REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

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

PETITION NO. E364 OF 2020

BETWEEN

OKIYA OMTATAH OKOITI.....PETITIONER

AND

1. HON. ATTORNEY GENERAL

2. THE NATIONAL ASSEMBLY

3. THE SENATE

4. THE PARLIAMENTARY SERVICE COMMISSION

5. THE LAW SOCIETY OF KENYA

6. THE INTER-RELIGIOUS COUNCIL OF KENYA.....RESPONDENTS

RULING NO. 1

1. *Okiya Omtatah Okoiti,* the Petitioner herein, is a public-spirited Kenyan and a human rights defender. He is once again in the corridors of justice with a Petition, which in the main, challenges the constitutionality of the **Independent Electoral Boundaries Commission (Amendment) Act No. 18 of 2020** (hereinafter referred to as '**the IEBC Amendment Act**'), an Act of Parliament which was recently assented into law. The Petition is dated 3rd November, 2020.

2. Contemporaneously with the Petition, the Petitioner filed an evenly dated Notice of Motion (hereinafter referred to as '*the application*') under a certificate of urgency. The application was certified urgent on 9th November 2020 and ordered to be heard on 12th November, 2020.

3. The application was heard as scheduled thereby resulting to this ruling.

4. The application has 9 prayers. The first four prayers are, by now, overtaken by events in that they sought reliefs prior to the *inter partes* hearing of the application. The rest of the prayers were tailored as follows: -

> "*5) That following the hearing and determination of this application inter parties but pending the hearing of the petition, a conservatory order does issue staying and or suspending the coming into force and/or the implementation and operationalization of Sections 2 and 3 of the Independent Electoral Boundaries Commission (amendment) Act No. 18 of 2020.*
>
> *6) that following the hearing and determination of this application* ***inter partes*** *but pending the hearing of the Petition, an injunction order does issue restraining the 4th, 5th and 6th Respondents form nominating members to the selection panel of Independent Electoral and Boundaries Commission and compiling and forwarding to the President names of persons nominated under Section 2 of the Independent Electoral and Boundaries Commission (Amendment) Act No. 18 of 2020.*
>
> *7) that following the hearing and determination of this application* ***inter partes*** *but pending the hearing of the petition, an injunction order does issue restraining the President, his agents or anyone else whatsoever from appointing persons nominated by the 4th, 5th*

and 6th Respondents to the selection Panel of Independent Electoral and Boundaries Commission under Section 2 of the Independent Electoral Boundaries Commission (Amendment) Act No. 18 of 2020.

8) That consequent to the grant of the prayers above, the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders.

9) The cost of the application be in the cause."

5. The application is supported by an Affidavit evenly sworn by the Petitioner. The Petitioner filed submissions dated 12th November, 2020 in further support of the application.

6. The application is opposed by all the Respondents. The 1st Respondent filed Grounds of Opposition erroneously dated 10th March, 2020. The 2nd, 3rd and 4th Respondents filed both Grounds of Opposition and submissions respectively. They were all dated 11th November, 2020. The 5th and 6th Respondents did not take part in the hearing of the application despite service.

7. The application seeks conservatory orders pending the hearing and determination of the Petition. I will, hence, lay the general caution in such applications, the settled principles for consideration, preliminary issues and then a discourse on the applicability of the principles to the application.

8. The Supreme Court in ***Civil Application No. 5 of 2014 Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others (2014) eKLR*** at paragraph 86 discussed 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.

9. In ***Nairobi Civil Appeal 151 of 2011 Invesco Assurance Co. Ltd vs. MW (Minor suing thro' next friend and mother (HW) [2016] eKLR*** the Court 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.

10. In ***Judicial Service Commission v 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.

11. Given the nature of conservatory orders, it is argued, that there is need for a Court to exercise caution in such applications. 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.

12. 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.

13. 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 application, I will, therefore, restrain myself from dealing with such issues.

14. Having said so, I will now deal with the principles guiding the grant of conservatory orders.

15. 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 settled.

16. The *locus classicus* is the Supreme Court in ***Civil Application No. 5 of 2014 Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others (2014) eKLR*** 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.

17. In ***Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board and Others Nairobi High Court Constitutional Petition No.154 of 2016 (2016) eKLR*** after going through several decisions, the Court rightly so, 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.

18. There is also the need to ascertain whether the conservatory order sought will delay the early determination of the dispute. (See ***Nairobi High Court Constitutional Petition No. E243 of 2020 Kenya Tea Development Agency Holdings Limited & 55 Others vs. The Cabinet Secretary Ministry of Agriculture, Livestock, Fisheries & Co-operatives & 2 Others and Kenya Small Tea Holders Growers Association (Kestega) (Interested Party)*** (unreported)**.**

19. The 1st Respondent raised a preliminary issue. It states that the Petition is on the unconstitutionality of the IEBC Amendment Act and not on allegations of infringement of or threat to infringement of any of the rights and fundamental freedoms embodied in the Bill of Rights. As such, it argues, that the application is a non-starter for the reason that the Petition was not brought within the provisions of **Article 23** of the Constitution.

20. The Petitioner is of the contrary view. He submits that although the Petition is challenging the constitutionality of the IEBC Amendment Act it is demonstrated, and so pleaded, that the effect of the said unconstitutionality is the direct infringement of the Petitioner's political rights under **Article 38** of the Constitution. The Petitioner further submits that political rights are among the rights and fundamental freedoms in the Bill of Rights.

21. Article 165(3)(d)(i) and (ii) of the Constitution empowers the High Court to hear and determine questions on the interpretation of the Constitution including the determination of whether any law is inconsistent with or in contravention of the Constitution and whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of the Constitution. Article 23(3) enumerates the reliefs available in proceedings brought under Article 22 which provision permits any person who claims that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened to institute Court proceedings. The reliefs under Article 23(3) include a conservatory order.

22. Article 258 of the Constitution creates an avenue to any person who claims that the Constitution has been contravened, or is threatened with contravention to institute Court proceedings. Unlike Article 23(3), no reliefs are provided for under Article 258.

23. Article **259** of the Constitution deals with the interpretation of the Constitution. It obligates anyone interpreting the Constitution to do so in a manner that *'promotes its purposes, values and principles; advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; permits the development of the law and contributes to good governance'. The* approach is often described as **'a mandatory constitutional canon of statutory and constitutional interpretation**'.

24. There are other settled principles of interpretation of the Constitution. They include that constitutional provisions must be construed purposively and in a contextual manner; that the Constitution must be construed as whole, among others. It therefore behooves a Court interpreting the Constitution to be guided by the language used in the Constitution. A Court should not unduly strain to impose a meaning that the text is not reasonably capable of bearing. It should also avoid what was described as *'excessive peering at the language to be interpreted*'. (See ***Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others vs. Smit NO and Others [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 24*** and ***Johannesburg Municipality vs. Gauteng Development Tribunal and Others [2009] ZASCA 106; 2010 (2) SA 554 (SCA) at para 39, which quoted Jaga v Dönges, N.O. and Another; Bhana v Dönges, N.O. and Another 1950 (4) SA 653 (A) at 664G-H***).

25. A Court must also adopt a holistic approach of interpretation. Provisions of a Constitution ought to be taken collectively rather than in isolation.

26. I have carefully considered the 1st Respondent's argument. I have, as well, reflected on the Petitioner's response thereto. Whereas the Constitution is silent on the remedies under Article 258, this Court is duty bound to interpret the Constitution in a manner as ordered under Article 259.

27. In a bid to settle the issue, I will consider a hypothetical scenario. The Senate, as part of the Parliament of Kenya, passes an omnibus bill that principally provides for establishment of a government otherwise than in compliance with the Constitution. The Bill also provides for torture, cruel and inhuman treatment, slavery, servitude and takes away the rights to fair trial and an order to *habeas corpus*. The Bill is assented into law and is ready for operationalization. A Kenyan rushes to the High Court and files a Petition under Article 258 challenging the constitutionality of the new law. The Petitioner pleads with the Court to stop the implementation of the law by initially granting an interim relief in form of a conservatory order. Faced with such a case, should the High Court fold its legal hands and claim that a conservatory order, as an interlocutory relief, is not provided for under Article 258 of the Constitution or that the Petition is not premised on the Bill of Rights? I do not think so, since, such an approach will be tantamount to the Court failing to uphold and defend the Constitution as

commanded in Article 3. Further, the Court will be taking such a narrow avenue on interpretation. The Court will, on all four corners, fail the test in Article 259.

28. A Court is always possessed of residual inherent powers. Such powers allow the Court to make any orders in the wider interest of justice. It is for the Court to fashion an appropriate remedy even in instances where the Constitution and the law are silent. A Court cannot just, helplessly so, stare at a Petitioner whose rights and fundamental freedoms are trampled upon or when it is ostensibly demonstrated that the Constitution is either contravened or so threatened. Unless a Court raises to, and asserts its authority, high are chances that it may fail the calling in Article 3 of the Constitution. The result will, undoubtedly, be anarchy and lawlessness in the society.

29. The Court of Appeal in ***Total Kenya Limited vs Kenya Revenue Authority (2013) eKLR*** held that even in instances where there are express provisions on specific reliefs a Court is not precluded from making any other orders under its inherent jurisdiction for ends of justice to be met to the parties. The High Court in ***Simeon Kioko Kitheka & 18 Others vs. County Government of Machakos & 2 Others (2018) eKLR*** held that Article 23 of the Constitution does not expressly bar the Court from granting conservatory orders where a challenge is taken on the constitutionality of legislation.

30. **In** ***Republic Ex Parte Chudasama vs. The Chief Magistrate's Court, Nairobi and Another Nairobi HCCC No. 473 of 2006, [2008] 2 EA 311*****, Rawal, J** (as she then was) stated that:

> ***While protecting fundamental rights, the Court has power to fashion new remedies as there is no limitation on what the Court can do. Any limitation of its powers can only derive from the Constitution itself. Not only can the court enlarge old remedies, it can invent new ones as well if that is what it takes or is necessary in an appropriate case to secure and vindicate the rights breached. Anything less would mean that the Court itself, instead of being the protector, defender, and guarantor of the constitutional rights would be guilty of the most serious betrayal.*** *See* ***Gaily vs. Attorney-General [2001] 2 RC 671; Ramanoop vs. Attorney General [2004] Law Reports of Commonwealth (From High Court of Trinidad and Tobago); Wanjuguna vs. Republic [2004] KLR 520…The Court is always faced with variety of facts and circumstances and to place it into a straight jacket of a procedure, especially in the field of very important, sensitive and special jurisdiction touching on liberties and rights of subjects shall be a blot on independence and many facetted jurisdiction and discretionary powers of the High Court. See The Judicial Review Handbook (3rd Edn) by Michael Fordham at 361.***

31. The Constitutional Court of South Africa in ***Fose vs. Minister of Safety & Security [1977] ZACC 6*** **emphasized the foregoing as follows: -**

> ***Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.***

32. In this case, it is important to note that the Petitioner pleaded the likelihood of infringement of his political rights under Article 38 of the Constitution as a result of the possible implementation of the IEBC Amendment Act.

33. This Court, therefore, find and hold, that the High Court has the requisite jurisdiction to grant any appropriate relief, including a conservatory order, in Petitions challenging the constitutionality of any legislation. It all depends on the circumstances of each case and whether the principles for grant of such a conservatory order are satisfied. The 1st Respondent's opposition hence fails.

34. A consideration of the applicable principles now follows.

35. As to whether a *prima-facie* case is established, I am alive that, in the main, the Petitioner seeks the declaration of unconstitutionality of the IEBC Amendment Act. The Petitioner argues that the prayers sought *vide* the application are aimed at preserving the substratum of the Petition. He further argues that he has demonstrated a clear *prima-facie* case to warrant the grant of the prayers.

36. The Petitioner's case is principally that the IEBC Amendment Act, which provides the criterion for appointing the Selection Panel for purposes of recruiting the Chairperson and Commissioners of the Independent Electoral Boundaries Commission (hereinafter referred to as '**IEBC**'), is geared towards compromising the independence and integrity of IEBC and by extension the integrity of the electoral processes and the elections. The Petitioner avers that the **Independent Electoral Boundaries Commission Act, 2011** (hereinafter referred to as '**the IEBC Act**') provides for a Chairperson and 6 Commissioners for IEBC. The IEBC Amendment Act provides that the 7 members of IEBC will be appointed through a Selection Panel comprised of 7 representative members. Section 2(2) of the IEBC Amendment Act provides that the membership of the Selection Panel will be as follows: -

> *(a) Two men and two women nominated by the Parliamentary Service Commission.*
>
> *(b) One person nominated by the Law Society of Kenya; and*
>
> *(c) Two persons nominated by the inter-religious Counsel of Kenya.*

37. The Petitioner argues that the Selection Panel, as provided for under the IEBC Amendment Act, does not meet the constitutional threshold of independence. He further argues that whereas the Panel is comprised of 7 members, 4 of the members are representatives of the Parliamentary Service Commission (hereinafter referred to as '**the PSC'**). He avers that the proportion of the membership therefore compromises the independence of the Selection Panel since the representatives to be nominated by the PSC are majority and decisions of the Selection Panel are based on simple majority. He further argues that it can only be the case that the members of the Selection Panel champion the interests of the nominating entities. To the Petitioner, the ultimate membership of IEBC will comprise of Commissioners who support of

the ideals and position of PSC and the Executive, by large. The Petitioner submits that the resultant effect will be an IEBC which is otherwise not independent and is biased, That, the Petitioner posits, will, no doubt, compromise the political rights guaranteed under Article 38 of the Constitution.

38. It is the Petitioner's position that for fairness, transparency, protecting the Constitution and for the integrity of the electoral processes and elections, the Selection Panel which recommended the appointment of the current Commissioners of IEBC, which is provided for under the **First Schedule of the Election Laws (Amendment) Act, 2016** (hereinafter referred to as '**First Schedule'**) be, instead, used as opposed to the Selection Panel provided for under the IEBC Amendment Act.

39. The Petitioner laments that there is an imminent danger that the President will immediately declare vacancies in IEBC and that will jump-start the irreversible process under the IEBC Amendment Act. The Petitioner urges that if the process provided for under the IEBC Amendment Act is allowed to start then the Commissioners will be eventually appointed and thereafter, their removal will be mountainous exercise in view of the process provided for in the Constitution.

40. The Petitioner relied on several decisions to buttress his submission in favour of a *prima-facie* case. They are Petition No. 8 of 2017 **Augustine Michael Murandi & 2 Others Vs Nolturesh Loitoktok Water and Sanitation Co. Ltd (Successor in title of National Water Conservation and Pipeline Conservation) [2017] eKLR , Kenya Association of Manufactures & 2 Others Vs Cabinet Secretary – Ministry of Environment and Natural Resources & 3 Others [2017] eKLR, Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 Others [2014) eKLR**, **Michael Osundwa Sakwa Vs Chief Justice and President of Supreme Court of Kenya & Another [2016] eKLR**, **County Assembly of Machakos Vs Governor, Machakos County and 4 Others [2018] eKLR**, **Board of Management of Uhuru Secondary School Vs City County Director of Education & 2 Others [2015] eKLR** and **Giella vs. Cassman Brown & Company (1973) EA 358.**

41. All Respondents are not convinced that a *prima-facie* case is established. Henceforth, I will consider their responses jointly in view of the common stand. The Respondents raised five grounds. They are, *first*, that the IEBC Amendment Act, as a legislation, enjoys the presumption of constitutionality, *second*, that the IEBC Amendment Act is aimed at bridging a lacuna in the law which resulted from the expiry of the term of the Selection Panel under the First Schedule, *third*, that the application and the Petition are premised on speculation and unfounded fear of the Petitioner, *fourth*, the political question doctrine, and *fifth*, that the Petitioner is conflating the role of PSC and that of Parliament.

42. The Respondents variously referred to several decisions in support of their respective submissions.

43. 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.*

44. 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* where 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.*

45. 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 allowing 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…..... 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.*

46. In sum, in determining whether a *prima-facie* case is demonstrated 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.

47. There is no doubt that the finality as to whether the IEBC Amendment Act is unconstitutional is the preserve of the main Petition.

48. The issues raised in the Petition are undoubtedly serious. The issues are at the heart of the country's electioneering processes and elections. **Article 88** of the Constitution establishes the IEBC. The mandate of IEBC is to conduct or supervise referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament. IEBC is hence one of the Commissions and Independent Offices created in the Constitution. The objects of the Commissions and Independent Offices are to protect the sovereignty of the people, to secure the observance by all State organs of democratic values and principles and to promote constitutionalism.

49. **Article 249(2)** of the **Constitution** provides as follows: -

The commissions and the holders of independent offices-

(a) are subject only to this Constitution and the law; and

(b) are independent and not subject to direction or control by any person or authority.

50. Sections 107 and 109 of the Evidence Act, Cap. 80 of the Laws of Kenya places the burden of proof on the party wishing the Court to believe a certain set of facts. In this case, therefore, the incidence of burden is on the Petitioner.

51. The issue of burden of proof on a Petitioner in a Constitutional Petition was addressed by the Supreme Court in ***Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR*** as follows: -

> *Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru vs. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.*

52. The Court of Appeal in ***Civil Application Nai. 31 of 2016 Alfred N. Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 Others [2016] eKLR*** further stated as follows: -

> ***….*** *We find that the applicant is entitled in law to institute proceedings whenever there is threat of violation of his fundamental rights and freedoms or threat of violation of the Constitution. Whether there is a threat of violation is a question of fact and evidence must be adduced to support the alleged threat.*

53. The above guidance, therefore, yields that the Petitioner in this case must lay some evidential basis to the effect that there is real danger of violation of the political rights and the Constitution, which danger is imminent. In ***Martin Nyaga Wambora vs. Speaker of the County Assembly of Embu & 3 Others (2014) eKLR*** the Court described 'real danger' to mean: -

> *The danger must be imminent and evident, true and actual and not frivolous; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention.*

54. It is upon the Petitioner to demonstrate the probability as opposed to a mere possibility of the alleged danger occurring. A mere speculation and expression of personal fear will not suffice. In other words, the Petitioner must connect the constitutional and legal provisions which are well pleaded with the facts. That, can only be attained by adducing evidence. The Petitioner is, hence, to transcend speculation and the fear of the unknown into the arena of evidence.

55. This Court is now called upon to determine whether the evidential burden on the Petitioner has been discharged in the circumstances of this case.

56. I have perused the Affidavit sworn by the Petitioner in support of the application and the Petition. It is sworn on 3rd November 2020. It is a 17-point Affidavit. The Affidavit mainly replicates the averments in the Petition.

57. **Article 10** of the Constitution provides for the national values and principles of governance which binds all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements any public policy decisions. Therefore, the nominating bodies provided in Section 2 of the IEBC Amendment Act, the members of the Selection Panel as well as the resultant Commissioners, as state and/or public officers, as the case may be, must comply with the dictates of the Constitution.

58. Further, the First Schedule provides for the manner in which the Selection Panel must carry out its duty in nominating the eligible persons. For instance, the interviews must be conducted in public and the public must be invited to participate. The public scrutiny does not end there. When the Selection Panel comes up with the names of those eligible, and are forwarded to the President, the President must forward those names to the National Assembly for approval in accordance with the Public Appointments (Parliamentary Approval) Act.

59. The Petitioner is hence expected to, at least, tender some evidence to demonstrate how the entities nominating the members of the Selection Panel are likely to contravene the Constitution and, by extension, the political rights. Attempting to discharge such evidential burden on reliance to the number of members the PSC is to nominate, without a doubt, falls far below the expected evidential threshold. There was need for evidence to show how the persons to be nominated by PSC will not exercise their respective individual decisional independence or how they will fail to attain the constitutional expectations. That, is lacking.

60. On the basis of the obtaining evidence, I respectfully find that the contents of the Affidavit are too scanty to discharge the burden. It is true the Petitioner pleaded and made serious averments. However, he is still short of adducing evidence in support. So far, the record largely contains the Petitioner's fear and speculation. May be the position will change as the matter progresses. For lack of proof aforesaid, a finding that the Petitioner has established a *prima-facie* case will be disproportionate to the mischief sought to be cured.

61. Having found that the Petitioner has failed to demonstrate a *prima-facie* case, a consideration of the other principles will be largely academic. In the words of the Court of Appeal in ***Naftali Ruthi Kinyua case*** *(supra)* ***'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'.

62. I chose to end this discussion here.

63. Lastly, as I come to the end of this ruling, I must thank the parties and Counsels for their readiness in proceeding with the hearing of the application within such a short notice. With a view to foster a sooner determination of the Petition and from the foregoing, I will as well, issue appropriate directions.

64. The following final orders hereby issue: -

(a) The Notice of Motion dated 3rd November, 2020 is hereby dismissed. Costs in cause.

(b) The Petition shall be heard by way of reliance on Affidavit evidence and written submissions.

(c) The Petitioner is hereby granted leave to file and serve Further Affidavit(s), as the case may be, together with written submissions within 7 days hereof.

(d) Upon service, the Respondents shall file and serve their respective responses to the Petition together with written submissions within 14 days.

(e) The Petitioner shall upon service file and serve Supplementary response, if need be, together with rejoinder submissions within 3 days thereof.

(f) Highlighting of submissions on 17/12/2020.

Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 16th day of November 2020

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Okiya Omtatah Okoiti, the Petitioner in person.

Mr. Emmanuel Bitta, Learned State Counsel instructed by the Honourable Attorney General for the 1st Respondent.

Mr. Mwendwa, Learned Counsel for the 2nd Respondent.

Miss. Thanji, Learned Counsel for the 3rd Respondent.

Mr. Njoroge and **Mr. Wambulwa,** Learned Counsels for the 4th Respondent.

No appearance for the 5th and 6th Respondents.

Dominic Waweru – Court Assistant