REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 167 OF 2016

IN THE MATTER OF ARTICLE 22 (1)

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 10, 47, 73, 159, 172, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010

MICHAEL OSUNDWA SAKWA…...…….PETITIONER

-VERSUS-

CHIEF JUSTICE AND PRESIDENT

OF THE SUPREME COURT OF KENYA…….....……..1ST RESPONDENT

JUDICIAL SERVICE COMMISSION…….....……..2ND RESPONDENT

AND

KENYA MAGISTRATES AND

JUDGES ASSOCIATION……1ST INTERESTED PARTY

LAW SOCIETY OF KENYA……..2ND INTERESTED PARTY

PRINCIPAL JUDGE

OF THE HIGH COURT……..3RD INTERESTED PARTY

AHMEDNASIR ABDULLAHI…….....……4TH INTERESTED PARTY

RULING

Introduction

1. The Petitioner herein, **Michael Osundwa Sakwa,** is described as an adult male of sound mind residing and working for gain in Nairobi as an Advocate of the High Court of Kenya.

2. The 1st Respondent is the **Chief Justice** and President of the Supreme Court of Kenya appointed under Article 166 (1) (a) of The Constitution of Kenya and is the Head of the Judiciary and the Chairman of the

Judicial Service Commission, the 2nd Respondent herein (hereinafter referred to as "the Commission").

3. The 2nd Respondent is the **Judicial Service Commission** appointed under Article 171 of the Constitution of Kenya and it is pleaded that its functions as set out under Article 171 (1) (b) of the Constitution of Kenya include the review and making of recommendations on the conditions of service of Judges.

4. The 1st Interested Party, the **Kenya Magistrates and Judges Association** (hereinafter referred to as "the Association") is a society of Magistrates and Judges registered under section 10 of the ***Societies Act***, Cap. 108 of the Laws of Kenya.

5. The 2nd Interested Party, the **Laws Society of Kenya**, is a society of Advocates established under section 3 of the ***Law Society of Kenya Act***, Cap. 18 of the Laws of Kenya.

6. The 3rd Interested Party, the Principal Judge of the High Court is a constitutional position created by Article 165(2) of the Constitution.

7. The 4th Interested Party, **Ahmednasir Abdulllahi**, in an advocate of the High Court entered into the roll of Senior Counsel and is a former Law Society's representative to the Judicial Service Commission.

8. What provoked these proceedings was the decision made by the Chief Justice on 15th April, 2016 by which the Chief Justice transferred 105 Judges of the High Court and directed that the said Judges report to the new stations by the 2nd day of June, 2016.

Petitioner's Case

9. According to the Petitioner, this decision was in total disregard of The Constitution of Kenya, ***Judicial Service Act, Cap. 185B***, ***The High Court (Organization and Administration) Act***, No. 27 of 2015, ***the Judiciary Transformation Framework 2012-2016*** and the ***Judiciary Transfer Policy & Guidelines for Judicial Officers***.

10. The said transfer, it was contended is intended or will pre-empt any such lawful annual ordinary transfer of Judges due for the 30th day of September, 2016 when the Chief Justice will have left office as he is due to retire on 16th June, 2016. The said transfer, it was averred, was contrary to ***The Judiciary Transformation Framework 2012-2016*** together with the ***Judiciary Transfer Policy Guideline for Judicial Officers*** which regulate the transfer of Judges and *inter alia* require that ordinary transfer be effected only after a Judge has served in a station for 3 years and that the transfer be effected by the 30th day of September of the year of end of tenure of the Judge's at the station. To the Petitioner, this timing is intended to enable the Judge on transfer complete matters and applications pending before him or her in order that he/she may commence duty at the next station in January of the year subsequent to the annual transfer chain. However, one of the Judges affected by the said transfers had served for less than a period of 8 months at Milimani High Court.

11. It was inferred by the Petitioner that the said transfers were informed by, *inter alia*, the motive to remove certain Judges from the cases which they were handling and in which unfavourable orders had been made against the 4th Interested Party herein.

12. To the petitioner, the effect of the said transfers was that there were many other Judges at the Milimani High Court with pending matters and applications or matters and application fixed for hearing between the date of the announcement and the 2nd day of June, 2016 as well as thereafter up to the end of the year. However due to the said decision, all Judges at the Milimani High Court affected by the transfer directed that they would not continue the hearing of any pending matters or applications before them and that the matters and applications ought to be mentioned before the Presiding Judges of the respective Divisions for reallocation to Judges who would take over from them with effect from the 2nd day of June,

2016. According to the Petitioner, this state of affairs is likely to occasion a backlog of cases and delay in the hearing of matters and applications pending or scheduled for hearing before various divisions of the High Court occasioning loss to litigants and Advocates.

13. It was contended that the said decision contravenes the national values and principles of governance set out under Article 10 (2) (c) of The Constitution of Kenya on good governance, integrity, transparency and accountability. The Petitioner's case was that the decision made on the 15th day of April, 2016 was not taken in consultation with the 2nd Respondent and the Interested Parties as required by the Article 10 (2) (a) and 172 (1) (b) of The Constitution of Kenya and further that the 1st Respondent's decision made on the 15th day of April, 2016 contravenes the Petitioner's right to fair administrative action set out under Article 47(1) & (3)(b) of the Constitution of Kenya for the reasons that the transfer will not result in the expeditious, efficient and reasonable determination of the matters or applications already listed before the Judges affected by the transfer until after the reallocation of the matters and applications to Judges who will take over from them with effect from the 2nd day of June, 2016; that the transfer will not promote efficient administration and determination of the matters or applications already listed before the Judges affected by the transfer until after the reallocation of the matters and applications to Judges who will take over from them with effect from the 2nd day of June, 2016.

14. The Petitioner therefore sought the following orders:

1. **A declaration be and is hereby issued that the transfer of Judges effected in the decision made by the 1st Respondent on the 15th day of April, 2016 is unconstitutional, unlawful, null and void *ab initio*.**
2. **A conservatory order be and is hereby issued staying the implementation and enforcement of the decision made by the 1st Respondent on the 15th day of April, 2016 transferring 105 Judges.**
3. **Or that such other Order (s) as this Honourable Court shall deem fit.**

15. Pending the hearing of the petition the Petitioner, vide his application dated 27th April, 2016 sought a conservatory order staying the implementation and enforcement of the decision made by the 1st Respondent on the 15th day of April, 2016 transferring the said 105.

16. It is this application that is the subject of this ruling.

17. According to **Mr Havi**, the Petitioner's learned counsel, the failure by the Chief Justice to adhere to the Transfer Policy amounted to a contravention of the provisions of Article 10 of the Constitution which enjoin the Chief Justice as a State Officer to inter alia adhere to the national values and principles of governance in implementing public policy decisions. In his view the said Transfer policy cannot be ignored by the Chief Justice when carrying out his constitutional mandate.

18. It was submitted by learned counsel that unless the conservatory orders sought are granted, the entire petition would be rendered academic and he relied on **Bidco Oil Refineries Ltd –vs- Attorney General & 3 others (2012) eKLR** for the position that conservatory orders are meant to preserve the subject matter of the dispute. He also cited **The Centre for Human Rights and Democracy & Another –vs- The Judges and Magistrates Vetting Board & 2 Others (2012) eKLR** for the yardsticks that guide the grant of conservatory orders. In his view the peril that is meant to be prevented is that if the Judges report to their new stations and the petition is allowed, the cost and damage that shall have been occasioned by such eventuality would be more than the damage that the grant of the conservatory order would cause.

19. Mr Havi also relied on **Justice Amraphael Mbogholi Msagha –vs- Chief Justice of the Republic of Kenya & 7 Others (2006) eKLR** on the need to adhere to the Transfer Policy. In the learned counsel's view the issues raised in the petition cannot be termed as frivolous. According to him the role of the Judicial Service Commission in setting the terms and conditions of service for judges encompasses the determination of the stations of the said judicial officers hence the need for their consultation. Based on **Vyas, Yash** in his article **"The Independence of the Judiciary: A *Third World Perspective*** published in

Third Legal Studies: **Vol. 11, Article 6**, it was submitted that the power to transfer judges must be exercised within certain acceptable parameters and if not so exercised or if exercised on ulterior motives are liable to be struck down by the Court.

Respondents' Case

20. According to the Respondents, this application is an abuse of the court process and is therefore incompetent and bad in law. It was contended that the appointment of the 1st Respondent as the Chief Justice of the Republic of Kenya was in accordance with the due process of the law.

21. It was averred that the mandate of he 2nd Respondent under Article 172(1)(b)(i) and (ii) of the Constitution does not extend to transfer of judges but only deals with the review and recommendation of the judges terms of service. On the other hand the mandate of transferring judges belongs to the Chief Justice pursuant to section 13(1) of the ***High Court (Organisation and Administration) Act No. 27 of 2015***. It was therefore averred that the Chief Justice is not required to consult and or inform the 2nd Respondent of his decision to transfer judges. To the Respondents, a policy cannot override an express provision of an Act of Parliament.

22. According to the Respondents, Part VII of the ***Judiciary Transfer Policy and Guidelines for Judicial Officers*** gives discretion to the Chief Justice to transfer judges notwithstanding the specific provisions in the policy so as to foster efficient, effective and fair administration of justice and in the interest of the judiciary. In effecting the said transfers, it was contended that the Chief Justice took into account the newly created High Court Stations which were geared towards bringing justice closer to the people. To them the transfer of judges will lead to clearing of backlogs as opposed to creating the same.

23. To the Respondents, pursuant to Article 160(5) of the Constitution, a member of the judiciary is not liable in any action or suit in respect of anything done or omitted to be done in good faith and in lawful performance of a judicial duty hence there is no cause of action capable of determination by this Court.

24. In their submissions which were highlighted by their learned counsel **Mr Omogeni, SC**, the Respondents relied on **Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR** and **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others, S.C. Application No. 5 of 2014.**

25. The Respondents therefore submitted that the principles that guide whether conservatory orders should be granted by the court are:

a. Whether the suit is arguable and not frivolous
b. Whether the suit would be rendered nugatory unless the conservatory orders sought are granted:
c. Whether it is in the public interest that the conservatory orders sought are granted.

26. With respect to the issue whether the suit is arguable and not frivolous, it was submitted that it was glaringly perceivable that the Petitioner had purported to invoke this Court's jurisdiction over personal peccadilloes which have over time given rise to misplaced personal apprehensions, discontents and preconceptions between two officers of this Court, specifically **Mr. Nelson Havi** and **Mr. Ahmednasir Abdullahi**, but which tiffs have no legal standing whatsoever before this Court. To the Respondents, the petitioner herein had tactfully managed to drag an ego contest into the corridors of justice by simply making reference to a few provisions of the Constitution and relied on **Franklin Mithika Linturi vs. Safaricom Limited [2009] eKLR,** where the court quoted the case of **Mpaka Road Development vs. Kana [2004] 1 EA 161** in which **Ringera J** (as he then was) stated as follows:

> **"A matter would only be scandalous frivolous and vexatious, if it would not be admissible in evidence to show the truth of any allegation in the pleading which is sought to be impugned, for example, imputation of character where character is not in issue. A pleading is frivolous if it lacks seriousness. It would be vexatious, if it annoys or tends to annoy. It would annoy if it is not serious or contains scandalous matter,**

irrelevant to the action or defence. A scandalous and/or frivolous pleading is Ipso facto vexatious."

27. It was contended the Petition herein had been steered on a character assassination tangent against both the 1st Respondent and officers of this Court who are not even parties to the suit herein and as such devoid of any cogent evidence in support of the wild allegations, the suit herein remains scandalous, vexatious and an abuse of the court process thus rife for summary determination. Reliance was placed on **CFC Stanbic Bank Limited vs. Echuka Farm Limited & another [2016] eKLR, Tom Odhiambo Achillah T/A Achilla T.O & Co Advocates vs. Kenneth Wabwire Akide T/A Akide & Company Advocates & 3 others [2015] eKLR.**

28. To the Respondents, under Article 1(1) and (3) (c) of the Constitution of Kenya, 2010 sovereign power of the people is delegated to various State organs in the exercise of their including, the Judiciary and Independent tribunals and anchored upon the aforestated delegation, Article 161 (2) of the Constitution of Kenya, 2010 establishes the office of the Chief Justice, who is the head of the judiciary while Article 165(1) thereof establishes the High Court. Section 5(1) of the ***Judicial Service Act, 2011*** on the other hand provides for the powers of the Chief Justice as the head of the judiciary with the power to exercise general direction and control over the Judiciary." Such powers according to section 13(1) of the ***High Court (Organization and Administration) Act No. 27 of 2015*** **m**ay, whenever it is necessary for purposes of promoting effective, prompt and efficient discharge of judicial service encompass the power to transfer a judge from one station to another; or deploy a judge from one division to another". The **Judiciary Transfer Policy and Guidelines for Judicial Officers** formulated under the provisions of the **High Court (Organization and Administration) Act No. 27 of 2015,** on the other hand provides under part II and VII on Responsibility of Transfers and Discretion that:

II

"Transfer decisions shall be made by the Chief Justice as the head of the Judiciary provided that s/he may delegate the implementation of this policy to the Registrar responsible for Magistrates Courts and the Principal Judge of the High Court."

VII

a. ***"notwithstanding anything contained in this policy, the efficient, effective and fair administration of justice and the interests of the judiciary shall be of paramount consideration in all transfer decisions.***
b. ***In regards to matters which are not specifically provided or covered by this policy, the Chief Justice may issue such general or particular directions as s/he may consider necessary to effectuate this policy and the smooth administration of justice.***
c. ***In case any doubt arises with regard to any aspect of this policy or its implementation, the same will be clarified by the chief justice and such clarification shall be treated as part of this policy."***

29. In line with the power to administer and organize the judiciary, it was submitted that the Notice dated 15th April 2016 by the 1st Respondent had the effect of posting judges to the newly created stations of **Kiambu, Nanyuki, Nyamira, Chuka, Lodwar, Kapenguria, Voi and Marsabit** towards efficient, effective and fair administration of justice which is of paramount consideration. To the Respondents, the creation of the new stations was for purposes of bringing justice closer to the people thus decongesting the Courts surrounding the new stations contrary to the Petitioner's assertion that the said action would cause backlogs.

30. On the principles that govern the Posting and Transfer policy, it was submitted that the ***Judiciary Transfer Policy and Guidelines for Judicial Officers*** provides that:

"The Policy shall be based on the following principles:

1. ***Judicial officers accept, upon appointment, to serve the people of Kenya wherever they may be***

called upon to serve within the Republic.

2. **…….**
3. **…….**
4. **……**
5. ***there are circumstances which may require a judicial office to be transferred to a particular station, even though this may not be in line with the rotation required in the transfer policy".***

31. It was the Respondents' submission that in reaching its decision dated 15th April 2016, the Chief Justice a**cted reasonably, in good faith and upon lawful and relevant grounds anchored upon the Constitution and statute law and most importantly in the public interest for purposes of bringing justice closer to the people and that no iota of evidence had been brought before this Court to show that the 1st respondent acted with malice and *mala fides*.**

32. In this regard it was submitted that consideration should be given to the provisions of **Article 160 (5) of the Constitution of Kenya** which provides that:

> ***"A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function."***

33. To the Respondents, the 1st Respondent while exercising his Constitutional discretion was not subject to the direction and/or mandatory consultation/counsel of any body/organ and as such he cannot be found liable for actions that were done in good faith.

34. It was submitted on behalf of the Respondents that towards determining whether the petition herein is arguable and not frivolous, it behoves this honourable Court to also determine whether the Constitutional violations alleged by the petitioner in the Constitutional petition herein dated 27th April 2016 were pleaded with the requisite degree of precision so as to be entertained by this honourable Court. It was further contended that despite being a Constitutional petition, the instant cause is marred with numerous allegations against the 1st Respondent and other third parties who are not even parties to the suit. To the Respondents, the few Constitutional provisions that have been strewn in the petition albeit haphazardly have only been towards an attempt to breathe life into pleadings that are in themselves incurable. In support of this submission the Respondent relied on **S. W. M v G. M. N (2012) eKLR**, where **Majanja, J** while citing ***John Kimani Mwangi vs. Town Clerk Kangema*** **Nairobi Petition 1039 of 2007** adopted the well founded principle of pleading constitutional infringement with specificity as follows:

> ***"Our courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of Rights, they must state the provision of the Constitution allegedly infringed in relation to them, the manner of infringement and the nature and extent of that infringement…The reason for this requirement is two fold; first the respondent must be in a position to know the case to be met so as to prepare and respond to the allegations appropriately. Secondly, the jurisdiction granted by section 84 of the Constitution is a special jurisdiction to enforce specific rights which are defined by each section of the bill of rights. It is not a general jurisdiction to enforce all rights known to man but specific rights defined and protected by the Constitution. It is not sufficient to rely on a broad notion of unconstitutionality but rather point to a specific provision of the Constitution that has been abridged."***

35. To the Respondents, though the Petitioner contended that Articles 10 (2) (a), 47 (1) & (3) (b) and Article 73 (1) (a), (b) and (2) (b) to (e) of the Constitution of Kenya had been infringed by the transfers effected vide the Notice dated 15th April 2016, none of those provisions supported the Petitioner's case. In regard to Articles 10 (2) (a) of the Constitution of Kenya, the 1st Respondent in exercising his judicial functions as donated by the Constitution was not under the obligation to consult any of the parties herein, much less the petitioner. In regard to Articles 47 (1) & (3) (b) of the Constitution of Kenya, no evidence was tendered before this Court to show that no other judge of the High Court in Nairobi possesses the diligence and exactitude to deliver justice in the manner and form of the two transferred judges. Further,

the pre-emptive nature of the Petitioners assertions does not take into account the paramount principle of efficient, effective and fair administration of justice all over Kenya, including the newly created High Court stations and not just in Nairobi. In regard to Article 73 (1) (a), (b) and (2) (b) to (e) of the Constitution of Kenya, the Respondents averred that no iota of proof was tendered to show that the transfers by the 1st Respondent lacked objectivity and impartiality and was not geared towards commitment in service to the people.

36. Accordingly, it was averred that the petition lacks specificity, which renders the petition fatally incompetent and hopeless.

37. With respect to the issue whether the petition will be rendered nugatory unless the conservatory orders sought are granted, it was submitted that avenues do exist where matters can be certified urgent to be heard on a priority basis and that nothing in this instance has been tabled before court to show that the Court presided by any other judge has frowned upon the aforestated matters being heard on a priority basis. Further to the foregoing, even if the matters herein above stated were to be heard before another judge the effect of which becomes that a judgement is delivered in a manner that substantially aggrieves a specific party, appropriate appellate remedies do exist in the law. It is thus extremely undesirable for this court to be called upon to make a determination in regard to a matter that is before another Court with the same jurisdiction. In actual sense, the Applicant's Petition is tantamount to forum shopping. In this respect the Respondents relied on **Julius Otieno Polo & another vs. Director of Public Prosecutions & another [2015] eKLR**, where the High Court expressed itself as follows;

> **"The petitioners have alleged bias against this court because the judge has made findings and orders in a previous petition with similar facts. Judicial bias is the judge's bias towards one or more of the parties to a case over which the judge presides and judicial bias is not enough to disqualify a judge from presiding over a case unless the judge's bias is personal or based on some extra-judicial reason, (see definition of judicial bias in Black's Law Dictionary, 9th Edition). In ANDREW ALEX WANYANDAH VRS THE ATTORNEY GENERAL & KENYA RAILWAYS CORPORATION – NAIROBI MILIMANI HCCCC NO.844 OF 2005, Justice Hatari Waweru was asked to disqualify himself on the allegations of begin biased due to several comments he had made when the matter was proceeding. The judge noted as follows:**
>
> > **"There is nothing like a litigant veto of the court or judge hearing his matter; litigants cannot choose their judges. Applications for disqualification of judges would not be lightly allowed., that would tend to erode public confidence in the courts and the determination of justice."**

38. It was accordingly submitted that the Petitioner's case and specifically the cases cited by him shall suffer no prejudice of the transfer herein impugned is effected. Further, it is in the greater interest of justice that the said transfer Notice takes effect.

39. On the issue whether it is in the public interest that the conservatory orders sought are granted, the Respondents relied on ***Black's Law Dictionary*, 9th Edition** which defines public interest as:

> **"…the general welfare of the public that warrants recognition and protection, something in which the public as a whole has stakes, especially that justifies Governmental regulation". In litigating on matters of "general public importance", an understanding of what amounts to 'public' or 'public interest' is necessary. "Public" is thus defined: concerning all members of the community; relating to or concerning people as a whole; or all members of a community; of the state; relating to or involving government and governmental agencies; rather than private corporations or industry; belonging to the community as a whole, and administered through its representatives in government, e.g. public land."**

40. It was reiterated that the Notice dated 15th April 2016 which transferred 105 judges of the High Court, had the effect of posting judges to the newly created stations of **Kiambu, Nanyuki, Nyamira, Chuka,**

Lodwar, Kapenguria, Voi and Marsabit towards the efficient, effective and fair administration of justice which is of paramount consideration.It was the Respondents' submission that this authority was exercised by the 1st respondent herein in the interest of justice and for greater public good, towards bringing justice closer to the people and this is in line with the First Pillar of the Judiciary Transformation Framework 2012 – 2016; People Focused Delivery of Justice.

41. On the other hand, the said notice of transfer is impugned by the Petitioner herein on grounds solely the few cases that the Petitioner has an interest in will not be heard and determined on merit by judges that he prefers (let alone the avenues for redress provided by the law). This Court has thus been called upon to balance the various interests as herein explicated. The Respondents relied on **Kenya Hotel Properties Limited vs. Willisden Investments Limited & 4 Others, Nairobi Court of Appeal, Civil Application 24 of 2012**.

42. The Respondents submitted that it would be an affront to justice if the people of **Kiambu, Nanyuki, Nyamira, Chuka, Lodwar, Kapenguria, Voi** and **Marsabit** counties were to be denied easy access to justice on account of a personal commercial squabble between a few officers of this Court. The Respondents also relied on **Multiple Hauliers East Africa Limited vs. Attorney General & 10 others [2013]eKLR** where the court relied on **Nyamu, Js** decision (as he then was) in **KenyaGuards Allied Workers Union v Security Guards Services & 38 Others, Misc. 1159 of 2003** where he expressed himself as follows:

> **"Where national or public interest is denied the gates of hell open wide to give way to deforestation, pollution, environmental degradation, poverty, insecurity and instability. At the end of the day, we must remember those famous words of a famous jurist-Justice is not a cloistered virtue. I must add that where justice is done and public interest upheld, it is acknowledged by the public at large, the sons and daughters of the land dance and sing, and the angels of heaven sing and dance and Heaven and Earth embrace. By upholding the public interest and treating it as twinned to the human rights we shall be able to do away with poverty eradication programmes and instead we shall have empowered our people to create real wealth for themselves. Public Interest must be the engine of the millennium and it must where relevant occupy centre stage in the courts…"**

43. To the Respondent, the immunity bestowed upon members of the judiciary by Article 160 (5) of the Constitution of Kenya 2010, is intended to protect and safeguard judicial officers from being personally culpable for acts they performed in good faith and is meant to enable the officers to perform the functions of the office without fear of being held personally culpable, if acting in good faith, while discharging the functions of the office under the Constitution or the Act. To them, it would thus be against the public interest to sue a judicial officer, who discharged their duty within the limits of the Constitution and statutes and in good faith. Support for this submission was sought from **Maina Gitonga vs. Catherine Nyawira Maina & another [2015] eKLR** where the High Court stated as follows:

> **"it is undoubted that under the established doctrine of judicial immunity, a judicial officer is absolutely immune from a criminal or civil suit arising from acts taken within or even in excess of his jurisdiction. Judicial immunity is necessary for various policies. The public interest is substantially weakened if a judge or a magistrate allows fear of a criminal or civil suit to affect his decisions. In addition, if judicial matters are drawn into question by frivolous and vexatious actions, 'there never will be an end of causes: but controversies will be infinite...judicial officers should not be put in a position which forces them to look over their backs every time they make a decision. Whenever a judicial officer has to make a decision, he should make such a decision in good faith and without fear that he will be taken to court for making the decision. Whenever a party wants to challenge the decision of a judicial officer by way of a judicial review, he should not make the judicial officer who made the decision a respondent. …"**

44. It was averred that as the Petition herein trifles the doctrine of public interest by not only hindering justice to be delivered to the people of Kenya but also by suing a Judicial officer who acted within their

judicial authority and in good faith, the petition should therefore be struck out or dismissed with costs.

2nd Interested Party's Case

45. The 2nd interested party, the **Law Society of Kenya**, filed the following grounds of opposition:

1. **The Petitioner has no locus standi to bring these proceedings and has not demonstrated any interest against the actions of the Chief Justice of the Republic of Kenya.**
2. **The Petitioner has not demonstrated any prejudice to be occasioned whatsoever either by the actions of the Chief Justice of the Republic of Kenya or by the court declining to grant the conservatory orders sought.**
3. **The discretion to transfer Judges is vested in the Chief Justice of the Republic of Kenya pursuant to the Constitution, the Judicial Service Act and the High Court (Organization and Administration) Act.**
4. **The Notice of Motion is untenable in law against the basis of the principle of mootness.**
5. **The Petitioner has not established any of the grounds for the grant of conservatory orders and the doctrine of proportionality militates against the grant of the orders sought.**
6. **The Notice of Motion is simply vexatious and an abuse of court process.**

46. It was submitted by the 2nd interested party, through its learned counsel, **Mr Mureithi**, that the Petitioner had not established the grounds that would warrant the grant of the conservatory orders sought. According to learned counsel whereas the petition was about the transfer of judges none of the wants the Court to determine is a question of policy as opposed to law a mandate which the Court does not have.

47. It was submitted that the rights under Article 47 of the Constitution complained of would only apply to the judges and not to anyone else. Accordingly, it was submitted that no rights had been violated thereunder or threatened with violation or infringement. It was submitted that there is no law that requires that a Judge remains in a station for three months. Neither is there a law that requires that a transferred judge reports to the new station after three months. To the contrary what the law requires is that such a Judge reports to the new station within three months.

48. According to the Law Society, the Chief Justice followed the law did not break any law as alleged. Since the petitioner has not shown that any of the cases cited in these petition will not be heard by any other Judge, it was submitted that the Petitioner had not shown that he stood to suffer any prejudice. To the Society, there is nothing to stop the Judges hearing the said matters from being retransferred back to Nairobi.

49. On the issue that the 1st and 2nd interested parties were not consulted, it was submitted that the Commission is comprised of representatives of the judiciary, as well as the Law Society and there was no need for separate consultation. To the Society this petition is frivolous and should be dismissed.

3rd interested party's case

50. The third interested party, the Principal Judge of the High Court, through his learned counsel associated himself with the submissions of the Respondents and the said interested party.

Determination

51. I have considered the application the subject of this ruling, the various responses thereto, the submissions made on behalf of the parties hereto and the authorities cited.

52. Before delving into the merits of the application, an issue was raised on the Petitioner's *locus standi* to commence these proceedings was raised. It was contended that since the Petitioner is not one of the Judges affected by the transfer, he had no *locus standi* to institute these proceedings particularly under Article 47 of the Constitution.

53. On this issue, it was held in **Ms. Priscilla Nyokabi Kanyua vs. Attorney General & Interim Independent Electoral Commission Nairobi HCCP No. 1 of 2010** as follows:

> **"Over time, the English Courts started to deviate and depart from their contextual application of the law and adopted a more liberal and purposeful approach. They held that it would be a grave lacuna in the system of public law if a pressure group or even a single spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. The strict rule of *locus standi* applicable to private litigation is relaxed and a broad rule is evolved which gives *locus standi* to any member of public acting *bona fide* and having sufficient interest in instituting an action for redressal of public wrong or public injury by a person who is not a mere busybody or a meddlesome interloper; since the dominant object of Public Interest Litigation is to ensure observation of the provision of the constitution or the law which can be best achieved to advance the cause of the Community or public interest by permitting any person, having no personal gain or private motivation or any other oblique consideration, but acting, *bona fide* and having sufficient interest in maintaining an action for judicial redress for public injury to put the judicial machinery in motion like *action popularis* of Roman Law whereby any citizen could bring such an action in respect of public delict. Standing will be granted on the basis of public interest litigation where the petition is *bona fide* and evidently for the public good and where the Court can provide an effective remedy…In Kenya the Court has emphatically stated that what gives *locus standi* is a minimal personal interest and such interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population. The court equally has recognised that organisations have rights similar to that of individual private member of the public. A new dawn was the ushered in and the dominion of Private Law and its restrictive approach was dealt a final blow. A new window of opportunity emerged in the area of Public Law and shackles of inhibition in the name of *locus standi* were broken and the law was liberalised and a purposeful approach took the driving seat in the area of Public Law. In human rights cases, public interest litigation, including lawsuits challenging the constitutionality of an Act of Parliament, the procedural trappings and restrictions, the preconditions of being an aggrieved person and other similar technical objections, cannot bar the jurisdiction of the court, or let justice bleed at the altar of technicality. The court has vast powers under section 60 of the Constitution of Kenya, to do justice without technical restrictions and restraints; and procedures and reliefs have to be moulded according to the facts and circumstances of each case and each situation. It is the fitness of things and in the interest of justice and the public good that litigation on constitutionality, entrenched fundamental rights, and broad public interest protection, has to be viewed. Narrow pure legalism for the sake of legalism will not do. We cannot uphold technicality only to allow a clandestine activity through the net of judicial vigilance in the garb of legality. Our legal system is intended to give effective remedies and reliefs whenever the Constitution of Kenya is threatened with violation. If an authority which is expected to move to protect the Constitution drags its feet, any person acting in good faith may approach the court to seek judicial intervention to ensure that the sanctity of the Constitution of Kenya is protected and not violated. As part of reasonable, fair and just procedure to uphold the Constitutional guarantees, the right to access to justice entails a liberal approach to the question of *locus standi.* Accordingly in constitutional questions, human right cases, public interest litigation and class actions, the ordinary rules of Anglo-Saxon jurisprudence, that an action can be brought only by a person to whom legal injury is caused, must be departed from. In these types of cases, any person or social action groups, acting in good faith, can approach the court seeking judicial redress for a legal injury caused or threatened to be caused or to a defined class of persons represented, or for a contravention of the Constitution, or injury to the nation. In such cases the court will not assist such a public-spirited individual or social action group espousing their cause, to show his or their standing to sue in the original Anglo-Saxon conception…"**

54. The Court continued:

"In the interest of the realisation of effective and meaningful human rights, the common law position in regard to *locus standi* has to change in public interest litigation. Many people whose fundamental rights are violated may not actually be in a position to approach the Court for relief, for instance, because they are unsophisticated and indigent, which in effect means that they are incapable of enforcing their fundamental rights, which remain merely on paper. Bearing this in mind, where large numbers of persons are affected in this way, there is merit in one person or organisation being able to approach the court on behalf of all those persons whose rights are allegedly infringed. This means that human rights become accessible to the metaphorical man or woman in the street. Accessibility to justice is fundamental to rendering the Constitution legitimate. In this sense, a broad approach to *locus standi* is required to fulfil the Constitutional court's mandate to uphold the Constitution as this would ensure that Constitutional rights enjoy the full measure of protection to which they are entitled."

55. Similarly, in **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others** Civil Appeal No. 290 of 2012 the Court of Appeal stated at page 16 as follows:

"Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the argument of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus standi to file the petition. Apart from this, we agree with the superior court below that the standard guide for locus standi must remain the command in Article 258 of the Constitution."

56. Article 258 of the Constitution provides as follows:

(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

57. Long before the promulgation of the current Constitution, it was held in Shah Vershi Devji & Co. Ltd vs. The Transport Licencing Board **Nairobi HCMC No. 89 of 1969 [1970 EA 631; [1971] EA 289** that:

"Section 70 of the Constitution of Kenya itself creates no rights but merely gives a list of the rights and freedoms which are protected by other sections of Chapter V of the Constitution. It may be helpful in interpreting any ambiguous expressions in later sections of Chapter V. The word "person" is defined in section 123 as including "any body of persons corporate or unincorporated. Thus, a company is a "person" within the meaning of Chapter V of the constitution which is headed "Protection of Fundamental Rights and Freedoms of the Individual" and would be entitled to all the rights and freedoms given to a "person" which it

is capable of enjoying. The word "individual" can be misunderstood. It is not defined in the Constitution nor in the Interpretation and General Provisions Act (Cap 2). But the meaning of it in the context in which it is used is clear. If a right or freedom is given to a "person" and is, from its nature, capable of being enjoyed by a "corporation" then a "corporation" can claim it although it is included in the list of rights and freedoms of the individual". The word "individual" like the word "person", does, where the context so requires include a corporation. The word must be construed as extending, not merely to what is commonly referred to as an individual person, but to a company or corporation. Supposing the right to be given by a special Act of Parliament to a limited company, it seems impossible to suppose that they would not be within the word "individual". "Individual" seems to be any legal person who is not the general public."

58. The same issue was also dealt with by **Nyamu, J** (as he then was) in **Mureithi & 2 Others (for Mbari ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443** as follows:

"The function of standing rules include: to restrict access to judicial review; to protect public bodies from vexatious litigants with no real interest in the outcome of the case but just a desire to make things difficult for the Government. Such litigants do not exist in real life – if they did the requirement for leave would take care of this; to prevent the conduct of Government business being unduly hampered and delayed by excessive litigation; to reduce the risk that civil servants will behave in over cautious and unhelpful ways in dealing with citizens for fear of being sued if things go wrong; to ration scarce judicial resources; to ensure that the argument on the merit is presented in the best possible way, by a person with a real interest in presenting it (but quality of presentation and personal interest do not always go together); to ensure that people do not meddle paternalistically in affairs of others…Judicial review courts have generally adopted a very liberal approach on standing for the reason that judicial review is now regarded as an important pillar in vindicating the rule of law and constitutionalism. Thus a party who wants to challenge illegality, unreasonableness, arbitrariness, irrationality and abuse of power just to name a few interventions ought to be given a hearing by a court of law…The other reason is that although initially it was feared that the relaxation of standing would open floodgates of litigation and overwhelm the Courts this has in fact not happened and statistics reveal or show that on the ground, there are very few busybodies in this area. In addition, the path by eminent jurists in many countries highlighting on the need for the courts being broadminded on the issue….Under the English Order 53 now replaced in that country since 1977 and which applies to us by virtue of the Law Reform Act Cap 26 the test of locus standi is that a person is aggrieved. After 1977 the test is whether the applicant has sufficient interest in the matter to which the application relates. The statutory phrase "person aggrieved" was treated as a question of fact – "grievances are not to be measured in pounds and pence"…Although under statute our test is that of sufficient interest my view is that the horse has bolted and has left the stable – it would be difficult to restrain the great achievements in this area, which achievements have been attained on a case to case basis. It will be equally difficult to restrain the public spirited citizen or well organised and well equipped pressure groups from articulating issues of public law in our courts. It is for this reason that I think Courts have a wide discretion on the issue of standing and should use it well in the circumstances of each case. The words person aggrieved are of wide import and should not be subjected to a restricted interpretation. They do not include, if course, a mere busybody who is interfering in things that do not concern him but this include a person who has a genuine grievance because an order has been made which prejudicially affects his interests and the rights of citizens to enter the lists for the benefit of the public or a section of the public, of which they themselves are members. A direct financial or legal interest is not required in the test of sufficient interest…"

59. What comes from the foregoing is that the Courts have moved away from the strict interpretation of the *locus standi* rule in public law litigation that reached its peak in **Maathai vs. Kenya Times Media**

Trust Ltd [1989] KLR 267 where **Dugdale, J** held that only the Attorney General could sue on behalf of the public. It is now clear from the current constitutional dispensation that the Court ought to interpret the rule relating to *locus standi* liberally so as not to lock out persons with genuine grievances from accessing the seat of justice.

60. In ***Mureithi Case*** (supra) the learned Judge proceeded:

> **"In my view the Courts must resist the temptation to try and contain judicial review in a straight jacket. Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them…The applicants are members of a Kikuyu clan which contends that during the Mau Mau war (colonial emergency) in 1955 their clan land was unlawfully acquired because the then colonial Governor and subsequently the presidents of the Independent Kenya Nation did not have the power to alienate clan or trust land for private purpose or at all. In terms of Order 53 they are "persons directly affected". I find no basis for giving those words a different meaning to that set out in the case law above. The Court has to adopt a purposive interpretation. I have no hesitation in finding that the clan members and their successors are sufficiently aggrieved since they claim an interest in the parcels of land which they allege was clan and trust land and which is now part of a vibrant Municipality. I find it in order that the applicants represent themselves as individuals and the wider clan and I unequivocally hold that they have the required standing to bring the matter to this Court. Moreover in this case I find a strong link between standing and at least one ground for intervention – the claim that the land belonged to the clan and finally there cannot be a better challenger than members of the affected clan."**

61. It is therefore clear that over time the issue of standing, particularly in public law litigation has been greatly relaxed and in our case the Constitution has opened the doors of the Courts very wide to welcome any person who has *bona fide* grounds that the Constitution has been or is threatened with contravention to approach the Court for an appropriate relief. In fact, since Article 3(1) of the Constitution places an obligation on every person to respect, uphold and defend the Constitution, the invitation to approach the Court for redress as long as the person hold *bona fide* grounds for believing that the Constitution is under threat ought to be welcome. I must however hasten to add that the liberal interpretation does not mean that the rule on *locus standi* is nolonger relevant in constitutional petitions. Where it is clear that the Petitioner has completely no business in bringing the matter to Court to permit such proceedings to be litigated would amount to the Court itself abetting abuse of its process.

62. In this case the Petitioner not only contends that his rights and the rights of others are threatened with violation but that the national values and principles of governance have been violated. In light of such allegations I cannot fault the Petitioner for instituting these proceedings and I hold that he was within his right to commence these proceedings. As to whether his case is merited is another matter. *Locus standi* is a totally different thing from the merits of the petitioner's case.

63. It was further contended that the petition suffers from lack of precision. This argument has found favour with the decisions of **Anarita Karimi Njeru vs. The Republic (1976-80) 1 KLR 1283** and **Mumo Matemu vs. Trusted Society of Human Rights Alliance, CANO 290/2012 [2013] eKLR,** for the proposition that infringement of human right and fundamental freedoms must be stated with precision and not merely generalized devoid of proof thereof. On the issue whether this Court can determine the Constitutional issues raised without compliance with the requirements stipulated in **Anarita Karimi Njeru vs. Attorney General** (supra), it is my view that the said decision must now be read in light of the provisions of Article 22(3)(b) and (d) of the Constitution under which the Chief Justice is enjoined to make rules providing for the court proceedings which satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation and that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Whereas it is prudent that the applicant ought to set out with reasonable degree of precision

that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed, to dismiss a petition merely because these requirements are not adhered to would in my view defeat the spirit of Article 22(3)(b) under which proceedings may even be commenced on the basis of informal documentation. This is not to say that the Court ought to encourage and condone sloppy and carelessly drafted petitions. What in means is that:

> **"the initial approach of the courts must now not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out. But the new approach is not to say that the new thinking totally uproots all well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice."**

See **Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission & 2 Others Civil Appeal (Application) No. 152 of 2009.**

64. It must similarly be remembered that a High Court is by virtue of the provisions of Article 165 of the Constitution a Constitutional Court and therefore where a constitutional issue arises in any proceedings before the Court, it is enjoined to determine the same notwithstanding the procedure by which the proceedings were instituted.

65. In my view where it is apparent to the Court that the Bill of Rights has been or is threatened with contravention, to avoid to enforce the Bill of Rights on the ground that the supplicant for the orders has not set out with reasonable degree of precision that of which he complains has been infringed, and the manner in which they are alleged to be infringed where the Court can glean from the pleadings the substance of what is complained of would amount to this Court shirking from its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles and the dictates of the rule of law at the altar of procedural issues. Where there is a conflict between procedural dictates and constitutional principles especially with respect to the provisions relating to the Bill of Rights it is my view and I so hold that the later ought to prevail over the former.

66. It was contended that this petition is frivolous and therefore ought to be dismissed. A pleading that is frivolous was described by **Onyango-Otieno, J** (as he then was) in **Trust Bank Limited Vs. Hemanshu Suryakat Amin & Company Ltd. & Another Nairobi High Court (Milimani) HCCC No. 984 of 1999** as one that is without substance or groundless or fanciful. Such an action can properly be described as lacking in *bona fides* and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense.

65. What constitutes frivolous proceedings has been the subject of several decisions in this jurisdiction. In **Franklin Mithika Linturi vs. Safaricom Limited** (supra) a case in which the decision of **Ringera, J** in **Mpaka Road Development vs. Kana** (supra) was quoted with approval, it was stated as follows:

> **"A matter would only be scandalous frivolous and vexatious, if it would not be admissible in evidence to show the truth of any allegation in the pleading which is sought to be impugned, for example, imputation of character where character is not in issue. A pleading is frivolous if it lacks seriousness. It would be vexatious, if it annoys or tends to annoy. It would annoy if it is not serious or contains scandalous matter, irrelevant to the action or defence. A scandalous and/or frivolous pleading is Ipso facto vexatious."**

66. Similarly in **CFC Stanbic Bank Limited vs. Echuka Farm Limited & Another** (supra) the Court expressed itself as follows:

> **"To my mind for a pleading to be scandalous, vexatious or frivolous, it must be a kind of pleading which, if it were to be heard on trial, would embarrass either one or both the parties, and cause them to desire to fight each other in public or in the court. It is a kind of**

pleading which a reasonable mind cannot take to court since the court is composed or reasonable people, the unreasonableness of the pleading would cause public odium and vex the mind of reasonable people so that they think less of either one or both, or all of the parties in the matter…"

67. As to whether this is the position, I will deal with later in this ruling.

68. What then are the circumstances under which the Court grants conservatory orders? It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a *prima facie* case with a likelihood of success. Accordingly in determining this application, the Court is not required-indeed it is forbidden-from making definite and conclusive findings on either fact or law. I will therefore refrain from making any determinations whose effect would be to prejudice the hearing of the main Petition. However, apart from establishing a *prima facie* case, the applicant must further demonstrate that unless the conservatory order is granted there is real danger which may be prejudicial to him or her. See **Centre for Rights, Education and Awareness (CREAW) & 7 others vs. The Hon. Attorney General**, Nairobi HC Pet. No 16/2011, **Muslims for Human Rights (MUHURI) & 2 others vs. The Attorney General & Judicial Service Commission,** Mombasa HC Pet. No. 7 of 2011 and **V/D Berg Roses Kenya Limited & Another vs. Attorney General & 2 Others [2012] eKLR.**

69. In the Privy Council Case of **Attorney General vs. Sumair Bansraj (1985) 38 WIR 286 Braithwaite J.A**. expressed himself follows:

"Now to the formula. Both remedies of an interim injunction and an Interim declaration order are excluded by the State Liability and Proceedings Act, as applied by Section 14 (2) and (3) of the Constitution and also by high judicial authority. The only judicial remedy is that of what has become to be known as the "Conservatory Order" in the strictest sense of that term. The order would direct both parties to undertake that no action of any kind to enforce their respective right will be taken until the substantive originating motion has been determined; that the status quo of the subject matter will remain intact. The order would not then be in the nature of an injunction, … but on the other hand it would be well within the competence and jurisdiction of the High Court to "give such directions as it may consider appropriate for the purpose of securing the enforcement of … the provisions" of the Constitution…In the exercise of its discretion given under Section 14(2) of the Constitution the High Court would be required to deal expeditiously with the application, inter partes, and not ex parte and to set down the substantive motion for hearing within a week at most of the interim Conservatory Order. The substantive motion must be heard forthwith and the rights of the parties determined. In the event of an appeal priority must be given to the hearing of the appeal. I have suggested this formula because in my opinion the interpretation of the word in Section 14 (2) "subject to subsection (3) and the enactment of Section 14(3) in the 1976 Constitution must have…the effect without a doubt of taking away from the individual the redress of injunction which was open to him under the 1962 Constitution. On the other hand, however, the state has its rights too…The critical factor in cases of this kind is the exercise of the discretion of the judge who must "hold the scales of justice evenly not only between man and man but also between man and state."

70. The aforesaid principles were adopted by the High Court of the Republic of Trinidad and Tobago in the case of **Steve Furgoson & Another vs. The A.G. & Another Claim No. CV 2008 – 00639 – Trinidad & Tobago**. The **Honourable Justice V. Kokaram** in adopting the reasoning in the case of ***Bansraj*** above stated:

"I have considered the principles of *East Coast Drilling –V- Petroleum Company of Trinidad And Tobago Limited (2000) 58 WIR 351* and I adopt the reasoning of BANSRAJ and consider it appropriate in this case to grant a Conservatory Order against the extradition of the claimants pending the determination of this motion. The Constitutional challenge to the Act

made in this case is on its face a serious one. The Defendant has not submitted that the Constitutional claim is unarguable. The Claimants contends that the Act is in breach of our fundamental law and the international obligations undertaken were inconsistent with supreme law. It would be wrong in my view to extradite the claimants while this issue is pending in effect and which will render the matter of the Constitutionality of the legislation academic."

71. Back home, **Musinga, J** (as he then was) in Petition No. 16 of 2011, Nairobi – **Centre For Rights Education and Awareness (CREAW) & 7 Others** stated that:

"...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."

72. In **The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012**, it was held by a majority as follows:

"In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the 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 powers 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 inaction or omission."

73. Similarly, in **Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR** this Court expressed itself as follows in regard to 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."

74. This position was adopted by the Supreme Court in **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others, S.C. Application No. 5 of 2014**, the Court held as follows at paragraph 86 and 87:

"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 supplicant'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 causes...The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

i. **the appeal or intended appeal is arguable and not frivolous; and that**
ii. **unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.**

These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:

(iii) That it is in the public interest that the order of stay be granted.

This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through the Constitution."

75. The first issue for determination is therefore whether the applicant has established a *prima facie* case. A *prima facie* case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the applicant has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues.

76. According to the Petitioner, in effecting the transfers the subject of this Petition the Chief Justice did not effect the said transfers in accordance with the provisions of the Constitution of Kenya, ***Judicial Service Act, Cap. 185B***, ***The High Court (Organization and Administration) Act***, No. 27 of 2015, ***the Judiciary Transformation Framework 2012-2016*** and the ***Judiciary Transfer Policy & Guidelines for Judicial Officers***. Article 10(1) of the Constitution provides as follows:

The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

77. What the said provision provides is that in *inter alia* implementing public policy decisions, a State Officer of whom the Chief Justice is ought to be guided by the said national values and principles of governance some which include participation of the people, good governance, integrity, transparency and accountability. According to the Petitioner, in effecting the said transfers, the Chief Justice did not adhere to the aforesaid national values and principles of governance. Where a State officer's action violates the said principles, any person may move the Court for a declaration to that effect as the Petitioner has done in this Petition. As to whether the contention of the Petitioner are warranted is another matter.

78. It must however be noted that what the said provision provides is that in implementing public policy decisions, the said principles must be adhered to as opposed to the position that in implementing the Constitution, the said policy must be adhered to which seems to be what the Petitioner is contending. It was further contended that the 1st and 2nd interested parties ought to have been consulted before the said transfers were effected. As to whether the said parties ought to have been consulted in light of the position adopted by them in this petition is a matter which will only be determined in the petition.

79. It is further contended that the transfers do not demonstrate respect for the people or bring honour to the dignity of the Chief Justice's office in so far as the same is perceived to have been effected for the interests of cartels controlling the Judiciary before **Dr. Mutunga** leaves office. Whereas it is the law that the discretion to transfer Judges of the High Court is given to the Chief Justice, the discretion of course must be exercised judiciously. Whether it was so done as contended by the Respondents cannot be decided with finality at this stage. However as this Court held in **Republic vs. Director of Public Prosecution & Another ex parte Kamani & Ors Judicial Review Application No.78 of 2015**:

> **"...where the Respondent is shown not to be acting independently but just reading a script prepared by someone else or that he has been pressurised to go through the motions...the Court will not hesitate to terminate the proceedings as in such circumstances, the powers being exercised by the Respondent would not be pursuant to his discretion but at the discretion of another person not empowered by law to exercise such discretion."**

80. Therefore where the decision to effect the transfers is informed by other motives other than the legally recognised principles, the Court may well be entitled to interfere. I therefore associate myself with the position adopted by **Vyas, Yash** in his article **"The Independence of the Judiciary: A *Third World Perspective*** published in ***Third Legal Studies:*** **Vol. 11, Article 6** where he states at page 138 that:

> **"A judge may sometimes be transferred from one jurisdiction to another. In many countries, prior consent of the judge whose transfer is proposed is not necessary. But any transfer by way of punishment is not permitted. Transfer with an oblique motive or for an oblique purpose, such as not toeing the line of the executive or for not rendering decisions unpalatable to the executive, amounts to a punishment. Such transfers are likely to be struck down by the courts, because they amount to interference with the independence of the judge concerned or of the judiciary."**

81. Having considered the issues raised in this petition, this Court cannot say with certainty that the Petitioner's case is so frivolous that it ought to be terminated at this stage. As was held in **Tom Odhiambo Achillah T/A Achilla T.O & Co Advocates vs. Kenneth Wabwire Akide T/A Akide & Company Advocates & 3 Others [2015] eKLR**:

> **"Summary determinations of cases are Draconian and drastic and should only be applied in plain and obvious cases both as regards the facts and the law. In a matter that alleges that the suit is scandalous, frivolous and vexatious, and otherwise an abuse of the court process, I must be satisfied that the suit has no substance, or is fanciful or the Plaintiff is trifling with the court or the suit is not capable of reasoned argument; it has no foundation, no chance of succeeding and is only brought merely for purpose of annoyance or to gain fanciful advantage and will lead to no possible good. A suit would be an abuse of the court process where it is frivolous and vexatious."**

82. Having considered the foregoing, it is my finding that considering the totality of the issues raised, this petition raises *prima facie* arguable issues for trial. In other words it cannot be said that the petition is wholly frivolous or unarguable at this stage.

83. Having passed the first hurdle the second issue is whether the petitioner has satisfied the provisions of Article 23(3)(c) of the Constitution.

84. Article 23(3)(c) of the Constitution provides that in any proceedings brought under Article 22, a court may grant appropriate relief, including a conservatory order.

85. Proceedings under Article 22 of the Constitution deal with the enforcement of the Bill of Rights. Therefore a strict interpretation of Article 23(3)(c) shows that the reliefs specified thereunder are only available where a party is alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. From the petition, the Petitioner alleges that the effect of the said transfers would be that his rights to efficient and expeditious disposal of the cases in which he is either a party or acting for other parties are likely to be violated as a result of the delay occasioned by the said transfers. However, as rightly submitted by the Respondents and the interested parties, there is no indication that the judges who will take over the same from the transferred judges will not be able to expeditiously deal with the same. In my view, there is no guarantee that if the transfers are effected in September, to take effect in January of next year the judges concerned must of necessity dispose of all the matters they are handling. Hearing and determination of cases have many imponderables apart from mere timelines. In my view to stop the transfer of all the 105 judges on the basis of pending matters before them without evidence that all of them have matters which they shall not have determined by 2nd June,

2016 would amount to making a determination based on speculation and conjecture. With respect to disruptions caused by the said transfers, even if the conservatory orders were to be granted there is no guarantee that the Judges affected by the transfers would necessarily resume the hearing of the maters pending the determination of the petition in light of the uncertainty that would be engendered by the outcome of this petition hence the position would not be any different.

86. In addition, the Petitioner's *locus* seems to be derived from the provisions of Article 258 of the Constitution which provides for the right to institute court proceedings, where it is alleged that the Constitution has been contravened, or is threatened with contravention. Apart from himself, the petitioner has not pointed out with reasonable exactitude the rights and fundamental freedoms in the Bill of Rights of other persons which he alleges to have been denied, violated or infringed or are threatened in order to justify the grant of conservatory orders. In my view, an applicant for conservatory order under Article 23(2)(c) of the Constitution ought to bring himself or herself within the provisions of Article 22 of the Constitution by pleading and establishing on a *prima facie* basis that his right or fundamental freedom in the Bill of Rights or those of other persons have been denied, violated or infringed, or is threatened.

87. As was held in **Kemrajh Harrikissoon vs. Attorney General of Trinidad and Tobago [1979] 3 WLR 63**:

> **"The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedoms, but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicants to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom."**

88. Whereas the Petition may well succeed on the issue whether the actions being undertaken by the Respondents are Constitutional, that *per se* does not necessarily merit the grant of the conservatory orders under Article 23(3)(c) of the Constitution.

89. This is not to say that a party seeking an order for a declaration that the Constitution has been contravened, or is threatened with contravention is necessarily undeserving of the conservatory orders under Article 23(2)(c) of the Constitution. What I am saying is that the applicant must go further and show that his allegations bring him within the provisions of Article 22 as well. This Court has of course held that in general conservatory orders are orders in rem and not in personam. However the Constitution itself gives an indicator as to when conservatory orders may be granted.

90. Apart from that as the Supreme Court appreciated in ***Munya Case*** (supra), the Court must consider whether or not it is in the public interest that the order of stay be granted and that this condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through the Constitution. This view resonates with that of **Francis Bennion** in ***Statutory Interpretation,*** 3rd Edition at page 606, that:

> **"it is the basic principle of legal policy that law should serve the public interest. The court… should therefore strive to avoid adopting a construction which is in any way adverse to the public interest".**

91. As is stated in ***Black's Law Dictionary, 9th Edn***. "public interest" is the general welfare of the public

that warrants recognition and protection and it is something in which the public as a whole has a stake; especially an interest that justifies governmental regulation. Article 1(1) of the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution while under Article 1(3)(c) sovereign power under the Constitution is delegated *inter* alia to the Judiciary and independent tribunals. Dealing with a similar provision in **Rwanyarare & Others vs. Attorney General [2003] 2 EA 664**, it was held with respect to Uganda that Judicial power is derived from the sovereign people of Uganda and is to be administered in their names. Similarly, it is my view and I so hold that in Kenya under the current Constitutional dispensation judicial power whether exercised by the Court or Independent Tribunals is derived from the sovereign people of Kenya and is to be administered in their name and on their behalf. It follows that to purport to administer judicial power in a manner that is contrary to the expectation of the people of Kenya would be contrary to the said Constitutional provisions. I therefore associate myself with the decision in **Konway vs. Limmer [1968] 1 All ER 874** that there is the public interest that harm shall not be caused to the nation or public and that there are many cases where the nature of the injury which would or might be done to the Nation or the public service is of so grave a character that no other interest public or private, can be allowed to prevail over it.

92. It is therefore my view and I so hold that in appropriate circumstances, Courts of law and Independent Tribunals are properly entitled pursuant to Article 1 of the Constitution to take into account public or national interest in determining disputes before them where there is a conflict between public interest and private interest by balancing the two and deciding where the scales of justice tilt. Therefore the Court or Tribunals ought to appreciate that in our jurisdiction, the principle of proportionality is now part of our jurisprudence and therefore it is not unreasonable or irrational to take the said principle into account in arriving at a judicial determination, especially where the Court is being called upon to exercise judicial discretion.

93. In this case, it is contended which contention is not denied that the said transfer had the effect of *inter alia* posting judges to the newly created stations of **Kiambu, Nanyuki, Nyamira, Chuka, Lodwar, Kapenguria, Voi** and **Marsabit.** To grant the conservatory orders sought would no doubt have the effect of depriving the said new stations of their rights under Article 48 of access to justice. It is a matter of judicial notice that one of the Judges posted to the said new stations was a Director of Judicial Training Institute and therefore his transfer or deployment cannot lead to any injustice to litigants. To grant the conservatory orders in the manner sought would therefore mean that the said judges and other Judges whose transfers may not necessarily affect the litigants would not move to stations where their services are needed by Kenyans. In other words other Kenyans who deserve accessible justice shall have been denied the same on the basis that an indeterminate number of Kenyans are affected. I therefore associate myself with the position of the Court of Appeal in **Kenya Hotel Properties Limited vs. Willisden Investments Limited & 4 Others,Nairobi Court of Appeal, Civil Application 24 of 2012** that:

> **"Turning to the issue of whether the Appeal raises an arguable point of "public interest", we wish to pause (sic) a question as to when public interest is put in motion. In the case of EAST AFRICAN CABLES LIMITED VS. THE PUBLIC PROCUREMENT COMPLAINTS, REVIEW &APPEALS BOARD AND ANOTHER [2007] eKLR the Court of Appeal indicated situations where public interest should take precedence in the following words:-**
>
> > **'We think that in the particular circumstances of this case, if we allowed the Application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mills, contend that in evaluating the rightness or wrongness of an action, we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable**.'"

94. It is therefore my view that to grant the conservatory orders in the manner sought would be

disproportionate to the mischief that is sought to be cured by such orders. As appreciated by **De Smith, Woolf and Jowel**, ***Judicial Review of Administrative Action***, Fifth Edition (pp.594-596), proportionality is "*a principle requiring the administrative authority, when exercising discretionary power to maintain a proper balance between any adverse effects which its decision may have on the rights, liberties, or interests of persons and the purpose which it pursues*".

95. Having considered circumstances of this case, it is my view and I hold that a higher injustice would be occasioned to the public at large if the conservatory orders are granted than if they are not.

96. It follows that the application dated 27th April, 2016 is unmerited.

Order

97. In the premises while a decline to strike out the petition, I disallow the application for conservatory orders and dismiss the same. The costs thereof will be in the cause.

98. Orders accordingly.

Dated at Nairobi this 31st day of May, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Havi with Mrs Kisera for the Applicant

Mr Omogeni for the 1st and 2nd Respondents

Mr Mureithi for the 1st interested party

Mr Kuria for the 3rd interested party

Cc Mutisya