed, the Petitioners stand to suffer real prejudice.

53. As to whether the Petition will be rendered otiose in the absence of the orders sought, this Court takes the contrary position. The issues raised in the Petition go beyond the nomination of independent candidates.

54. Some of the issues which are not directly pegged to the nominations include whether independent candidates ought to form coalitions or Liaison Committees and whether there ought to be an Office of the Registrar of Independent candidates, among others.

55. It is, now, the finding of this Court that the Petition survives even in the absence of the orders sought in the application.

56. On the basis of the foregoing, the issue at hand is answered in the negative.

(iii) Public interest:

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

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

58. Broadly speaking, the Constitution and the laws govern the people. As such, the Constitution remains supreme and the laws are always presumed to be constitutional until the contrary is proved. In a matter, therefore, where the constitutionality of a statute is impugned or an issue arises as to whether the Constitution is contravened, Courts must weigh, with care and at a preliminary stage, the alleged breach against the provisions of the Constitution and the doctrine of presumption of constitutionality and legality of statutes.

59. The 1st Respondent has declared the holding of the general election on 9th August, 2022. The Constitution and the law prescribes several timelines and requirements towards the said elections. For instance, Article 99 of the Constitution provides for supporters on the eligibility of an independent candidate.

60. Looking at the nature of prayers sought in the application, there is a possibility of this Court creating a **constitutional crisis** if the orders are allowed at this point in time. I say so because once the cited provisions of the impugned regulations are suspended, then there will be no legal framework to enable the 1st Respondent attain the dictates of Article 99(1)(c) of the Constitution.

61. It will then be incumbent upon the 1st Respondent to come up with other regulations in place. Given that the general election is barely 3 months away, it is highly doubtful that the 1st Respondent will be able to come up with other regulations, which are statutory instruments, and as such the 1st Respondent will not be able to successfully complete the nomination process. It will then mean that the whole electoral process will be held in a *limbo* and the 1st Respondent will not be able to conduct fair and free elections. That will definitely result into a constitutional crisis.

62. Speaking to the foregoing, this Court in Nairobi High Court Petition No. E019 of 2021 **Law Society of Kenya vs. Anne Kananu Mwenda and Others** (2021) eKLR stated as follows: -

> ***41. A Court of law must, as a primary duty and in public interest, uphold the Constitution. A Court must not in any manner whatsoever create a constitutional crisis. It remains the cardinal duty of a Court to foresee such a crisis and take steps to avoid it.***

62. On the basis of the foregoing, and in the exceptional circumstances in this matter, this Court finds that public interest tilts in favour of the Respondents. It is in public interest that the impugned regulations be adhered to pending the outcome of the Petition.

Disposition:

63. The above analysis yields that the Petitioners have not, in the meantime, successfully laid a basis for the grant of the orders sought in the application.

64. That being the case, the application is unsuccessful. However, given the nature of the Petition herein, there is need for appropriate directions and for expeditious disposal of this matter.

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

(a) The Notice of Motion dated 13th April, 2022 is hereby dismissed.

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

(c) The Respondents and the Interested Party shall within 14 days hereof file and serve responses to the Petition, if not yet.

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

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

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

Orders accordingly.

DELIVERED, DATED and **SIGNED** at **NAIROBI** this **28th** day of **April, 2022.**

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Mr. Dunstan Omari and **Mitchell Kimuma,** Learned Counsel for the Petitioners.

Dr. Arua, Learned Counsel for the 1st Respondent.

Miss. Wamuyu, Learned Counsel for the 5th Respondent.

Mr. Abdikadir Osman, Learned Counsel for the Interested Party.

Jared Otieno – Court Assistant.