REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

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

PETITION NO. E327 OF 2020

BETWEEN

LAW SOCIETY OF KENYA.....PETITIONER

AND

1. ATTORNEY GENERAL

2. INSPECTOR GENERAL OF NATIONAL POLICE SERVICE.....RESPONDENTS

RULING NO. 2

Introduction:

1. The Law Society of Kenya (hereinafter referred to as '*the LSK*') is the Petitioner in this matter. The LSK initiated the Petition herein pursuant to its mandate under the Law Society of Kenya Act No. 21 of 2014 which *includes* assisting the Government and Courts in matters relating to legislation, the administration of justice, the practice of law, upholding the Constitution, advancing the rule of law.

2. LSK filed a Petition together with a Notice of Motion. Both were evenly dated 12/10/2020. I will hereinafter refer to the Notice of Motion as '**the application'**). The application was filed under certificate of urgency. Upon filing, appropriate directions were issued by the Duty Judge. On 14/10/2020 this Court issued further directions on the hearing of the application *vide* Ruling No. 1.

3. The application was heard by a combination of written and oral submissions. This ruling is on the application.

The Application:

4. The following four orders were sought in the application: -

> *1. This Application be certified urgent and heard ex-parte.*
>
> *2. A conservatory order be and is hereby issued restraining the 2nd Respondent acting by himself or any police officer under his command from seeking to license or authorise the holding of public gatherings, meetings and processions, banning, disrupting or in any manner whatsoever interfering with peaceful public gatherings, meetings and processions of the **Law Society of Kenya**, its Branches and Chambers as well as Members, on the strength of the directives made by the **National Security Advisory Committee** on 7th October, 2020 and ratified by **The Cabinet** on 8th October, 2020, for the use of **Section 5 of the Public Order Act Cap 56 of the Laws of Kenya** to contain, restrict and prohibit public gatherings and meetings in the name of combating Covid-19 and containing the weaponization of public gatherings, pending the hearing and determination of this Application or the Petition herein.*
>
> *3. A conservatory order be and is hereby issued restraining the 2nd Respondent acting by himself or any police officer under his command from seeking to license or authorise the holding of public gatherings, meetings and processions, banning, disrupting or in any manner whatsoever interfering with peaceful public gatherings, meetings and processions on the strength of the directives made by the **National Security Advisory Committee** on 7th October, 2020 and ratified by **The Cabinet** on 8th October, 2020, for the use of **Section 5 of the Public Order Act Cap 56 of the Laws of Kenya** to contain, restrict and prohibit public gatherings and meetings in*

the name of combating Covid-19 and containing the weaponization of public gatherings, pending the hearing and determination of this Application or the Petition herein.

*4. A conservatory order be and is hereby issued suspending the directives made by the **National Security Advisory Committee** on 7th October, 2020 and ratified by **The Cabinet** on 8th October, 2020, for the use of **Section 5 of the Public Order Act Cap 56 of the Laws of Kenya** to contain, restrict and prohibit public gatherings, meetings and processions in the name of combating Covid-19 and containing the weaponization of public gatherings, pending the hearing and determination of this Application or the Petition herein.*

5. The application was supported by an Affidavit evenly sworn by *Collins Odhiambo*, the then Acting Secretary of the LSK.

6. LSK filed submissions and a List of Authorities on 20/10/2020 in support of the application.

The Responses:

7. The application was opposed by both Respondents. The 1st Respondent relied on a Replying Affidavit sworn by *Kennedy W. Kihara*, the Principal Administrative Secretary to the Cabinet in the Office of the President, and a member of the National Security Advisory Committee. The Affidavit was sworn on 16/10/2020.

8. The 2nd Respondent relied on a Replying Affidavit sworn by *Dominic Kisavi*, a Senior Superintendent of Police, a Staff Officer of Operations, Kenya Police Service.

9. The gist of the responses is that the grant of the conservatory orders sought will amount to interference with the Executive's power to maintain peace and order for national security.

10. The Respondents filed joint submissions dated 18/10/2020.

Issues for Determination:

11. I have considered the application, the response, both the filed and oral submissions, the decisions referred thereto and the Petition.

12. For purposes of determining the application, I will, *in seriatim*, consider the four main principles in applications for conservatory orders and the applicability of those principles to the application herein.

Analysis and Determination:

13. Given the nature of applications for conservatory orders, Courts are generally called upon to exercise caution in such applications. The good reason thereof is to avoid dealing with finality, and in the interim, with issues which are the preserve of the main Petition.

14. **Ibrahim, J** (as he then was) aptly captured the caution 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.

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

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

16. In ***Judicial Service Commission 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.

17. A Court, therefore, dealing with an application for conservatory orders must remain focused and maintain the delicate balance by 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 issues falling within the realm of the main Petition.

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

19. 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.

20. 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" 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. 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.*
>
> (emphasis added)

21. 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.*

22. The four fourth principle is whether the conservatory order sought will delay the early determination of the dispute. This principle was elucidated by this Court in ***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)**.**

23. A consideration of the principles now follows.

(i) Whether a *prima-facie* case was established: -

24. The Petitioner pleaded that the Petition, in the main, seeks to declare Section 5 of the Public Order Act, Cap. 56 of the Laws of Kenya as unconstitutional. Likewise, the Petitioner also seeks to declare the directives made by the National Security Advisory Committee on 7th October, 2020 and ratified by The Cabinet on 8th October, 2020 as unconstitutional. The basis for such prayers, the Petitioner contends, is that Section 5 of the Public Order Act and the directives fundamentally limit the rights and fundamental freedoms in respect to opinion, expression, freedom of the media, association, assemble and to demonstrate.

25. For completeness of this discussion, I will reproduce verbatim the part of the directives, relevant to the application, as issued by the National Security Advisory Committee on 7th October, 2020 and ratified by The Cabinet on 8th October, 2020 as follows: -

> ***1. That All Public Meetings and Public Processions Shall Be Held in Strict Compliance with Section 5 of the Public Order Act, Cap. 56 Laws of Kenya. The convenor or any person intending to hold a Public Meeting or a Public Procession shall****:*
>
> *a) Notify the Officer Commanding Station (OCS) of such intent at least three days but not more than fourteen days before the proposed date of the public meeting or procession.*
>
> *b) Be present throughout the meeting or procession and shall assist the police in the maintenance of peace and order at the meeting or procession.*
>
> *c) Obey all Orders given to him or her by the OCS or any police officer of or above the rank of inspector.*
>
> *d) At all times bind themselves to be peaceful and non-violent and shall keep to the designated places of public meetings or public processions.*
>
> ***2. That Any Person Who So Elects to Attend or Participate in a Public Meeting and or Procession Shall, Pursuant to the Law and in Particular, Section 5 of the Public Order Act:***
>
> *a) Exercise a high sense of civic duty and responsibility and not to be in possession of any weapon.*
>
> *b) At all times bind themselves to be peaceful and non-violent and shall keep to the designated places of public meetings or public processions.*

c) Report to the relevant authority incidents of hate speech, incitement to violence, ethnic contempt or any other offence;

d) Respect the freedom of expression of other people;

e) Not abuse, exclude, demean, stereotype or profile other people;

f) Not propagate insurgency and socio-economic hostility among and between Kenyans;

g) Maintain strict observance of the law for the safety and well-being of everyone present.

3. That All Persons Who Elect to Address Any Public Meeting and Procession Shall Be Bound By the Legal Penalties and Obligations Set Out In Sections 13 and 62 of the National Cohesion and Integration Act, Which Provisions Bar Speeches, Utterances and Messages that Contain:

a) Offensive, abusive, insulting, misleading, confusing, obscene or profane language.

b) Inciting, threatening or discriminatory language that may or is intended to expose an individual or group of individuals to violence, hatred, hostility, discrimination or ridicule on the basis of ethnicity, tribe, race, color, religion, gender, disability or otherwise.

c) Attacks on personal rights that trigger discrimination on the basis of their ethnic background, economic status, race, religion or associations.

4. That All Media Outlets Shall Be Held Responsible for All the Content that they Publish and or Broadcast Pursuant to Section 62 of the National Cohesion and Integration Act as read together with the Guidelines for Monitoring Hate Speech in the Electronic Media issued by the National Cohesion and Integration Commission. Accordingly, the media shall*:*

a) Not publish words intended to incite feelings of contempt, hatred, hostility, violence or discrimination against any person, group or community on the basis of ethnicity or race.

b) Desist from providing platform to hate mongers, inciters and tribalists.

c) Practice responsible and conflict sensitive reporting.

d) Endeavor to air programs that promote respect, national unity and cohesion.

5. That All Social Media Users Shall be Held Individually Liable for All Content on their Social Media Profile Pursuant to the National Cohesion and Integration Act as read together with the Guidelines on Prevention of Dissemination of Undesirable, Bulk and Premium Rate Political Messages and Political Social Media Content via Electronic Communication Network. In That Regard, Every Social Media User Shall Ensure that:

a) All their content is written in a language that avoids a tone and words that constitute hate speech, ethnic contempt, and incitement to violence, harassment, abuse, defamation or intimidation.

b) Before forwarding and or sharing any messages, authenticate and validate the source and truthfulness of their content so as to limit information that might spread rumors, mislead or is not supported by facts.

c) Administrators of social media platforms are duty bound to moderate and control undesirable content and discussions that have been brought to their attention on their platforms.

In this regard, NSAC hereby directs the relevant security organs to enforce these directives without fear or favour to the offenders, regardless of their economic standing, ethnicity, religion and political association and status.

26. The full extent of the above directives is annexed to the Affidavit of Collins Odhiambo. I will henceforth refer to the directives as ' *the impugned directives*' and the National Security Advisory Committee as '*the NSAC'*.

27. It is deponed that as a result of implementation of the impugned directives several public meetings were declared unlawful and banned, disrupted with the use of brute police force and permission to hold public meetings denied by the 2nd Respondent. One such meeting was a fundraiser at St Leo Catholic Church Shianda, Mumias East Constituency on 11th October, 2020 in respect of which permission was declined on 9th October, 2020. The reasons given for denial of the permission were sated as *'COVID 2019 public health instructions and directives'* and '*security threats'*.

28. The Petitioner contends that the impugned directives are used as a tool to further a favoured political cause since several other public meetings are held in which the impugned directives are not applied. It was further deponed that *'The meetings include the National Prayer Day held at State House on 9th October, 2020 and attended by thousands of persons as well as the endorsement of Former Prime Minister Raila Odinga as President Uhuru Kenyatta's successor at his Bondo home on 9th October, 2020 by Kikuyu elders together with a fundraiser held in Bondo on 11th October, 2020, again, all public meetings attended by thousands of persons'* were among such meetings.

29. The Petitioner further contends that the impugned directives are selectively applied by the 2nd Respondent, and, in the guise of fighting Covid-19 pandemic with the result of limiting rights and fundamental freedoms guaranteed in the Bill of Rights. It is also deponed that the rights and freedoms of and/or to an opinion, expression, freedom of the media, association, assemble, demonstrate and campaign for a political cause are non derogable, are given and exercisable equally and without discrimination and cannot be limited when exercised peacefully, save for persons serving in the Kenya Defence Forces or the National Police Service a position underscored by Article 24 (2) and (5) of The Constitution.

30. It is posited that the role of the police *'in general and the 1st and 2nd Respondents in particular, in so far as the exercise of the rights and freedoms of and/or to an opinion, expression, freedom of the media, association, assemble, demonstrate and campaign for a political cause is concerned should be limited to maintaining law and order whilst complying with constitutional standards of human rights and fundamental freedoms as demanded of the National Police Service by Article 244 (c) of The Constitution of Kenya'*.

31. The Petitioner further posits that the National Police Service Act No 11A of 2011 contains general functions which are sufficient to enable the National Police Service maintain law and order without resort to the impugned directives.

32. The impugned directives were further faulted in that *'under Section 15 of the National Cohesion and Integration Act No 12 of 2008, the National Cohesion and Integration Commission which is mandated with the roles of investigations for purposes of prosecution of offences enumerated in the said Act, including hate speech. The National Security Advisory Committee cannot arrogate to itself the powers of the National Cohesion and Integration Commission as it has, as doing so contravenes Article 10 of The Constitution of Kenya on the rule of law, good governance, integrity, transparency and accountability'.*

33. In the words of Collins Odhiambo *'the directives made by the National Security Advisory Committee on 7th October, 2020 and ratified by The Cabinet on 8th October, 2020, for the use of Section 5 of the Public Order Act Cap 56 of the Laws of Kenya to contain, restrict and prohibit public gatherings, meetings and processions in name of combating Covid-19 and containing the weaponization of public gatherings have been enforced and implemented with a target to individuals perceived to be opposed to popular Government views on several issues of national importance including: BBI, Referendum, National Debt and accountability for funds allocated for alleviation of effects of Covid-19 amongst others as demonstrated hereinabove.*

34. Relying on the decisions in ***Taib A. Taib vs. Minister for Local Government & 3 Others (2006) eKLR*** and ***Coalition for Reform and Democracy (CORD) & Another vs. Republic of Kenya & Another (2015) eKLR*** the Petitioner submits that the exercise of executive power can be assailed if abused or used in violation of the Constitution. It is further submitted that the presumption of constitutionality of a statute is a rebuttable presumption and, like in this case, a party relying on the doctrine to restrict a right and/or fundamental freedom guaranteed in the Bill of Rights has the burden of justifying such restriction otherwise the Constitution will be '*a mere body or skeleton without a soul or spirit of its own'*.

35. The Petitioner also submits that where there is a conflict between protection and enforcement of individual rights and fundamental freedoms, on one hand, and the aspect of national security on the other hand, the former must always prevail. The decisions in ***Sudi Oscar Kipchumba v Republic (Through National Cohesion & Integration Commission) [2020] eKLR*** and ***Malawi Law Society and Others v President and Others (2002) AHRLR 110 (MwHC 2002)*** were referred to in support of the position.

36. Further submission was made that the application attained the required legal threshold as it demonstrates that the Respondents are using the impugned directives to trample upon the rights of Kenyans in the context of maintaining public peace. This Court was urged to allow the application.

37. The 1st Respondent admits that the Cabinet ratified the impugned directives *'in furtherance of the legitimate purpose of ensuring safety, peace and order and attainment of national security in any given area of the country.'* The 1st Respondent also referred to ***Nairobi Constitutional Petition 269 of 2016 Ngunjiri Wambugu v Inspector General of Police, & 2 Others (2019] eKLR*** which sanctioned the Covid-19 containment measures as a further basis of the impugned directives.

38. The limitation of the individual rights and fundamental freedoms which resulted from the impugned directives, the 1st Respondent contends, is in consonance with the provisions of the Public Order Act, is reasonable and justifiable as the position was affirmed in ***Nairobi Constitutional Petition No. 544 of 2015 Boniface Mwangi v Inspector General of Police & 5 others [2017] eKLR*** and by the Court of Appeal in ***Civil Appeal No. 261 of 2018 Haki Na Sheria Initiative v Inspector General Of Police & 3 others [2020] eKLR.***

39. It is posited that the impugned directives are a restatement of obtaining law which law has not been declared unconstitutional. The 1st Respondent further posits that the impugned directives are in consonance with various provisions of the Constitution and the law and that they provide the least restrictive means of balancing between the individual rights of persons and those of the greater public in the exercise and enjoyment of various rights.

40. According to the 1st Respondent, the application seeks to usurp policy preferences of the National Executive contrary to the principle of separation of powers and that the Court is called to direct executive policy preferences.

41. The Petitioner was accused of failing to disclose that it was engaged in various litigation with the Respondents on the government containment measures in fighting Covid-19. The matters include ***Nairobi Constitutional Petition No. 120 of 2020 Law Society of Kenya-vs-inspector General of Police & Another, Nairobi Constitutional Petition No. 132 of 2020 Law Society of Kenya-vs-Attorney-General & Cabinet Secretary of Health and Nairobi Constitutional Petition No. 144 of 2020 between Law Society of Kenya -vs- Attorney-General & Cabinet Secretary for Health, Nairobi Constitutional Petition No. 78 of 2020 Law Society of Kenya and other -vs-Cabinet Secretary for Health*** **and others.** As a result of the non-disclosure, the 1st Respondent further submits that, the Court's discretion miliates against the Petitioner.

42. The 1st Respondent also took issue with the time allocated to file a response to the application. It was deponed that the 1st Respondent was only given 16 hours to respond and as such *'the time period given to the Respondents to respond to the application unduly restricted the Respondent right to have adequate time and facilities to prepare a response to the case as envisaged under Article 50(2)(c) of the Constitution and has disproportionately impaired the Respondent's right to a fair hearing.'*

43. The 2nd Respondent posits that the impugned directives were issued '*with the aim of containing heightened political tensions in the country'* following the death of 2 persons during a political rally in Murang'a County. It was further posited that the impugned directives were aimed at *'enforcing lawful government measures to contain the spread of the deadly covid-19 virus whose reported daily rate of infections was gradually on the upturn after easing of restrictions aimed at reopening the economy'* and that the impugned directives are issued in public interest, are applied uniformly throughout the country and are strictly in compliance with the law.

44. In a bid to further justify the impugned directives, the 2nd Respondent cited various incidents of lawlessness and confrontation between public factions where even some officers of 2nd Respondent were injured. The 2nd Respondent further deponed that the police would only restrict any public meeting or procession upon receipt of information on planned violence. The meeting of St. Leo Catholic Church Shianda was cited as an example where the police, had to, and, intervened accordingly.

45. The 2nd Respondent vehemently denied the allegation that it is biased in discharging its duties.

46. The Respondents jointly submit that the executive power enjoyed a constitutional sanction and is *prima-facie* lawful. They further submit that the doctrine of presumption of constitutionality is applicable in this case hence the conservatory orders cannot issue in the interim. The decision of the Supreme Court in ***Raila Odinga & Others -v- Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013*** was referred to in buttressing the argument. This Court was urged to take note of the fact that the Public Order Act has been in place for over 40 years.

47. Relying on ***Board of Management of Uhuru Secondary School vs. City County Director of Education & 2 Others [2015] eKLR, Nairobi Constitutional Petition 269 of 2016 Ngunjiri Wambugu v Inspector General of Police, & 2 others (2019) eKLR*** and ***Nairobi Constitutional Petition No. 544 of 2015 Boniface Mwangi v Inspector General of Police & 5 others [2017] eKLR*** the Respondents submitted that the application fell short of the required legal bar as the limitations of the individual rights and fundamental freedoms were justified.

48. The Respondents vehemently submitted that the Petitioner had not demonstrated any *prima-facie* case and as such the application cannot stand.

49. 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.*

50. 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.*

51. 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.*

52. 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.

53. In sum, therefore, 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.

54. On one hand, the Petition mainly revolved around whether **Section 5** of the **Public Order Act** is unconstitutional. On the other hand, the

application mainly challenged the nature and effect of the impugned directives.

55. The Petitioner argue that it has demonstrated a *prima facie* case in that the NSAC and The Cabinet were actually interfering with the mandate of the 2nd Respondent as provided for in the Constitution. It is strenuously submitted that the 2nd Respondent is sufficiently enabled by the Constitution and various laws to carry out its mandate and that the NSAC and The Cabinet could not validly issue any directives on how the 2nd Respondent was to discharge its duties.

56. The 2nd Respondent is a creature of Chapter 14 Part 4 of the Constitution. **Article 244** of the **Constitution** provides the objects and functions of the National Police Service as follows: -

> *(a) strive for the highest standards of professionalism and discipline among its members;*
>
> *(b) prevent corruption and promote and practice transparency and accountability;*
>
> *(c) comply with constitutional standards of human rights and fundamental freedoms;*
>
> *(d) train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and*
>
> *(e) foster and promote relationships with the broader society.*

57. The National Police Service is under the command of the 2nd Respondent. The manner in which the 2nd Respondent is to carry out its mandate is provided for under **Article 245(2)(b)** and **(4)** of the **Constitution** as follows: -

> ***2. The Inspector General –***
>
> (a) …...
>
> **(b) *shall exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation.***

4. *The Cabinet Secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service,* ***but no person may give a direction to the Inspector General with respect to—***

> *(a)* ***the investigation of any particular offence or offences;***
>
> ***(b) the enforcement of the law against any particular person or persons; or***
>
> ***(c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.***

5. Any direction given to the Inspector-General by the Cabinet secretary responsible for police services under clause (4), or any direction given to the Inspector-General by the Director of Public Prosecutions under Article 157(4), shall be in writing.

58. **Article 157(4)** of the **Constitution** provides that: -

The Director of Public Prosecutions shall have power to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

59. The independence of the 2nd Respondent is constitutionally-insulated from any form of interference or directional command. Apart from the Director of Public Prosecutions and only to the extent so provided, no other person, body or entity has the power to give any form of directives to the 2nd Respondent on how to discharge its functions.

60. The above is further ring-fenced in that even the power donated to the Cabinet Secretary under Article 254(4) of the Constitution to issue any directives to the 2nd Respondent is only limited to policy issues.

61. The foregoing is the obtaining constitutional stature in respect of the 2nd Respondent in Kenya.

62. That being the legal standing, at paragraph 20 of his Affidavit, *Kennedy W. Kihara* deponed as follows: -

That the National Security Advisory Committee directed that the relevant security organs enforce these directives without fear or favour to the offenders, regardless of their economic standing, ethnicity, religion and political association and status.

63. I have carefully considered the statement issued by the NSAC. There is no doubt that the statement issued several directives. The directives include the manner in which public meetings, gatherings and processions are to be conducted and how those addressing such meetings, gatherings or processions must conduct themselves. There is also a directive on how media outlets are to cover and report public

events. There is a further directive on social media users relating to the content. There is also the directive to the police to ensure compliance of the impugned directives. It is worth-noting that the impugned directives were variously hinged on some legal provisions.

64. From the record, the Respondents neither deponed to nor alleged that the NSAC and/or the Cabinet are part of the 2nd Respondent or the Office of the Director of Public Prosecutions.

65. It is, therefore, clear that the NSAC and the Cabinet are, among the bodies, entities and persons, constitutionally-estopped from directing the manner in which the 2nd Respondent discharges its duties.

66. There is an unequivocal admission on issuance of the impugned directives by NSAC which were adopted by the Cabinet. As said, the impugned directives directed the 2nd Respondent on how to discharge its mandate. The effect of the impugned directives is hence tantamount to the NSAC and the Cabinet usurping the powers and mandate of the 2nd Respondent as donated by the Constitution.

67. In as much as the impugned directives may have been intended for the good of the citizenry, this Court cannot lose sight of the fact that the impugned directives are on a direct collision course with Article 245(2)(b) and (4) of the Constitution. Pursuant to Article 2(4) of the Constitution, and to the extent demonstrated above, the impugned directives must, without any doubt, give way to the constitutional muster.

68. On the basis of the foregoing, I am satisfied that the Petitioner demonstrated, on the preponderance of probability, that the Constitution was infringed by the impugned agencies as to call for an explanation or rebuttal from the later. I therefore find and hold that the Petitioner established a *prima-facie* case.

(ii) Whether there is real danger that the Applicant will suffer prejudice and its case rendered nugatory unless the conservatory orders are granted:

69. 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.

70. Generally, any infringement or threat to infringement of the Constitution is an affront to the people of Kenya. That is the clear purport of the Preamble and Chapter 1 of the Constitution. In this matter the gist of the Petition is the constitutionality of Section 5 of the Public Order Act. Before this Court pronounces itself on the Petition, the Petitioner has preliminarily demonstrated that the Constitution is under attack. In the unique circumstances of this matter I find that the general public stands to suffer great prejudice if the Constitution is not allowed to reign.

71. I hence find and hold that the Petitioner has satisfactorily demonstrated that the impugned agencies shall continue to muzzle and usurp the powers of the 2nd Respondent in the discharge of its duties unless the application is allowed.

(c) Public Interest:

72. '*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.*

73. '*Public interest litigation'* was described by the Court of Appeal in ***Nairobi Civil Appeal No. 364 of 2017 Tom Mboya Odege vs. Edick Peter Omondi Anyanga & 2 Others (2018) eKLR*** as follows: -

> *A legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected.*

74. The Court further held that: -

> *…... The best examples are in Articles 22(2)(a) and 258 of the Constitution which grant every person the right to move to court in 'public interest' where there is a claim or alleged contravention or infringement of a right or fundamental freedom, or threat thereto, or a contravention or threat to violate the Constitution.*

75. The nature of public interest litigation was discussed by the Supreme Court of India decision in ***Ashok Kumar Pandey vs. State of West Bengal AIR 2004 SC 280*** as follows: -

> *…. Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the court is acting bona fides and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either*

by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.

76. There can be no greater public interest than upholding the Constitution and the law. There are several laws which enable the 2nd Respondent to fully, firmly and independently discharge its constitutional and statutory duties. In other words, even without the impugned directives still the 2nd Respondent is sufficiently endowed with legal authority and power to fully discharge its constitutional and statutory mandate.

77. The dictates of public interest in this matter are, therefore, in favour of the 2nd Respondent discharging its mandate independently, as provided for under the Constitution and the law, that is, without the direction of any other person, entity or body save the Director of Public Prosecutions.

78. I now find that public interest in this case favours the maintenance of the ***status quo ante*** the impugned directives.

(d) Whether the application will delay the determination of the dispute:

79. I have carefully perused the pleadings in this matter. There is no danger that the 2nd Respondent may not be able to discharge its functions under the Constitution and the law if the application is allowed. As such, allowing the application will not in any way curtail the powers of the 2nd Respondent.

80. I therefore do not see any possibility of multiplicity of suits or any delay in determining the Petition if the application is allowed.

81. As I come to the end of this ruling I must address the issue raised by the 1st Respondent that it was given only 16 working hours to respond to the application. The position is incorrect for two reasons. *First*, the matter was certified as urgent by the Duty Court on 13/10/2020 as a result of the immense public interest involved. Service was ordered to be effected on the same day and parties were to appear before Court for directions on the following day. All parties were duly served and appeared before Court as ordered. The Respondents confirmed having been served. The Court then gave directions on the hearing of the application *vide* Ruling No. 1. In the directions, the Respondents were given upto the close of business on 16/10/2020 to file their responses and submissions. Since the Respondents were served on 13/10/2020 then they had 3 clear days within which to comply. *Second*, the Respondents are represented by Counsel. No application was made for extension of time for whatever reasons. Infact the Counsel for the Respondents expressed his readiness to proceed with the hearing when the matter came up for hearing. In any event, the Respondents put up a well-spirited opposition to the application.

82. It is imperative to note that in some cases parties maybe expected to put on the overdrive gear as a balance between, and to accommodate, the individual rights of the parties and the larger public interest. This, is one such case.

(c) Conclusion:

83. Going by the foregoing discussion and given the nature of the Petition, I will, as well, issue directions towards an expedited hearing and determination of the Petition.

84. From the above discourse the following final orders do hereby issue: -

(a) A conservatory order be and is hereby issued restraining the Inspector General of Police whether by himself or any police officer under its command from taking directives from the National Security Advisory Committee and/or any other person, body or entity in the manner in which the Inspector General of Police or its officers should carry out their constitutional and statutory duties pending the hearing and determination of the Petition. However, and for clarity, the Director of Public Prosecutions and the Cabinet Secretary responsible for police services remain at liberty to exercise their mandates under Article 157(4) and Article 245(4) of the Constitution respectively.

(b) Pending the hearing and determination of the Petition, a conservatory order be and is hereby issued suspending the directives issued by the National Security Advisory Committee on 7th October, 2020 and ratified by The Cabinet on 8th October, 2020 since the effect of the said directives is to direct the manner in which the Inspector General of Police and any of its officers under its command should carry out their constitutional and statutory duties.

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

(d) The Respondents shall file and serve their respective responses to the Petition, if not yet, within 14 days of this ruling.

(e) Upon service, or in the event the Respondents have already filed and served their respective responses, the Petitioner shall file and serve Supplementary response thereto, if need be, together with written submissions within 7 days.

(f) The Respondents shall thereafter file and serve written submissions within 7 days of service.

(g) The Petitioner shall upon service file and serve rejoinder submissions, if need be, within 3 days of service.

(h) Highlighting of submissions on 16/12/2020.

Orders accordingly.

DELIVERED, DATED and **SIGNED** at **NAIROBI this 12th day of November 2020**

A. C. MRIMA

JUDGE

Ruling No. 2 Virtually delivered in the presence of:

Nelson Havi & Moses Kulgat for the petitioner

Immanuel Bitta for the Respondent

Dominic Waweru – Court Assistant