



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**  
**ACEC PETITION NO. 38 OF 2019**

**MIKE SONKO MBUVI GIDEON KIOKO.....PETITIONER**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF**

**THE NATIONAL POLICE SERVICE.....2<sup>ND</sup> RESPONDENT**

**THE ANTI-CORRUPTION & ETHICS COMMISSION.....3<sup>RD</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**THE SPEAKER, NAIROBI CITY COUNTY ASSEMBLY....5<sup>TH</sup> RESPONDENT**

**THE CHIEF MAGISTRATE, NAIROBI ANTI-CORRUPTION**

**COURT, HON. D.N. OGOTI.....6<sup>TH</sup> RESPONDENT**

**AND**

**THE COUNCIL OF GOVERNORS.....1<sup>ST</sup> INTERESTED PARTY**

**THE LAW SOCIETY OF KENYA.....2<sup>ND</sup> INTERESTED PARTY**

**THE SENATE OF KENYA.....3<sup>RD</sup> RESPONDENT PARTY**

**RULING**

**INTRODUCTION**

1. The Petitioner/Applicant was charged together with others at the Anti-Corruption Court at Nairobi in Nairobi ACEC Case No. 31 of 2019 and ACEC Case No. 32 of 2019 with several counts. As part of his bail terms and conditions, the trial court on 11<sup>th</sup> December, 2019 prohibited him from accessing his office at Nairobi City County and compelled him to remove his personal items from the said office.

2. Being dissatisfied with the said terms and conditions, he approached this court by way of constitutional petition, wherein he sought several orders including staying the enforcement of the stated bond terms, an order of certiorari pursuant to Article 23(3) of the Constitution to remove to the court for purposes of being quashed and to quash the said bond terms. He further sought a temporary injunction barring the Nairobi City County Assembly Speaker from assuming, taking over or otherwise occupying the office of the Nairobi County Governor by alleged reasons of the petitioner being charged among others.

**APPLICATION**

3. By a Notice of Motion under certificate of urgency dated 17<sup>th</sup> January, 2020 under Articles 48 and 165 (4) and Articles 3, 4, 13, 19, 21(3)

& 23 of the Constitution of Kenya and the Practice and Procedure Rules thereunder, the Petitioner sought that this Honourable court be pleased to certify that the petition herein raises substantial questions of law to warrant the same being referred to the Honourable Chief Justice, for the appointment of a bench of uneven number of Judges, of not less than five(5) to hear and determine the petition.

4. He further sought for a conservatory orders and directions thereon.

5. The application was grounded upon the following grounds: -

a) The Petition raises novel points surrounding the application and scope of Section 62(6) of the Anti-Corruption and Economic Crimes Act, in relation to the Petition (and similar classes of parties indicted as sitting incumbent Governors of counties) which issues had not been canvassed in a constitutional court for interpretation.

b) The matter requires a substantial amount of time to be determined, in as much as the Respondents and the interested parties input will be effectual in resolving the raised Constitutional issues.

c) The net effect of the prayers sought in the petition herein is to clarify with finality the scope and application of Section 62(6) of ACECA viewed within the constitutional framework and the interface this statutory provision has with the discharge of the functions of office holders of the constitutional office of a County Governor, such as the Petitioner, when indicted with criminal charges under the Anti-Corruption and Economic Crimes Act.

6. It was contended that the core substantial question of law on the petition, revolved around the application of Section 62(6) of the Anti-corruption and Economic Crimes Act as invoked by the petitioner in furtherance of the right to protection of the Law under Article 27(1) of the Constitution, which was a matter of general and grave public importance, which question had not been settled by either the Court of Appeal or the Supreme Court of Kenya.

7. The Petitioner framed the issues which he considered to warrant consideration as summarized as follows: -

a) Whether the arrest without summoning the Petitioner in any manner on 6<sup>th</sup> December, 2019 was in breach of Section 52 of the National Police Service Act and a violation of the Principle of Rule of Law under Article 10(1)(b) of the Constitution and whether the manner and nature of the arrest violated the Petitioner's rights under Articles 28 and 244(h) of the Constitution.

b) Whether the access into and procurement of evidence from the petitioner's bank account violated the petitioner's right to privacy under Article 31 and constitute illegal evidence under Article 51(4) of the constitution.

c) Whether the Petitioner is entitled to the benefit of due process confirmed under Section 62(6) of ACECA and whether the orders issued was ultra-vires the said Section of the law.

d) Whether in declaring the entire Nairobi City County a 'scene of crime' the 1<sup>st</sup> Respondent acted irrationally and unreasonably in violation of Article 157 (11) of the Constitution.

8. The application was supported by the Petitioner's affidavit in which he deposed that he was aware that the Judicial Officers in the Economic and Anti-Corruption Division of the Court had expressed themselves in decisions ignoring the application of Section 62(6) of ACECA, as regards sitting Governors including himself, which should have protected him from constructive removal from office, by the operation of the Criminal Charges in the Economic Crimes Court.

9. He stated that he was aware that the Samburu County and Kiambu County Governors face similar indictment and had their criminal indictment used as constrictive bar to their accessing offices, which made his petition, a weighty issue of law calling for an uneven number of Judges in order to resolve it with finality.

10. It was deposed further that he was aware that notwithstanding the mention of the issue of Section 62(6) of the Anti-Corruption and Economic Crimes Act, in two concurrent appeals by Hon. Ferdinand Ndungu Waititu and Hon. Moses Kasaine Criminal Appeal No. 416 of 2019 Nairobi and 109 of 2019 Nairobi respectively, the issue had not been determined by any other court in Kenya and there was no ready and available answer thereto.

11. It was contended further that he had been advised by his Advocates on record, that there were a myriad of proceedings arising from the interpretation of Section 62(6) of ACECA, including Advisory opinion sought before the Supreme Court, being No. 1 of 2020, which therefore necessitates clarity of the issue by the Constitutional Court.

12. The petitioner stated further that since filing of this petition, there had been fresh proceedings including contempt of court, after he appointed a Deputy Governor and High Court Constitutional Petition No. 1 of 2020 by PETER ODHIAMBO AGORO challenging the exercise of constitutional powers vested upon him to appoint a Deputy Governor, during the pendency of the two Anti-Corruption Cases against the backdrop of Section 62(6) of ACECA.

## **RESPONSES**

13. The 1<sup>st</sup> Respondent filed Preliminary Objection to the application and raised the following grounds: -

a) *This Honourable court does not have the requisite jurisdiction to consolidate a matter empaneled under Article 165 (4) of the*

## **Constitution.**

14. The 3<sup>rd</sup> Respondent similarly filed Notice of Preliminary Objection on the following grounds:-

*1) This court lacks jurisdiction to order for consolidation in the absence of a formal Notice of Motion application.*

*2) This court lacks jurisdiction on its own motion, to lift an issue or issues supposedly emanating from live proceedings of pleadings before another Judge or Bench of Judges, which it has hitherto never been seized of and proceed to invite parties to address it on the issue or issues.*

*3) Court lacks jurisdiction to grant an order directing or referring a matter to a bench constituted as per Article 165(4) of the Constitution, as such power is reserved by the Constitution to the Chief Justice and not to any Judge.*

## **PROCEEDINGS AND DIRECTIONS**

15. Upon filing the Petition herein, the Petitioner by a Notice of Motion dated 18<sup>th</sup> day of December, 2019 sought for recusal of Justices, Mumbi Ngugi, Ngenye and Onyiego, from hearing and participating in any Bench constituted to hear this matter or deciding any aspect of this proceedings, leading to the named Judges recusing themselves from the proceedings.

16. In view of the above, the file was placed before the Hon. Chief Justice, who then directed on 30/8/2020 that the matter be placed before me for trial and determination, long before I was transferred to the Anti-Corruption and Economic Crimes Division of the High Court.

17. When the matter was first placed before me on 16/9/2020, I gave directions on the filing of submissions, for the purposes of hearing and determination of the application herein. At the next mention date, the court's attention was drawn to the fact that there was a petition which had been filed by the Council of Governors, at the Constitutional and Human Rights Division being **Petition No. E312 of 2020** and the Court invited the parties to address it on the relationship between the said petition and the current one and whether this petition, since it raised the same issues, could be placed before the same bench.

18. Mr. Kinyanjui for the petitioner took the view that since the petition raised substantially similar issues with those raised by the Council of Governors, where a Bench had been constituted, the best recourse was to forward this petition to the Chief Justice for the two to be together. Mr. Kihara for the DPP took the opposite view, that there was a difference between the two petitions, since in this present petition, there was a prayer for stay of proceedings before the Lower Court, which barred the petitioner from accessing the office, which was not removal from office, whereas the petition by the Council of Governors was in respect of removal from office.

19. Mr. Kokebe, for the 5<sup>th</sup> Respondent, supported Mr. Kihara and stated that the matters were distinct and that the same was also distinct from **reference No. 1 of 2020** before the Supreme Court. He was of the view that this matter should proceed as a stand-alone, since the reference is what led to the petition filed by the Council of Governors.

20. Mr. Saluny on the other hand was of the view that the substance between this petition and E312/2020 was more or less the same and to save judicial time, they could be heard together.

21. Mr. Wambugu for EACC Stated that they had filed a Preliminary Objection in Petition No. E312 of 2020 and therefore submitted that this petition be held in abeyance, pending determination of the issues raised in Petition No. E312/2020.

22. In rejoinder Mr. Kinyanjui submitted that there was no prejudice in the matter being referred to the Hon. Chief Justice, as a Bench had been constituted on the issue of Section 62 (6) of ACECA and that it will expedite the hearing of this petition, which was filed in 2019. He submitted that whereas his client was not a party to the matter of the Council of Governors, referring this petition to the Chief Justice to be placed before the said Bench would be the best way in using the judicial resourced.

23. The court directed that the parties herein file further submissions, to address it on the issues of the matter which had been placed before the three Judge Bench (**Petition No. E312/2020**) and the matter pending before the Supreme Court, (**Reference No. 1/2020**) in addition to the issue of the empanelment in respect of this petition. It is this direction by the court that led to the Preliminary Objections by the Respondents herein. The court further issued directions that the Preliminary Objections be considered as Responses to the Application by the Petitioner for empanelment.

## **SUBMISSIONS**

24. The Petitioner through Mr. Kinyanjui, filed submissions dated 29<sup>th</sup> day of September, 2020 and as directed by the court supplementary submissions dated 9<sup>th</sup> November, 2020 to the effect that the core substantial question of law, revolved around the application of Section 62(6) of the Anti-Corruption and Economic Crimes Act, against the Applicant's right to Protections of the law, under Article 27(1) of the Constitution. It was submitted that in the case of **KIBUNJA v A.G & 12 others (NO.2) [2002] 2KLR 6**, it was held that in exercise of the discretion (to refer the matter to Chief Justice,) several factors have to be taken into account, including but not limited to the complexity of the case and the issues raised, their weight, their sensitivity if any and the public interest in them.

25. It was stated that the question of the application of Section 62(6) of ACECA to the cases such as the one of the Petitioner, calls for canvassing of alternative views from what the High Court had rendered and the Courts of Appeal touched on, hence the necessity to certify the matter as requiring an uneven number of Judges bench, to interpret implication of the said provisions on the Constitutional rights and the office of the Governor, support was placed upon the following cases:- **COMMUNITY ADVOCACY AND AWARENESS TRUST & 8**

**OTHERS v A.G AND 6 OTHERS [2012] eKLR and PHILLIP TUNOI & ANOTHER v JUDICIAL SERVICE COMMISSION & ANOTHER [2015] eKLR.**

26. It was the petitioner's further submissions that whereas the same had sought for a five bench, the same may still refer to a three Judge Bench, since the court had taken judicial notice of the pendency of Nairobi High court **Constitutional Petition No. E312 of 2020 The Council of Governors Vs The DPP, EACC, IG of Police & A.G.** It was submitted that whereas the issues of consolidation may be determined by the court in its discretion, it was worth noting that from the practice of the courts, where similar issues are raised in different proceedings before the court or courts of concurrent jurisdiction, the paramount policy of saving cost and judicial time is encouraged.

27. It was submitted further that the prayers in **Petition No. E312 of 2020** was worded in similar terms with the petition herein, the effect of which is that, the finding of the court will be the same, as both petitions address themselves on the effect to be given to and the constitutionality of Section 62(6) of ACECA, which was a common question of law, for which the case of **STUMBERG & Another v POTGIETOR [1970] EA 323** was tendered in support. It was further contended that Rule 17 of Mutunga Rules, gives the court discretion to order the consolidation of several petitions on its own motion.

28. It was submitted further that considering the issues raised in this petition and in **Petition No. E312/2020**, filed by Council of Governors, it was evident that a consolidation order would save the court's time. The two petitions would be heard together and a single determination on the issues raised in the two petitions, would save judicial time. In support of the submissions, reliance was placed on the following cases: **FEDERATION OF WOMEN LAWYERS IN KENYA v SPEAKER OF THE NATIONAL ASSEMBLY & 2 OTHERS [2018] eKLR** and **HERMANNUS PHILLIPUS STEYN v GIOVANNI GNECHI – RUSCONE [2013] eKLR**.

29. It was contended that the plea to stay this petition, ostensibly to await the outcome of Petition No. E312 of 2020, as stated by the 5<sup>th</sup> Respondent, was a misapprehension of the scope of an order of consolidation of suit. It was submitted that Council of Governors was enjoined into this petition as an interested party and that it is the petitioner herein who first raised the issue of constitutionality of Section 62(6) of ACECA. Reference was made to the case of **JOHANA GITHAGO & 400 OTHERS v AG & 5 OTHERS [2015] eKLR**.

30. It was contended that the parties in this petition and in **Constitutional Petition No. E312/2020** and the Respondents and their Advocates were the same. It was further stated that they were addressing the same issues for which the case of **LAW SOCIETY OF KENYA V CENTER FOR HUMAN RIGHTS & DEMOCRACY & 12 OTHERS [2014] eKLR** was submitted in support.

31. On the merit of the application for reference to the Chief Justice, it was submitted that the same meets the principles applicable under Article 165 (4) of the Constitution and that two Judges had pronounced themselves on the issue of Section 66(6) of ACECA, which provoked the matter in which they adjudicated upon, to proceed to the Court of Appeal and now in the supreme Court. It was concluded that the Supreme Court decision in the case of **KENYA NATIONAL COMMISSION ON HUMAN RIGHTS v ATTORNEY GENERAL, IEBC and 16 others [2020] eKLR** held that it would be divested of jurisdiction unless the issue is first dealt with by a constitutional court.

32. On behalf of the 1<sup>st</sup> Respondent it was submitted by way of written submissions which were highlighted by Mr. Kihara, that having been charged and barred from access to his office, as per bond terms, the applicant was now questioning the scope and application of Section 62(6) of the Anti-Corruption and Economic Crimes Act. It was the 1<sup>st</sup> Respondent contention, that the issues raised, do not warrant the empanelment of a five Judge Bench, as there was no substantial question of law of questions of great public interest.

33. It was submitted that the petition has not met the substantial question test as set out in **H. HARRISON KINYANJUI v ATTORNEY GENERAL & ANOTHER [2012] eKLR** and **COUNTY GOVERNMENT OF MERU v ETHIC & ANTI-CORRUPTION COMMISSION [2014] eKLR**. It was contended that the issue of public interest is not automatically a ground to merit empanelment of a bench, as was stated in the case of **WYCLIFFE AMBESA OPARANYA & 2 OTHERS v DPP & ANOTHER [2016] eKLR**.

34. It was submitted that a single Judge of the High Court has the jurisdiction and power to handle a constitutional question and was not obliged to follow a decision of the court delivered by three Judges, as was stated in the case of **PETER NGANGA MUIRURI v CREDIT BANK LTD & 2 OTHERS [2008] eKLR**. It was contended that the applicant had not satisfied the principles set by the Supreme Court in the case of **HERMANUS PHILLIPUS STEYN v GIOVANNI GNECHI - RUSCONE** quoted with approval in the case of **OKIYA OMUTATA OKOITI & ANOTHER v ANNE WAIGURU & 3 OTHERS [2017] eKLR**.

35. On the application of Section 62(6) of the Anti-Corruption and Economic Crimes Act, in relation to bond terms, it was submitted that the same had been subjected to several decisions and was therefore no longer a substantial question of law. The following cases were cited: -

a) **THUITA MWANGI & OTHERS v EACC & 3 OTHERS [2013] eKLR** to the effect that the Section, must be read in the context of its purposes and the spirit enshrined in Chapter 6 of the Constitution.

b) **MOSES KASAINI LENKULALA v DPP [2019] eKLR** to the effect that in considering the provision of the Section one must have regard to the provision of the constitution with regard to leadership and integrity.

c) **FERDINAND NDUNGU WAITITU BABA YAO & 12 OTHERS v REPUBLIC [2019] eKLR** to the effect that Section 62(6) of ACECA must restate the supremacy of the constitution and that it would be a mockery if someone charged with such weighty offences, can be allowed back to the office.

36. It was contended that same interpretation was confirmed by the Court of Appeal in **MOSES KASAINI LENKULALA v REPUBLIC [2019] eKLR**. It was therefore contended that consolidating this petition with E312/2020 will only prolong the hearing of the matter, since the petition had not been certified.

37. On behalf of the 3<sup>rd</sup> Respondent, on the issue of whether there could be order for consolidation of this petition with **HCCHR PET. No. E312/2020**, it was submitted that whereas the court may order consolidation, either on its own motion or on an application by a party, cases are tried and determined on the basis of the pleadings made and issues of fact or law framed by parties or the court, on the basis of pleadings, as was stated in the case of **ANTONY FRANCIS WAREHAM t/a WAREHAM & 2 OTHERS v KENYA POST OFFICE SAVING BACK [2004] eKLR**. It was submitted that no pleadings was made by the petitioner to form a basis for determination and that the order for consolidation may only be done on the basis of formal application, as was stated in **NATIONAL UNION OF WATER & SEWERAGE EMPLOYEES & 3 OTHERS v NAIROBI WATER AND SEWERAGE COMPANY LTD [2018] eKLR**.

38. It was stated further that this court, having never been seized by HC CHR PET E312 of 2020, cannot on its own motion make an order for consolidation and that substantive directions were to be issued by the court actually seized of the matter, as was stated in the case of **PHILLIP TUNOI & 2 OTHERS V JSC & ANOTHER [2015] eKLR**.

39. On the merit of the application for empanelment, it was submitted that in addition to the issue of Section 62(6) of ACECA as read with Article 181 and 182 of the Constitution, which prohibited the 6<sup>th</sup> Respondent for giving an order barring the petitioner from accessing the office of the Nairobi City County Governor, the same also raised issues of violation of the right to privacy, violation of his right to dignity, violation of his right as an arrested person.

40. It was submitted that the issues raised herein had been determined by the Court of Appeal in **FERDINAND WAITITU BABAYAO v REPUBLIC [2019] eKLR** and therefore did not raise any substantial point of law and should therefore be dismissed.

41. On behalf of the 5<sup>th</sup> Respondent, the same filed written submissions which were highlighted by Mr. Kokebe. It was submitted that the grounds set out by the petitioner neither transcend nor go beyond the circumstances of his case and had no significant bearing on the general public. It was contended that the question of application of Section 62(6) of ACECA as a bail term, had been addressed in the cases of **MOSES LENOLKULA v DPP [2019]**, **MOSES LENOLKULA v REPUBLIC [2019] eKLR** AND **FERNINAND NDUNGU WAITITU BABAYAO v REPUBLIC [2019] eKLR** among others and was therefore not a novel issue.

42. It was stated that the 5<sup>th</sup> Respondent preferred a reference to the Supreme Court on 7<sup>th</sup> day of January, 2020 as Reference **No. 1 of 2020. THE SPEAKER, NAIROBI CITY COUNTY ASSEMBLY v HON. A.G OTHERS**, regarding the effect of the application of Section 62(6) within the Nairobi City, which reference neither questions the application of the Section and does not raise any similar issue in this petition. It was submitted that the decision whether or not to empanel a bench of more than one judge, ought to be made only where it is absolutely necessary and in strict compliance with the relevant constitutional and statutory provisions. It was however conceded by Mr. Kokebe that the court could only makes a finding that the file be placed before the Chief Justice, who if he forms an opinion can place it before a bench already empaneled.

43. On the issue of conservatory orders, it was submitted that the same could not be granted as the petition had not met the principles set out in **GATIRAU PETER MUNYA v DICKSON MWENDA KITHINJI & 2 OTHERS [2014] eKLR** and the case of **OKIYA OMUTATA (supra)**.

#### **ANAYLSIS AND DETERMINATION**

44. The following facts are as regards the petition and the application for empanelment are not disputed:- that by the time the application was listed for hearing before me, The Council of Governors had filed a constitutional Petition on the interpretation of Section 62 (6) of the ACECA being **Constitutional Petition E312 of 2020**, wherein the Petitioner/Applicant herein, is named as one of those Governors affected by the decision of the Anti-Corruption Magistrate's Court, in respect of orders barring them from accessing the County offices, having been charged with offences under the Act.

45. The said petition was certified as raising substantive issue of law and referred to the Chief Justice, who constituted a three Judge Bench, to hear the matter, which petition is currently pending for directions, hearing and determination. That as submitted by the petitioner, save for the issues as to how he was arrested, the petition herein as regards the application of Section 62(6) of ACECA, to Governors who are charged with offences under the Act, raises the same issues raised in PETITION E312/2020, in terms of what they considered to be "constructive removal" from office, through imposition of bail terms, without the existence of a legislation enacted under Article 181(2) of the Constitution, that provides for grounds, procedures and timelines of such removal, as well as resumption of office.

46. It is further not disputed that issue of asking the Governors, including the petitioner herein, not to access the office during the pendency of trial before the Magistrate Anti-Corruption Court, as bond terms and conditions, has been litigated upon before Superior Courts, but the issue of constitutionality of Sections 62(6) as read with Article 181(2) of the Constitution and the integrity Articles of the Constitution, including but not limited to Articles 2, 6 and 10 thereof, has not been subjected to litigation save for in this current petition and Petition E312 of 2020, both which are pending determination as a constitutional issue.

47. It must also be stated for record purposes, that when this matter came up for direction before me, I did not indicate that the matter should be consolidated, what the court did, was to ask the parties to address it on the issues of what should be the best action, where a matter raising similar issues, had been certified as raising substantive issues of law and an uneven bench to determine the same duly constituted by the Hon. Chief Justice so what the court wanted the parties to address, was whether this petition would be placed before a Bench already empaneled. It is therefore clear that the Respondents misunderstood the Court's direction leading to the filing of preliminary objections herein, which I find to be lacking merit at this stage of proceedings. The preliminary Objection did not meet the test set out in the case of **MUKISA BISCUIT MANUFACTURERS LTD v WEST END DISTRIBUTORS LTD [1969] EA 695**.

48. From the issues herein, the following stands out for the court's determination.

*a) Whether the petition raises substantive issues of law, which warrants reference to the Chief Justice to constitute a bench of*

*uneven number of Judges.*

*b) Whether where a finding has been made by the court differently constituted that matters in issue herein raises substantive issues of law, the court is bound to follow the said determination.*

*c) Which is the best course of action in view of the confirmation by the parties that a matter raising similar issues, has been certified as raising substantive issues of law by this court differently constituted and an uneven bench empaneled.*

*d) Whether the petitioner has made out a case for grant of conservatory orders, should the court refer the matter to the Chief Justice.*

49. The jurisprudence on the application of Article 165 (4) of the Constitution is now well settled in Kenya and there will be no need for this court to add to the line of authorities starting from the Supreme Court decision in **HERMANUS PHILLIPUS STEYN** quoted with approval in the case of **OKIYA OMTATA OKOITI & ANOTHER v ANN WAIGURU (SUPRA)** where it was stated that the following principles must be satisfied:-

*a) The issue to be canvassed is one, the determination of which affects the parties and transcends the circumstances of the particular case and has significant bear on the public interest.*

*b) The applicant must show that there is a state of uncertainty in the law.*

*c) The matter must fall within the terms of Article 165(3) (b) or (d) of the Constitution.*

*d) The applicant must identify and concisely set out the specific substantial question or questions of law which he/she attributed to the matter for which the certification is sought.*

*e) Whether a matter raised a substantial point of law for purposes of Article 165 (4) of the Constitution is a matter that is determined on a case by case basis.*

50. As regards the application before me, save for the issues of the manner of arrest and how the evidence against the petitioner was obtained, which I do not consider to be raising a substantive issue of law, the issue of the application of Section 62(6) of ACECA, which the petitioner has raised in this petition, has been certified to be raising substantive issues of law in **Constitutional Petition No. E312/2020** by this court, and whereas that determination by a Judge of concurrent jurisdiction is only persuasive, I am of the considered view, the issue raised in Petition No. E312 of 2020 applies to this matter and therefore that the petition herein raises substantial issues of law, similar to those identified in the latter case, which ought to be considered by an uneven number of Judges.

51. In addition to the issues raised by the petitioner on the application and scope of Section 62(6) of ACECA in relation to the sitting Governors of Counties, I am of the view that the issue of constitutionality of Section 62(6) of ACECA, which was enacted in 2003, before the Constitution of Kenya, 2010, is a substantive point of law which needs to be determined, against the express provisions of Articles 2(4), its inconsistency with the Constitution, Article 10(2)(c), good governance, integrity, transparency and accountability, Article 27(1) equality before the law, in so far as the same creates a special category of public officers and Chapter six (leadership and integrity), in particular Article 73(1) (iii) (iv) 2(c).

52. On what the court should do with the petition herein;- it is clear that there is a petition pending before a three-judge Bench, which raises similar issues and therefore the court has two options;- stay the proceedings herein pending determination of the said petition, on account of the doctrine of subjudice, which will lead to delay in conclusion of this matter, or to forward the same to the Honourable the Chief Justice, so that if it pleases His Lordship (Her Ladyship), the same in empaneling the Judges, the attention of the Chief Justice is drawn to the fact that a Bench has already been empaneled in **Petition No. E312/2020** dealing with similar issues, which matter is pending for directions and it will save judicial time if this petition is placed before the said Bench for directions and determination.

53. I am of the considered view that the latter option finds favour, as the same will maximize the use of judicial resources and the issues dealt with together, as was stated by the court in, **Constitutional Petition No. E246/2020 Nairobi ADRIAN KAMOTHO NJENGA v A.G & 50 OTHERS** which led to the Chief justice placing the file to a Bench and that had been empaneled in **CONSTITUTIONAL PETITION NO. 206 OF 2020 KATIBA INSTITUTE v THE PRESIDENT & OTHERS** dealing with the same subject matter.

54. On the issue of conservatory orders, the petitioner has not placed before the court any materials to demonstrate any harm the same will suffer, should the proceedings before the Anti-Corruption Magistrate Court proceed concurrently with the petition herein, as the petition herein is not challenging the validity of the charges and should any order be made in his favour, he shall be allowed to access his office which is the main subject matter of this petition. I therefore decline to grant conservatory orders herein.

## **ORDER**

55. Having stated the matters herein, I find and hold that the petitioner raises substantial issues of law including the constitutionality of Section 62(6) of ACECA as read against the Constitution of Kenya 2010 which requires the empanelment of Judges bench to hear and determine the matter and is therefore referred to the Chief Justice under the provisions of Article 165(4) of the Constitution.

56. The attention of the Hon. Chief Justice is drawn to the fact that **Petition No. E312/2020** raising the same issues as those by the petitioner herein had been referred to his Lordship and a three Judge Bench duly empaneled to hear and determinate the same which matter is pending directions.

57. Each party shall bear their own cost.

**Dated, signed and delivered virtually at**

**Nairobi this 27<sup>th</sup> day of January, 2021**

.....

**J. WAKIAGA**

**JUDGE**

**IN THE PRESENCE OF**

***Mr. Kinyanjui for the petitioner***

***Mr. Wambugu for 3<sup>rd</sup> respondent***

***Mr. Kokebe for county assembly***

***Ms Shisanya for 2<sup>nd</sup> interested party***

***Ms Wangia for Kihara for 1<sup>st</sup> Respondent***

***Court Assistant – Potishoi***