REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

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

CONSTITUTIONAL PETITION NO. E401 OF 2021

-BETWEEN-

OKIYA OMTATAH OKOITI.....PETITIONER

-VERSUS-

THE PARLIAMENTARY SERVICE COMMISSION..... RESPONDENT

-AND-

1. THE NATIONAL ASSEMBLY

2. THE SENATE

3. THE AUDITOR GENERAL

4. THE INSURANCE REGULATORY AUTHORITY

5. THE ASSOCIATION OF KENYA INSURERS....INTERESTED PARTIES

RULING NO. 2

1. On 25th October, 2021, this Court rendered Ruling No. 1.

2. The Court enjoined the five Interested Parties herein and directed each of them to file their responses to the Petition and the Notice of Motion dated 30th September, 2021. The ruling on the application was deferred in Ruling No. 1 pending the filing of the responses by the Interested Parties.

3. The matter was scheduled to come up on 9th December, 2021. However, the Hon. Judge was indisposed and the Deputy Registrar deferred the matter to 2nd March, 2022. As a result, the Petitioner filed a Notice of Motion dated 9th December, 2021 under certificate of urgency seeking some interim prohibitory orders against the execution of the contract between the Respondent and the successful bidder.

4. The Notice of Motion dated 9th December, 2021 was considered by the Duty Judge and directed to be served. It was scheduled for directions on 16th December, 2021.

5. When the matter came up before Court on 16th December, 2021, it was confirmed that all the Interested Parties had filed their respective responses as directed.

6. The Court was made aware of another application by way of Notice of Motion dated 16th December, 2021. That application had been filed that morning by the Petitioner. The application sought to enjoin the successful bidder who had entered into a contract with the Respondent the day before.

7. The parties, therefore, made further submissions on the best way forward and which submissions were to be taken into account in determining the Notice of Motion dated 30th September, 2021.

8. In urging the Court to grant the conservatory orders sought, the Petitioner informed the Court that the proceedings before the Pubic Procurement Administrative Board, being Application No. 142 of 2021, were determined in favour of the Respondent and a contract signed between the Respondent and the successful bidder.

9. According to the Petitioner, the execution of the contract contravened Section 168 of the Pubic Procurement and Asset Disposal Act, 2015 and it was aimed at defeating the current proceedings. The Petitioner submitted that the Respondent was acting with impunity and ought to be stopped on its tracks by the grant of the conservatory orders.

10. The Respondent was of the contrary position. It submitted that since the current medical cover contract was ending on 31st December, 2021, there was urgency and necessity in entering into the contract which is to commence on 1st January, 2022.

11. This Court has carefully perused the documents filed on record including the pleadings, the responses and the several applications.

12. In the main, the Petition prays for the following orders: -

> i. A DECLARATION that Tender No. PJS/007/2021-22 for provision, with effect from 1st January, 2022, of a two-year Medical Insurance Cover for members of Parliament who will have only seven months and nine days to be in office is wasteful and unreasonable and, unconstitutional, null and void ab initio.
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> ii. AN ORDER Quashing the Tender No. PJS/007/2021-2022 for provision of Medical Insurance cover for members of Parliament.
>
> iii. AN ORDER that the respondent pays the Petitioner's costs of this suit.
>
> iv. Any other relief the court may deem just to grant.

13. Despite the numerous applications on record and the proceedings which were undertaken before the Pubic Procurement Administrative Board, this Court should not lose focus of the dispute in these proceedings as pleaded in the Petition.

14. There is no doubt that the main contention raised by the Petitioner in these proceedings is that the impugned procurement is wasteful of public funds and unreasonable thereby unconstitutional, null and void and that it ought to be quashed.

15. As I already stated in Ruling No. 1, this Court takes the issues raised in these proceedings with the seriousness they deserve. The Court also urged the Respondent to be more vigilant even as the matter progressed.

16. This Court has intently considered the contents of the responses by the Interested Parties. The Insurance Regulatory Authority and the Association of Kenya Insurers gave their views on the matter. This Court has found them useful in aiding it to chart the best way forward.

17. Both Insurance Regulatory Authority and the Association of Kenya Insurers are of the view that the impugned tender process does not necessarily lead to loss of public funds going by the market practice.

18. The Association of Kenya Insurers proposed further measures which this Court may take to take care of the respective parties' concerns even as the matter progresses.

19. One of the hotly contested issue was the execution of the contract between the Respondent and the successful bidder even before the expiry of the grace period of 14 days provided for under Section 168 of the Pubic Procurement and Asset Disposal Act, 2015.

20. Without deciding the said issue, this Court notes that there is no evidence that the party which lost before the Pubic Procurement Administrative Board was aggrieved or at all by the said outcome. I say so because that party has neither filed any judicial review proceedings under the Pubic Procurement and Asset Disposal Act, 2015 neither has it lodged any constitutional Petition thereto before this Court. There is also a pending application for joinder of the successful party and the revocation of the contract.

21. This Court shall, therefore, remain vigilant so as not to turn the current Petition to a proxy Petition.

22. Having said so, I will now turn to the law on conservatory orders. I will endeavour a discussion on the following areas: -

> i. The nature of conservatory orders;
>
> ii. The guiding principles in conservatory applications; and
>
> iii. The applicability of the principles to the applications.

23. I will deal with the above sequentially.

The nature of conservatory orders:

24. 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.

25. 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.

26. 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.

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

28. 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.

29. 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.

30. 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.

31. 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:

32. 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.

33. 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.

34. 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.

35. 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.

36. 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, among many others.

The applicability of the principles to the Notice of Motion dated 30th September, 2021:

i. A *prima-facie* case:

37. 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.

38. 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.

39. 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).

40. 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.

41. 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.

42. Returning to the case at hand, the Petitioner's case is hinged on the allegation that the impugned tender is likely to lead to loss of public funds.

43. The Respondent has put up a rebuttal on the Petition. This Court has also invited the Interested Parties to share their views of the Petition.

44. On the basis of the issues raised in the Petition, this Court is satisfied that the Petition constitute a *prima-facie* case.

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

45. 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.

46. 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 clear purport of the Preamble and Chapter 1 of the Constitution.

47. 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.

48. Therefore, 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.

49. According to the Petitioner, the damage in issue is the possible loss of public funds. At this preliminary stage, suffice to say that Respondent, the 4th and the 5th Interested Parties share a contrary position. The evidence by the parties is, however, yet to be tested in a full hearing.

50. Speaking of evidential proof, the Court of Appeal in ***Civil Application Nai. 31 of 2016 Alfred N. Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 Others*** [2016] eKLR stated as follows: -

> 35. In the instant case, the trial judge made a finding that there was no threat of violation of the applicant's fundamental rights and freedoms. We remind ourselves that the trial judge made this finding in an interlocutory application. **In our view, whether there is a threatened violation is a matter of fact to be ascertained in a full hearing of the Petition.**

51. The 1st and 2nd Interested Parties have shared the position taken by the Respondent and decried the possibility of rendering the Members of Parliament without any medical cover as from the 1st January 2022 if the orders sought are granted. They contended that there is a real likelihood of exposing the Members of Parliament to no medical cover by the end of this month and that the time between now and the expiry of the current medical cover is less than a month and no procurement of a medical cover can be undertaken within such a short period.

52. The Respondent, the 1st and the 2nd Interested Parties, therefore, argue that going by the assurance given by the 4th and 5th Interested Parties that there can be no loss of public funds in the impugned procurement, then no interim orders ought to be issued, but instead the matter ought to be expedited.

53. The respective positions have been duly considered.

54. This Court finds that the possibility of exposing the Members of Parliament to no medical cover by 1st January, 2022 is so real. Conversely, the issue as to whether the procurement will result to loss of public funds is not settled. It awaits the main hearing of the Petition.

55. As to whether the Petition will be rendered nugatory if no orders are granted, this Court takes the position that the issues raised in the Petition subsist and ought to be determined in a full hearing. The determination of the Petition will accord direction and serve as a good guide on the issues raised now and in the future. In other words, the Petition cannot be rendered nugatory in the absence of the orders sought.

56. In the end, this Court, therefore, finds that the Respondent and the Members of Parliament stand to suffer real damage if the interim orders are granted and that the failure to grant the conservatory orders will not render the Petition nugatory.

(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 of statutes.

59. The Constitution under Article 127 establishes the Respondent. It then provides the duties of the Respondent in Article 127(6). One of its

duties is to ensure that it undertakes measures to ensure the well-being of the members and staff of Parliament. The procurement of the medical cover is, hence, a way of discharging the constitutional mandate. However, such process must be undertaken within the Constitution and the law.

60. 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 Respondent. It is in public interest that the members of Parliament are not exposed to a situation where they will be rendered without any medical cover, at least, at the moment.

Disposition:

61. The above analysis yields that the Petitioner has not, in the meantime, successfully laid a basis for the grant of the orders sought in the application.

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

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

a. The Notice of Motion dated 30th September, 2021 is hereby dismissed.

b. The Notice of Motion dated 9th December, 2021 is hereby marked as spent.

c. Minet Kenya Insurance Brokers Limited is hereby enjoined in these proceedings as the 6th Interested Party.

d. The Respondent shall within 21 days hereof file and serve a Further Affidavit on the pro-rate amount of premium payments applicable to the current Members of Parliament payable up until the end of August 2022, that is from 1st January, 2022 to 31st August, 2022.

e. The remainder of the Notice of Motion dated 16th December, 2021 and the Petition shall be heard together and by way of reliance on the pleadings, Affidavit evidence and written submissions.

f. The Petitioner shall file and serve any further supplementary response, if need be, together with written submissions within 14 days in (d) above.

g. The Respondent and the Interested Parties shall file and serve their respective written submissions within 14 days of service.

h. The Petitioner to file and serve any further submissions, if need arises, within 7 days of service.

i. Highlighting of submissions on a date suitable to the Court and the parties.

j. The Petitioner shall extract and serve a copy of this order upon Minet Kenya Insurance Brokers Limited, the 6th Interested Party, within 7 days.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2021

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Okiya Omtatah Okoiti, the Petitioner in person.

Mr. Angaya, Counsel for the Respondent.

Mr. Mwendwa, Counsel the 1st Interested Party.

Mr. Wambulwa, Counsel the 2nd Interested Party.

Miss. Ondieki, Counsel the 3rd Interested Party.

Mr. Wairoma, Counsel the 4th Interested Party.

Miss. Ouma and **Mr. Muhindi**, Counsel the 5th Interested Party.

Elizabeth Wanjohi – Court Assistant.