Obunga & 5 others v Independent Electoral & Boundaries Commission & another; Principal Registrar of Persons & another (Interested Parties) (Constitutional Petition E219 of 2022) [2022] KEHC 10608 (KLR) (Constitutional and Human Rights) (24 May 2022) (Ruling)

Neutral citation: [2022] KEHC 10608 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E219 OF 2022

AC MRIMA, J

MAY 24, 2022

BETWEEN

BERNARD NETO OBUNGA ..... 1ST PETITIONER

JOSEPH SIAMBAI YAMOHANGA ..... 2ND PETITIONER

HALIMA SHARIFF ABDULKADIR ..... 3RD PETITIONER

NICHOLAS MUTEITHIA MAUA ..... 4TH PETITIONER

PETER MACHARIAH GITONGA ..... 5TH PETITIONER

LUCY GAKENIA MAKUTHO ..... 6TH PETITIONER

AND

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION .... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

AND

PRINCIPAL REGISTRAR OF PERSONS ..... INTERESTED PARTY

OFFICE OF DATA PROTECTION COMMISSIONER ..... INTERESTED PARTY

RULING

1. The constitutionality and validity of various provisions of the Election (General) Regulations, 2012 (hereinafter referred to as 'the impugned Regulations') relating to the participation of independent candidates in elections in Kenya has, once again, been challenged in these proceedings.

2. The petitioners are Kenyans desirous of vying for various elective positions in the General Election scheduled for the August 9, 2022 as independent candidates.

3. In their quest to suspend some of the impugned regulations calling for submission of certified copies of identity cards of the candidates' supporters to the Independent Electoral and Boundaries Commission (hereinafter referred to as 'the 1st respondent' or 'the IEBC' or 'the Commission') in the interim, the petitioners filed a notice of motion dated 16th May, 2022 which I will hereinafter refer to as 'the application'.

4. On the directions of this court, the application was orally heard on May 19, 2022, hence, this ruling.

The Application:

5. The application seeks the following orders: -

    1. The instant application and Petition be certified as urgent and the same be heard ex-parte in the first instance.

    2. Pending the inter-partes hearing and determination of this Application, the Honorable Court be and is hereby pleased to issue an order temporarily restraining the 1st respondent from implementing regulations 18 (2) (c), 24 (2) (c), 28 (2) (c), 32 (2) (c) and 36 (2) (c) of the Election (General) Regulations, 2017 requiring independent candidates for the various elective positions in the August 2022 General Elections to submit copies of identity cards of their supporters to the Respondent for clearance purposes to vie for elective posts, but allow and accept the candidates to submit just the signatures and the requisite forms with the registered voters details.

3. Pending the hearing and determination of the Petition, the Honorable Court be and is hereby pleased to issue an order temporarily restraining the 1 Respondent from implementing regulations 18 (2) (c), 24 (2) (c), 28 (2) (c), 32 (2) (c) and 36 (2) (c) of the Election (General) Regulations, 2017 requiring independent candidates for the various elective positions in the August 2022 General Elections to submit copies of identity cards of their supporters to the 1st Respondent for clearance purposes to vie for elective posts, but allow and accept the candidates to submit just the signatures and the requisite forms with the registered voters details.

    4. Such other/further order/directions that the honourable court may deem fit, expedient and just in the circumstances.

    5. Costs of this application be provided for.

6. The application was supported by the affidavit of Bernard Neto Obunga, the 1st petitioner, sworn on even date.

7. The Interested Parties herein, the Principal Registrar of Persons and the Office of Data Protection Commissioner, did not take part in the hearing of the application.

8. The application was opposed by all the respondents. The 2nd respondent filed grounds of opposition to the application.

Analysis:

9. I have carefully considered the application, the pleadings, the responses thereto, the parties' oral 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.

10. I will deal with the above sequentially.

11. Before I do so, I must state that due to time constraints, I will not reproduce the parties' cases and submissions verbatim, but will definitely take into account all what is on record.

The nature of conservatory orders

12. 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: -

> "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.

13. 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: -

> 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.

14. 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.

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

16. 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.

17. 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.

18. 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.

19. 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:

20. 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.

21. 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.

22. 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.

23. 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.

24. 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:

25. 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.

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

> 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.

27. 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).

28. 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.

29. 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.

30. 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.

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

    a. A declaration that regulations 18 (2) (c), 24 (2) (c), 28 (2) (c), 32 (2) (c) and 36 (2) (c) of the Election (General) Regulations are inconsistent with *the Constitution* and therefore void and invalid in terms of article 10, 38(3) and 83(3) of *the Constitution*.

    b. A declaration that regulations 18 (2) (c), 24 (2) (c), 28 (2) (c), 32 (2) (c) and 36 (2) (c) of the Election (General) Regulations are inconsistent with *the constitution* and therefore void and invalid in terms of Articles 10 and 27 of *the Constitution*.

    c. A declaration that regulation 18 (2) (c), 24 (2) (c), 28 (2) (c), 32 (2) (c) and 36 (2) (c) of the Election (General) Regulations are wholly unconstitutional and accordingly stand to be struck out from the body election regulations.

    d. A declaration that regulation 18 (2) (c), 24 (2) (c), 28 (2) (c), 32 (2) (c) and 36 (2) (c) of the Election (General) Regulations offend the *Data Protections Act* and the *Registration of Persons act* and therefore null and void to the extent of these inconsistences and therefore unenforceable.

    e. The Honourable court be pleased to issue an order for costs in favour of the Petitioners.

    f. The Honourable court be pleased to issue any other or further remedy that it shall deem fit to grant in the interests of justice in the circumstances of this petition.

32. As pointed out earlier, the petition challenged the constitutionality of some of the impugned regulations. On a consideration of the petition against 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.

33. 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:

34. 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.

35. 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*.

36. 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.

37. 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.

38. 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.

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

40. It was the petitioners' contention that the impugned regulations infringe on the right to privacy under article 31 of *the Constitution* in respect of the supporters whose copies of the identity cards are to be submitted to the Commission. The Petitioners decried the amount of identity cards required and raised concerns on their safety in the hands of the Commission.

41. It was also submitted that the regulations impugn article 83(3) of *the Constitution* as the administrative arrangements by the Commission have the effect of denying the realisation of the political rights. The Petitioners alleged that article 47 of *the Constitution* also stood impugned.

42. The petitioners further submitted that the provisions sought to be suspended came into force in 2017 when the election laws were amended and not in 2012 and that the regulations are first to be applied in the forthcoming General election.

43. It was also contended that the Commission only informed the candidates of the requirement to avail copies of their supporters' identity cards just recently and that it was unreasonable and impossible to comply with the requirement in such a short period.

44. The petitioners argued that since the Commission carried out elections and referenda in the past without calling for copies of the identity cards, but only signed forms, it will, as well, not be prejudiced if only the signed forms were submitted.

45. The Commission was faulted in not putting in place any mechanism to aid the collection of the copies of the identity cards and signatures since the public was not co-operative given the rampant cases of identity fraud.

46. The respondents vehemently argued against the suspension of the law. They submitted that the law, and not administrative decisions, is in place and any person intending to vie as an independent

candidate is required to comply and that a court cannot waive compliance of the law. It was then argued that, as such, the issue of time constraints does not arise.

47. The respondents argued that the issues raised in the Petition and application are evidence-based and call for an in-depth analysis at the hearing of the Petition. It was also contended that the impugned regulations were taken into account in coming up with the election calendar such that any changes thereto shall affect the planning of the General election.

48. The allegation of security of the identity cards was countered by the fact that all information concerning citizens is already in possession and custody of various Government agencies and it was submitted that the Petitioners had not been proved how the Commission will not be able to secure the privacy of such information.

49. It was also argued that the impugned regulations were passed by Parliament and enjoy the presumption of constitutionality and legality until otherwise amended or found to be unconstitutional by court.

50. 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.

51. 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 Anotherwhich 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 Kimanicase, 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.

52. 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.

53. 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 Servicescase, (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.

54. This Court remains alive to the provision of Article 99(1) (c) of *the Constitution*. It requires any person nominated by a party or who is an independent candidate in an election to the National Assembly to be supported by at least 1000 registered voters in the constituency and in the case of an election to the Senate, by at least 2000 registered voters in the County. The constitutional requirement was passed in 2010 when *the Constitution* was promulgated.

55. There is also the requirement in Article 85 of *the Constitution* on independent candidates.

56. The Elections Act was then enacted in 2011 as one of the legislations under Articles 82 and 88 of *the Constitution*. With it came the impugned regulations in 2012 which regulations were amended in 2017 vide Legal Notice No. 72 of 2017.

57. The amendments in 2017 included the requirement for submission of copies of identity cards as part of the eligibility documents by candidates to an election. The amendments, however, were to be effective from the General elections of 2022. Therefore, it is now around 5 years since the passing of the contested provisions of the impugned regulations.

58. 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*.

59. There seems to be no attempt by the Petitioners to explain the laches. Maybe that will be covered at the hearing of the Petition.

60. It is also important to note that the amendments were made after the Commission had conducted previous elections and referenda. Being part of the implementers of *the Constitution* which was then still very new, Parliament saw the need to strengthen the electoral laws and introduced the amendments to the impugned regulations with a clear direction that they be implemented in the subsequent elections.

61. The Petitioners' however contended that the Commission only informed them of the requirement to avail copies of the identity cards in April, 2022. This Court does not agree with that position. I say so because the law has been in place since 2017. What the Commission did in April 2022 was to call for the compliance of the law. The Petitioners' position would have been holding had the requirement been an administrative decision of the Commission and not the law. In the former case, the decision would have been called to be compliant with Article 47 of *the Constitution*, and based on other considerations, high are chances that interim reliefs would issue.

62. To, therefore, suspend any law, the requirements discussed in the above decisions must be fulfilled.

63. 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 31, 38, 47 and 83 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).

64. 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. Further, the Petitioners' fear is based on sheer apprehension and no real prejudice has been demonstrated. In fact, being an evidential issue, it ought to be dealt with at the hearing of the Petition.

65. 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.

66. 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. The Petition ought to be determined on its merit for, at least, posterity purposes.

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

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

(iii) Public interest:

69. '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.

70. 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.

71. The 1st respondent has declared the holding of the general election on August 9, 2022. *The Constitution* and the law prescribes several timelines and requirements towards the said elections.

72. 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*.

72. 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.

72. 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: -

> 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.

72. 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:

72. 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.

72. 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.

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

    a. The notice of motion dated May 16, 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 24TH DAY OF MAY, 2022.

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Mr. Asembo, Learned Counsel for the Petitioners.

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

Miss. Wamuyu, Learned Counsel for the 2nd Respondent.

Jared Otieno – Court Assistant