REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 397 OF 2017

CENTRE FOR RIGHTS EDUCATION &

AWARENESS (CREAW)……..…1ST PETITIONER

COMMUNITY ADVOCACY &

AWARENESS TRUST (CRAWN TRUST)……...….2ND PETITIONER

VERSUS

THE SPEAKER OF THE NATIONAL ASSEMBLY…….....1ST RESPONDENT

SPEAKER OF THE SENATE……..2ND RESPONDENT

THE HON. ATTORNEY GENERAL…….……3RD RESPONDENT

AND

NATIONAL GENDER & EQUALITY COMMISSION…..…..... AMICUS CURIAE

RULING

1. Centre for Rights Education and Awareness (CREAW) and Community Advocacy and Awareness Trust (CRAWN TRUST), the petitioners, filed a Petition dated 15th August 2017 against Speaker of the National Assembly, Speaker of the Senate and the Attorney General, Respondents, seeking various orders, among them, a declaration that the composition of the National Assembly and the Senate does not meet the Constitutional threshold of the Two-Thirds Gender Principle.

2. Together with the Petition, the petitioners filed a notice of motion of the same date 15th August 2017 under urgency, and sought orders that the application be certified urgent, that the petition be set down for hearing on priority basis as well as directions on the expeditious hearing of the petition.

3. On the following day, 16th August 2017 the petitioners filed an amended notice of motion dated the same day and introduced two important prayers for Conservatory orders stopping the swearing of the members of the National Assembly and the Senate, pending the hearing and determination of the application and the petition.

4. The application and petition were placed before me for consideration and Mr Ogolla appeared for the petitioner/applicants and moved the motion. Counsel intimated to Court that there was an amended motion and prayed that the application be certified urgent and heard expeditiously.

5. On the same day and time, Mr Mbithi applied that his client, the **Gender and Equality Commission,** be enjoined in the proceedings as a*micas curiae*. The court certified the application urgent and admitted it to hearing during the vacation. The court further directed that the application and petition be served on the respondents and gave directions on filing of responses, and set the application for hearing on 21st August 2017. The Gender and Equality Commission was also enjoined in the proceedings as *amicus.*

6. When the application came up for hearing, on 21st August 2017 all parties were represented. Mr Ogolla appeared for the applicants, Mr Mwendwa together with Agayo for the 1st respondent, Miss Otieno for 2nd respondent and Miss Gitiri for 3rd respondent. Mr Mbithi appeared for the *amicus* .

7. Me Ogolla moved the motion and urged the Court to grant a Conservatory order in terms of prayer 3 of the motion dated 16th August 2017 stopping members of Parliament from being sworn in pending the hearing and determination of the petition.

8. Learned Counsel, submitted that the petition raises serious constitutional and legal issues for determination and should the Court agree with the petitioners after hearing the petition, it will have a significant effect on the Parliament hence it was appropriate that the swearing in of members of Parliament be stopped until the petition is heard and determined.

9. Counsel argued that the main issue relates to the composition of Parliament which, he submitted, does not meet the two-third gender requirement in terms of Article 27(8) of the constitution. According to Counsel, the current composition negates the rights of women's representation in Parliament, and contended that were the Court to decline to grant Conservatory Orders, the unintended consequence would be that Parliament's sittings, though unlawful, would proceed. He therefore prayed that the order sought in the motion be granted.

10. Mr Mwendwa opposed the motion and relied on the grounds of opposition and replying affidavit. According to Mr Mwendwa, the petitioner's Counsel when he appeared before Court moved a motion dated 15th August 2017 and directions were given on the basis of that application which, according to Counsel, had sought to have the petition heard on priority basis.

11. Learned counsel argued that the application dated 15th August 2017 violated section 39(2)(c) of the High Court Organization and Administration Act as read with rule 17 of the rules made under that Act. Counsel contended that a party had to seek leave of Court to be heard during the vacation and had to make a specific prayer to that effect in the application.

12. Secondly, Counsel contended that the amended Notice of Motion dated 16th August 2017 was amended in violation of rule 18 of the **"Mutunga" Rules** which provides that a party must seek leave before amending pleadings. Counsel also made reference to **Order 8 rule 7** of the Civil Procedure Rules on the amendment of pleadings. In Counsel's view, the amendment was done without taking into account the law and procedure on the amendments.

13. Thirdly, Counsel argued that Article 74 of the Constitution is clear that state officers cannot take up their duties before taking Oath of office, and that Article 126(2) provides for when Parliament's sittings should start. He therefore submitted that the Court cannot stop Parliamentary sittings that are regulated by the Constitution for purposes of swearing in of members of Parliament. He urged that the application be dismissed with costs.

14. Miss Otieno, learned Counsel for the 2nd respondent associated herself with Mr Mwendwa's submissions and agreed that the application is for dismissal.

15. Miss Gitiri, learned counsel for the 3rd respondent, also agreed with Mr Mwendwa's submissions. Counsel, however, added that laws and rules are made to be followed, and failure to comply with rules makes the Notice of Motion untenable.

16. In this regard, Counsel submitted that the Notice of motion dated 15th August 2017 did not comply with section 39(2)(c) of the HCOA Act and rule 17 of the rules made thereunder. Regarding the amended Notice of motion dated 16th August 2017, counsel submitted, that the same is defective since it did not comply with Order 8 Rule 7 of the civil procedure Rules on the manner of amendment. According to learned Counsel, the petitioners also ignored Mutunga Rules in that they did not seek leave of Court to amend their motion. Counsel urged that the amended motion dated 16th august 2017 be struck out.

17. Counsel further contended that there was no prayer for the application to be heard during the vacation. Referring to the case of ***Samwel Kamau Macharia v Kenya Commercial Bank & Another, 2***012 eKLR, Counsel submitted that the Court can only exercise jurisdiction as conferred on it by the Constitution or the Law or both. Referring to Article 126(2) Counsel submitted that Parliament must convene pursuant to a Gazette Notice signed by the President which cannot be stopped by an order of the Court. Counsel argued that it is also not in the public interest to grant the orders sought.

18. Mr Mbithi, learned counsel for the ***amicus,*** on his part submitted that the application was admitted to hearing during the vacation and contended that the petition would have to be determined before the time for swearing in of members of Parliament. On the submission that the applicants did not seek leave to amend the motion, Mr Mbithi submitted that the Court should consider Articles 22(3)(d) and 159(2)(d) of the Constitution and avoid technicalities of procedure in determining the matter. Counsel further submitted that the application was clear on what was amended and urged the Court to allow the application.

19. In a brief rejoinder, Mr. Ogolla submitted that the Court should consider Order 8 of the Civil Procedure together with Article 20(3) of the Constitution and allow development of the law in a manner that is aimed at promoting rights. He also relied on Article 159(2)(d) of the Constitution on the fact that the Court should decide cases on the basis of substantial justice as opposed to technicalities. According to Mr Ogolla, the Court was informed of the amended Notice of motion, and the Court should therefore grant conservatory order on the basis of the motion.

20. Counsel went on to contend that under Article 3(2) of the Constitution, a government cannot be established other than in accordance with the Constitution itself. He was of the view that the constitution of Parliament is not in conformity with the constitution as required by Article 27(8) hence there are good grounds for granting Conservatory Orders which will save the country unnecessary loss should the Court eventually hold that Parliament is not properly constituted.

21. I have considered the application and submissions by Counsel from both sides. The application seeks a conservatory order stopping Members of Parliament from being sworn in on grounds that the Constitution of the both the National Assembly and Senate violates the Constitution.

22. The respondents have opposed the application on grounds namely – that the Court was not moved under vacation rules hence the application cannot be heard during vacation; that the purported amendment to the notice of motion was done without leave of the Court hence it is defective and that the anomalies are grave to the extent that the application cannot be granted as it is; and that grant of a conservatory Order will be against public interest and the Constitution.

23. I will first deal with the question of amended Notice of Motion.

24. As stated at the beginning of this ruling, the petitioners filed a notice of motion together with the petition both dated 15th August 2017. A day later on 16th August 2017, they filed an Amended Motion, introducing two Prayers for Conservatory orders pending the hearing and determination of the application as well as the petition. The amendment was done before the file was placed before the Duty Judge for

consideration.

25. The respondents have contended that the amendment was done without leave of the Court and in disregard of both the Mutunga Rules and Civil Procedure Rules 2010. And that leave was not sought or granted for the application to be heard during recess.

26. Rule 18 of the Mutunga rules provides that a party who wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the Court. On the other hand Order 8 rule 1 of the Civil Procedure Rules which governs amendment of pleadings provides that a party may without leave of Court amend his pleadings once at any time before pleadings close. Pleadings close 15 days after service of defence or 15 days after service of pleadings where no defence is filed. This means a party would be at liberty to file amended pleading at any time before pleadings close..

27./ The petitioners filed an amended Notice of Motion one day after filing its petition and motion which was within the framework of Order 8 rule 1 of the Civil Procedure Rules. Rule 18 of the Mutunga Rules on the other hand states that a party may amend at any stage with leave of the Court.

28. My understanding of rule 18 is that it is a procedural requirement which does not oust the position in order 8 rule. In any case, rules must be interpreted in a manner that would favour substantive justice rather that restrictive interpretation. That would appear to be the import of rule 3(3) of the Mutunga rules which provides that the overriding objective of the rules is to facilitate access to justice for all persons as required under Article 48 of the Constitution.

29. Rule 3(2) also provides that the rules be interpreted in accordance with Article 259(1) of the Constitution and that they be applied with a view of advancing and realizing (a) the rights and fundamental freedoms enshrined in the Bill of Rights, and (b) values and principles in the Constitution. One of the principles of the Constitution is that justice be administered without undue regard to the technicalities of procedure.

30. Sub-rule (4) further states that in exercising its jurisdiction under the rules, the Court should facilitate the just, expeditious proportionate and affordable resolution of cases. This cannot be done if Courts gave un due regard to procedural technicalities while applying the rules.

31. It is also important to note that even when one seeks leave to amend, the Court exercises its discretion whether or not to grant such leave, and the general principle of law is that Courts should always allow parties to amend their pleadings unless there are compelling reasons not to do so. Even where the applicant failed to strictly follow the manner of amending the motion, I do not think that alone would be a grave error as to invalidate the motion.

32. For the foregoing reasons I do not see any merit in the respondents' contention that the Notice of Motion dated 16th August 2017 is defective. This submission is therefore declined.

33. The second issue for determination is whether the petitioners properly moved the Court to have the application heard during recess. The application was filed in Court on 15th August 2017. There is no denial that it was filed during recess and that the Court was sitting as a Duty Court during recess. Section 39 of the High Court Organization and Administration Act (No 17) of 2015, provides that the Chief Justice may make rules for the effective administration of the High Court, and in particular under Sub-section 2, to make rules for the disposal of urgent and priority matters during Court recess.

34. Rule 16 of the High Court (Organization and Administration) rules, 2016 in relation to proceedings during recess. provides-

> ***" All applications which are determined to be urgent shall be heard promptly during recess by the Duty Judge"***

35. Rule 17 provides that a party to a cause may at any time apply to a judge for an order that the cause be

tried or heard during recess, and if the Duty Judge is satisfied that there is urgent need for the trial or hearing to take place in vacation the judge may make an order accordingly and fix a date for the trial or hearing. The urgency should be demonstrated through an affidavit filed together with the application for leave.

36. It is therefore a legal requirement that any party wishing to be heard during recess, should seek and obtain the Duty Judge's leave. It is on the basis of this that the respondents have objected to the application saying the petitioners violated the legal requirement to seek leave to be heard during recess.

37. I have perused the pleadings filed herein on 15th August 2017. There is no application filed seeking leave to have the petition or application heard during the recess. The Notice of Motion dated 15th August 2017 and filed on the same day does not also contain a prayer that the application or petition be heard during the recess. However, in the certificate of urgency filed on the same day, the applicant's counsel stated that the application was extremely urgent and deserved a hearing on priority basis and during the vacation on grounds enumerated in that certificate. It is acknowledged that the statement did not amount to a prayer for leave to be heard during the vacation, but expressed that desire.

38. I have also perused the amended notice of motion of 16th August 2017, and although the motion is expressed to have been brought under the vacation Rules, Articles 22(1), 22(3) and 259 of the Constitution, and rule 23 of the Mutunga rules, the amended Motion does not contain a prayer seeking leave for hearing during the recess either.

39. The respondents' Counsels have argued, quite rightly, that the petitioners violated the rules in this regard. They want the application heard in the normal manner or dismissed. The petitioners counsel has on his part relied on Article 159(2)(d) of the Constitution and asked the Court to apply the principle of substantive justice and allow the application.

40. When the application first came before Court, Mr Ogolla informed the Court that there was an amended notice of motion. He also submitted that the application was an urgent one and required to be heard during the vacation. The Court then certified the matter urgent and admitted it to hearing during the vacation. The petitioners were ordered to serve and the Court set a hearing date

41. In doing so the Court exercised its discretion based on the facts disclosed in the application. I must also point out that the requirement that an applicant seek leave to be heard during the vacation or recess is only a procedural requirement. Section 39(2)(c) cited by the respondent's counsel merely states that the Chief Justice may make rules for hearing of applications or matters during the vacation. It is pursuant to this section that rules 15 to 19 of the High Court (Organization and Administration) Rules were promulgated. Furthermore, rule 17 is clear that it is within the discretion of the Duty Judge to decide whether there is urgency which would require that a matter be heard during the recess.

42. Further still, rule 3 of the rules requires that the Court applies the principle of substantive justice devoid of Procedural technicalities. Rule 3 provides as follows.

> ***(1) "Despite any provision in these rules, the Court shall administer justice without un due regard to procedural technicalities as contemplated under Article 159(2)(d) of the Constitution .***
>
> ***(2) A proceeding before the Court shall not be rendered in valid merely because a party has failed to comply with any aspect of these rules, but the Court has the discretion to invalidate any proceedings for reason to be recorded.***
>
> ***(3) Where any party fails to comply with these rules or the relevant practice Directions, the Court may having regard to the seriousness of the non-compliance and generally to the circumstances of the case give appropriate directions.*** (Emphasis)
>
> ***(4) . . . "***

43. The rules appreciate that the essence of litigation is to accord parties a fair hearing and just determination of cases. In case of failure to comply with the procedure, the fundamental consideration should be the seriousness of the **non-compliance** with the rules and whether the noncompliance can invalidate proceedings. The rules leave the matter at the discretion of the Court recognizing the principle that the Court should do substantive justice.

44. Bearing the above in mind, I am of the considered view that the omission in including a specific prayer for leave to hear the application during the recess cannot be a ground for invalidating otherwise lawful pleadings. The respondents do not dispute the fact that the matter is urgent, but their only quarrel is that leave was not sought for hearing during recess. I note that as the duty judge, I admitted the matter for hearing during vacation, and there would be no good reason to invalidate the proceedings for lack of a prayer for such leave.

45. In arriving at this conclusion,, I take guidance from sections 1A and 1 B of the Civil Procedure Act (cap 21) and the decisions on the oxygen principle, that the overriding objective is to facilitate just, expeditious, proportionate, and affordable resolution of disputes, and that in interpreting any provisions of the Act and rules the Court should give effect to the overriding principle. And for purposes of furthering the overriding objective the Court should handle matters with the ultimate aim of attaining just determination of proceedings, efficient disposal of business of the Court and efficient use of available resources.

46. These principles were echoed in the case of ***Abok James Odera t/a AJ Odera & Associates V John Patrick Machira t/a Machira & Co. Advocates*** [2013]eKLR where the Court of Appeal stated-

> ***"The principle confers on the courts considerable latitude in the exercise of its discretion in the interpretation of the law and rules made there under.***
>
> ***The aim of the overriding objective principle is to enable the Court achieve fair, just, speedy, prepositionate, time and cost saving disposal of cases before it ….The application of the overriding objective principle, does not operate to uproot established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness (s*ee Kariuki Network Limited & another v Dally & Figgis Advocates Civil Application No Nai 293 of 2009)**

47. The Court went on to state that in applying or interpreting the law or rules made there under the Court is under duty to ensure that the application or interpretation being given to any rule will facilitate the just expeditious proportionate and affordable resolution of appeals (cases).

48. Applying the above principle to this case, I am of the considered view that it will achieve a broader sense of justice in the finding that failure to include a precise prayer for leave to hear the application during the recess did not in any way cause prejudice to the respondents. I therefore find that the amended motion is properly before Court.

49. The next and main issue for determination is whether or not the Court should grant the Conservatory Order sought by the petitioners. Prayer 3 of the amended motion seeks a conservatory order stopping the swearing in of members of the National Assembly and the Senate pending the hearing and determination of this petition.

50. The grounds upon which the motion is based are, among others, that the just ended election of the new members of Parliament did not achieve the two-third gender principle, despite the period for implementation of this constitutional requirement having been definitively interpreted by the supreme Court in ***RE The Matter of Gender representation in the National Assembly and the Senate,* Advisory Opinion No 2 of 2012** which put the date of passing the necessary legislation to be 27th August 2015. Further reference was made to other decisions of the High Court which required that legislation be enacted to implement the two third gender principle.

51. The petitioners argued that any attempt to establish a government otherwise than in accordance with the Constitution is unlawful and, therefore, Parliament as one of the State Organs, must comply with the requirements of the Constitution.

52. According to the petitioners, following the declaration of election results of the 8th August 2017 General elections, the elected members of the National Assembly and the Senate do not meet the constitutional threshold in terms of gender parity. In this regard, the petitioners argue, the non-compliant Parliament may hold its first sittings anytime and, for that reason, there is justification to grant a conservatory order to forestall such an eventuality pending the hearing and determination of the petition.

53. The respondents' counsel opposed the application submitting that it the Constitution determines when Parliament must sit and, therefore, a conservatory order would go against the dictates of the same Constitution. They also argued that such an order would be against public interest because there are many duties awaiting the new Parliament which it must perform hence granting a conservatory order is not the best course to take.

54. Rule 23 of the Mutunga rules provides that despite any provision to the country a judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim orders. In this regard, granting a conservatory order is at the discretion of the Court. There are however, principles the Court should bear in mind when considering an application for conservatory orders.

55. A party who moves the Court seeking conservatory orders must show to the satisfaction of the Court that his or her rights are under threat of violation, are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending cause or petition.

56. In other words, an applicant should demonstrate to the Court that she/he has a prima facie case with a probability of success and that should the court not grant the conservatory order sought, she/he will continue to suffer prejudice while awaiting determination and her/his cause.

57. That is what Musinga J (as he then was) said in the case of ***Rights Education and Awareness (CREW) and 7 others v Attorney General [2011] eKLR***, that at this stage a party seeking a conservatory order is only required to demonstrate that he has a Prima facie case with a likelihood of success and that unless the conservatory order is granted, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.

58. A conservatory order would normally issue where there is real impending danger to violation of the Constitution or fundamental rights and freedoms with a consequence that a petitioner or the public at large would suffer prejudice unless the court intervenes and grants Conservatory orders. In such a situation, the Court would issue a conservatory order for purposes of preserving the subject matter of the dispute.(***Bidco Oil Refineries Ltd v Attorney General & 3 others [2012] eKLR)***

59. In the case of ***Centre for Human Rights and Democracy & another v the Judges and Magistrates vetting Board & 2 Others [2012]*** it was stated that under Article 23(3)(c) of the Constitution the Court had powers to grant Conservatory Orders at any stage of the proceedings if it deemed it fit to do so, but had to be satisfied with the credential of the petitioners, the *prima facie* correctness or nature of information available to Court, that the grievances are genuine, legitimate, deserving and or appropriate, and the applicant had shown or demonstrated the gravity and seriousness of the dispute. A party is not supposed to engage in a mild, vague indefinite or reckless allegations against the respondent.

60. The role of this Court is to enforce observance of the Constitution and the law by everybody and ensure that basic human rights, and fundamental freedoms guaranteed by the Constitution are respected, protected and enhanced. This is in appreciation that rights are granted for enjoyment.

61. In this regard, the Court stated in the case of ***Centre for Human Rights and Democracy & another v the Judges and Magistrates vetting Board & 2 Others*** ***(supra)*** that;

> "***Where a legal wrong or legal injury is caused to a person or to determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has power to grant appropriate reliefs so that the aggrieved party is not rendered helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by in action or omission"***

62. In ***Judicial Service Commission V Speaker of the National Assembly Another [2013]eKLR*** the Court again stated that;

> "***Conservatory orders… 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" (Emphasis)***

63. And as stated by the **Supreme Court** in ***Gatiru Peter Munya v Dickson Mwaura Kithinji & 2 Others [2014]eKLR***,

> ***"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 adjudicatory authority of the court in the Public interest. Conservatory orders therefore are not unlike interlocutory injunctions linked to such private party issues on 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 the case bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes." (emphasis)***

64. It cannot be argued that the present petition falls outside the principles stated in the above decisions. The grievances raised are neither frivolous nor illegitimate. The petitioners have raised legitimate, genuine and deserving constitutional concerns regarding the composition of Parliament with respect to the two third gender rule.

65. However, taking into account the principles for granting conservatory orders enunciated in the decision referred to above and the facts of this petition, the fundamental question this Court must determine is whether the petitioners have made a case deserving grant of conservatory orders at this stage. And in doing so, the Court must look at the prayers in the petition and determine the suitability of granting the order sought.

66. The reliefs sought in the petition are as follows;

> ***a. A declaration that the Composition of the National Assembly and the Senate has failed to meet the Constitutional threshold of the not more than two thirds, gender principles.***
>
> ***b. A declaration that the failure by parliament to meet the not more than two thirds gender principle contemplated under Article 27(8) and 81(b) amounts to a violation of the rights of women to equality and freedom from discrimination and a violation of the Constitution.***
>
> ***c. An order in the nature of mandamus directing parliament that the first and only order of business is to pass the necessary legislation to implement the not more than two thirds gender principle.***

67. Juxtaposing the above prayers *visa vis* the prayer for a conservatory order sought in the motion, the question that presents itself is what is the conservatory order intended to achieve at this stage? Taking the view that a Conservatory order is meant to preserve the subject matter or prevent further breach pending the determination of a pending cause or petition, one is left wondering whether in reality the petitioners intended that they be granted the conservatory orders sought in the motion while awaiting the hearing of their petition.

68. My understanding of the petitioners' prayers is that they want declarations to the effect that Parliament as constituted violates the constitution. They also seek in prayer (c), of the petition, a command in form of an order from the Court directing the National Assembly to enact the elusive legislation to implement the two third gender principle.

69. If that be the petitioners' prayer, Parliament and cannot transact business before members of the two Houses subscribe to the oath of office as required under Article 74 of the Constitution. That would inform why during submissions, the petitioners' Counsel seemed to agree with the respondents' counsel that swearing in of members of Parliament is a constitutional requirement, and that Parliament must commence its sittings within thirty (30) days after election as required by Article 126(2) of the Constitution.

70. Having considered this application, perused the prayers in the petition as well as the grounds upon which the motion is based, it is clear that the amended notice of motion to seek conservatory orders was merely an afterthought. The petitioners' intention was to have the petition heard as a matter of urgency before they amended their motion to introduce prayers for conservatory orders.

71. I do not see how the petitioners will benefit from a conservatory order which as conceded by their own counsel, can only last up to the time Parliament sits. It is also important to note that the petitioners are not seeking to bar members of Parliament from being sworn in at all, at least not from what they seek in their petition. Thus far the essence of a conservatory order would, in my respectful view appear to be lost.

72. Having given due consideration to the application before me, submissions by counsel from both sides, the nature of the material on record, and decisions on granting conservatory orders, I am not satisfied that the petitioners' motion for conservatory orders is for granting.

73. Consequently, the amended Notice of motion dated 16th August 2017 and filed on the same day is declined and dismissed with no order as to costs.

Dated Signed and Delivered at Nairobi this 24th Day of August, 2017

E C MWITA

JUDGE