REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

PETITION NO. 7 OF 2011

IN THE MATTER OF: ARTICLES 1, 2(1) (2) (4) 3(1), 4, 10, 12(1)(A),

19, 20, 22, 23, 165, 258 AND 269 OF THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER THE CONSTITUTION OF KENYA 2010 to wit CONTRARY TO ARTICLES 10,19,21,22,23
AND
IN THE MATTER OF: CONTRAVENTION OR BREACH OF THE CONSTITUTION OF KENYA to wit, Article 258
AND
IN THE MATTER OF: THE INTERPRETATION, IMPLEMENTATION AND ENFORCEMENT OF THE CONSTITUTION OF KENYA to wit ARTICLE 259

BETWEEN

MUSLIMS FOR HUMAN RIGHTS (MUHURI)…….....…..1ST PETITIONER

KHELEF ABDULRAHAMAN KHALIFA ……..…...2ND PETITIONER

NDUNGU WAINAINA ……..……..…….3RD PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL ……..……1ST RESPONDENT

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

THE DIRECTOR GENERAL, NATIONAL

SECURITY INTELLIGENCE SERVIE……..……3RD RESPONDENT

R U L I N G

The three Petitioners who are a Non-governmental Organization Muslim for Human Rights' (hereinafter referred to as **"MUHURI**"), and two individuals, Khelef Abdulrahaman Khalifa and Ndungu

Wainaina lodged a Petition dated 2nd February, 2011 under the provisions of the Constitution of Kenya, namely Article 1, 2(1), (2), (4), 3(1), 4, 10,11,12(1), 19, 20, 22, 23, 165, 258 and 259. The said Petitioners allege contraventions of Fundamental Rights and Freedoms enshrined and protected under the said Constitutional provisions.

The Petitioners named the following as Respondents:-

1. The Hon. Attorney General – as the Principal Legal Adviser to the Government including the President of Kenya

2. The Judicial Service Commission (hereinafter referred to as the "**J.S.C.")**, A Constitutional commission established under Article 171 of the Constitution of Kenya.

3. The Director General, National Security Intelligence Service (hereinafter referred to as the **"N.S.I.S.").**

In the said Petition, the Petitioners seek the following Orders and/or reliefs:-

(a) "A Declaration that the 1st Respondent has the duty to advise the Executive, especially the President that they are bound by the Constitution at all times and regarding all matters of state.

(b) A Declaration that the 2nd Respondent is obligated to originate through a competitive process of a name or names of persons recommended to be nominated by the President with the requisite consultation with the Prime Minister during the transitional period recognized under the Constitution.

(c) A Declaration that the President and the Prime Minister must consult on the state appointments established by the Constitution and that in the event there is no concurrence in the consultations, a written memorandum be presented to Parliament with the details on convergence and divergence.

(d) A Declaration that the appointment of Maj. Gen. Michael Gichangi as the Director General of the 3rd Respondent is singularly unlawful, illegal and unconstitutional in that it failed to adhere to the Constitution of Kenya and instead based on the Statute which is overtaken by the Constitution.

(e) An Order that the position of Director General National Security Intelligence Service be advertised and filled in accordance with the Constitution and more particularly Article 232 (1)(g)(h), (i) and (2) thereof

(f) Costs of this Petition be borne by the Respondents."

It is essential and pertinent to set out the basis or grounds upon which the Petition is founded for one to understand the complaints of the Petitioner's and the nature and particulars of the allegations of contraventions, violations, breaches and/or infringements of Constitutional provisions mentioned hereinabove. The Petitioners have made the following averments and statements in their petition, to wit:-

"1. Your humble Petitioners are a Kenyan Organization and individuals who believe in the Rule of Law and are key stakeholders in the governance sector requiring the highest levels of fidelity to the Law particularly the Constitution of Kenya 2010.

2. Your humble Petitioners support the implementation and enforcement of the Constitution in its letter and spirit.

3. That your humble Petitioners expect that the Respondents and all state officers including the President of the Republic to uphold and defend the Constitution as is directed by the same Constitution.

4. The 1st Respondent is the Principal Legal Adviser to the government including the President of Kenya

5. The 1st Respondent is bound by the Constitution under Article 156(6) to promote, protect and uphold the Rule of Law and to defend public interest.

6. Your humble Petitioners aver that the office of Director of Public Prosecutions is a state office as defined under Article 260 therefore appointment to the office must be in accordance to the dictates of the Constitution of Kenya.

7. The 2nd Respondent is a Constitutional Commission established under Article 171 of the Constitution of Kenya.

8. The functions of the 2nd Respondent include recommending to the President persons to be appointed Chief Justice, Deputy Chief Justice and Judges and to effectively promote and facilitate the independence of the Judiciary and the efficient, effective and transparent administration of justice.

9. The 1st Respondent, in the humble submission of the Petitioners is under duty to advise the President that appointments to the state offices under the Constitution of Kenya are to be made in accordance with the Constitution of Kenya and not any other law or considerations.

10. Your humble Petitioners aver that the 2nd Respondent is duty bound to actualize the provisions regarding the process of appointing the Chief Justice and Deputy Chief Justice immediately upon its own appointment, having known the last day in office of the outgoing Chief Justice.

11. Your humble Petitioners aver that the appointment of the Director General of the National Security Intelligence Service (Maj. Gen. Gichangi) **effected on 15th January vide Gazette Notice Number 450 to serve for another term of five years done directly under the NSIS Act 11 of 1998 without obligation to the Constitution of Kenya is unlawful, illegal, unconstitutional, null and void *ab initio.***

12. That further the nomination of a person (Hon. Justice Alnashir Visram) to the seat of the Chief Justice with such name not originating from the 2nd Respondent to the President to recommend upon consultation with the Prime Minister and subsequent approval of the Parliament was unlawful, illegal, unconstitutional thus null and void.

13. Your humble Petitioners further aver that the nomination of the person to be appointed Attorney General (Prof. Githu Muigai) without obligation to the Constitution of Kenya is unlawful, illegal and unconstituional thus null and void.

14. Your Humble Petitioners further aver that the nomination of the person to the position of Director of Public Prosecutions (Mr. Kioko Kilukumi) being not in obligation of the Constitution of Kenya unlawful, illegal, unconstitutional thus null and void.

15. Your Humble Petitioners do aver that the failure of the Respondents to be bound by and uphold the Constitution of Kenya is a violation of the rights of the Petitioners to be subjected or government under the Rule of Law.

16. Your Humble Petitioners aver that all persons, institutions or public officers are bound by the Provisions of the Constitution. Therefore the appointments referred to herein above were made without due regard to the Constitution.

17. Your humble Petitioners contend that in failing to uphold the Constitution with regard to

appointments of the state officers as stated above, in the context of competitive sourcing of candidates for nomination, active, meaningful and principled consultation during the transitional period recognized by the Constitution, then any nomination and particularly the nomination and purported appointment is illegal, unlawful and unconstitutional thus null and void.

18. The humble Petitioners contend that the purpose of consultations as a transitional mechanism of appointments is to secure the public confidence and trust in the institutions that are created and recognized as state institutions.

19. The humble Petitioners recognize that the Constitution has been breached, contravened and or is being threatened with further breach or contravention thus this action.

20. Your humble Petitioners bring this action in their own behalf and on behalf of Kenyans who want the government through the Respondents Parliament, Executive or other public organ to keep fidelity to the rule of law and Constitutionalism.

21. With regard to the appointment of the Chief Justice, Section 24 of the Transitional clauses in the Sixth Schedule is complementary to the requirements of appointment under Article 166(1) and not to be interpreted exclusively.

22. Your humble Petitioners therefore pray for:-

a) A declaration that the 1st Respondent has the duty to advise the Executive, especially the President that they are bound by the Constitution at all times and regarding all matters of state.

b) A declaration that the 2nd Respondent is obligated to originate through a competitive process of a name or names of persons recommended to be nominated by the President, with the requisite consultation with the Prime Minister during the transitional period recognized under the Constriction.

c) A declaration that the President and the Prime Minister must consult on the state appointments established by the Constitution and that in event there is no concurrence in the consultations, a written memorandum be presented to Parliament with the details on convergence and divergence.

d) A declaration that the reappointment of Maj. Geneal Michael Gichangi as the Director General of the 3rd Respondent is singularly unlawful, illegal and unconstitutional in that it failed to adhere to the Constitution of Kenya and instead based on the statute which is overtaken by the Constitution.

e) An order that the position of director General National Security Intelligence Service be advertised and filled in accordance with the Constitution and more particularly Article 232(1)(g), (h), (i) and (2) thereof.

f) Costs of this Petition be borne by the Respondents.

The Petitioners is supported by the affidavit worn by the 2nd Petitioner on 2nd February 2011. It gives a factual narration of the averments and other statements which are fully set out there.

The Petition, simultaneously filed an application on the same day, 2nd February, 2011 by way of a Chamber Summons, under the provisions of Rule 20 and 21 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedom of the Individual) High court Practice and Procedure Rules 2006. It is deemed that it is a common fact/ground that the provisions in the said Rules of the Old Constitution do apply currently by virtue of Section 19 of the Sixth schedule of the New

Constitution enacted under Article 262 of the New Constitution – 2010 providing for 'TRANSITIONAL AND CONSEQUENTIAL PROVISIONS"

It reads as follows:-

"Rules for the enforcement of the Bill of Rights –
19. Until the Chief Justice makes the rules contemplated by Article 22, the Rules for the enforcement of the Fundamental Rights and Freedoms under section 84(6) of the Former Constitution shall continue with the alteration, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with Article 22"

In the said interlocutory application, the Petitioners seek the following orders:-

"*1. A Conservatory Order be and is hereby issued restraining Maj. General Michael Gichangi from in any way directly or indirectly acting as the Director General of the National Intelligence Service until the Petition is heard and determined.*

2. A Conservatory Order be and is hereby issued against the Publication of the names of Mr. Justice Alnashir Visram as a person nominated for consideration as a Chief Justice until and unless Mr. Justice Alnashir Visram is vetted in accordance with Article 23(1) of the Transitional and Consequential provisions of the Constitution.

3. An Order directing the Judicial Service commission to immediately establishand initiate mechanism of transparently and Accountably sourcing for suitable candidates for the appointment as Chief Justice and Deputy Chief Justice.

4. A Conservatory Order be and is hereby issued restraining the 1st Respondent, on behalf of the Government of Kenya, from presenting or in any way publishing names of any person including those of Prof. Githu Muigai and Kioko Kilukumi as persons nominated to fill the positions of Attorney General or Director of Public Prosecutions respectively until the hearing and determination of this petition.

5. An Order directing that the Petition be heard on priority basis within the earliest opportunity until final determination."

The said interlocutory application by way of Chamber Summons is supported by an affidavit sworn by Hussein Khalid Khamis, the Executive Director of "MUHURI", the 1st Petitioner on 2nd February 2011. The said deponent states as follows:-

"1. THAT I am the Executive Director of the 1st Petitioner/Applicant herein thus capable of making this affidavit.

2. THAT we as MUHURI are concerned that the Constitution of Kenya 2010 is continually being sabotaged or violated with regard to appointment of state officers among other ways.

3. THAT the Director General of the National Intelligence Service was appointed outside of the Constitution yet the position is Constitutional and is provided for as a public service position to be filled within given preconditions.

4. THAT the nomination of Alnashir Visram, a serving Judge of Appeal without vetting as provided for under the Constitution is a direct breach of the Constitution.

5. THAT the nomination of Prof. Githu Muigai and Kioko Kilukumi to fill the position of Attorney General and Director of Public Prosecutions respectively was done in breach of the Constitution which recognizes the offices as public service offices thus ought to be filled in accordance with Constitution under given preconditions.

6. THAT the breach of explicit and relatively easy provisions of the Constitution is evidence of the Government's unwillingness to be bound by the Constitution which demands accountability

and transparency from all officers including the President of the Republic, who we suspect, is suffering Constitutional culture shock for not being used to accountability in such matters.

7. THAT in addition to what I have said herein, I adopt the affidavit sworn by Khelef Abdulrahaman Khalifa in support of the Petition herein to support the application for Conservatory Orders.

8. THAT it is important to recognize that the Judiciary of Kenya desperately needs the public confidence it ought to have and it is to be found from among other things having an open, transparent and accountable appointment mechanism that will insulate it from political manipulation.

9. THAT the continued violation of the Constitution will erode the confidence the people of Kenya have in the Constitution they so roundly passed thus risk a future repeat of violence like happened in 2007/08.

10. THAT it is at this early time in the implementation and enforcement of the Constitution that the court must stand firm and protect and enforce the Constitution otherwise there will be desperation manipulation, nepotism, ethnic and regional optional machinations all of which will collectively and singularly undermine the stability of the Republic.

11. THAT I swear this affidavit is support of the application for Conservatory Orders herein.

12. THAT what I have stated is within my knowledge save for information deponed to on information whose sources are otherwise disclosed.

The application is opposed by all the Respondents. The 1st and 2nd Respondents are represented by the Attorney General through, Acting Principal State Counsel Mr. Mwangi Njoroge who is based in Mombasa while the 3rd Respondent retained its own Counsel, Mr. Waweru Gatonye instructed by the Firm of Waweru Gatonye Advocates. The Petitioners were represented y Mr. Haron M. Ndubi, Advocate.

The 1st, 2nd and 3rd Respondents filed Grounds of Opposition respectively. None of them filed any Replying Affidavit to the Application. By the time the Interlocutory Application was heard by me, none of the Respondents had filed any Replying Affidavit to the Petition.

The 1st and 2nd Respondents raised the following grounds in opposition to the application:-

"1. The applicants have not demonstrated how their rights (if any) have been violated by the Respondents and the Court cannot proceed to issue the Conservatory Orders based on mere allegations of breach of rights.

2. There is no material placed before the Court to show/prove the 1st Respondent has abdicated or failed in the Constitutional duty bestowed upon 1st Respondent under Article 156 (4) (a) of the Constitution and the orders sought in the Chamber summons application and Petition ought not to issue.

3. The Conservancy Order sought against 1st Respondent cannot issue and is not available as the 1st Respondent's Constitutional duties are expressly spelt out under Article 156(1) to (7).

4. The Conservatory Order sought against the 2nd Respondent ought not to issue in view of the express provisions of Article 171 and 172 setting out the functions and mandate of the 2nd Respondent vis a vis the 6th Schedule to the Constitution on the matter.

5. The balance of convenience militates against the grant of the order sought in prayer 2,3, and 4.

The 3rd Respondent in his Grounds of Opposition set out the following grounds:-

"1. The Director General of the National Security Intelligence Service (hereinafter referred to as the Director General) is a State Officer as defined under Article 260 **of the Constitution of Kenya (hereinafter referred to as the Constitution) to be nominated (when the Constitution is in full operation) under the provisions of** Article 132 (2)(f) **of the Constitution.**

2. The Constitution is clear that State Officers referred to under Article 132 (2) (f) of the Constitution **will not be vetted by the National Assembly until the final announcement of all the results of the first elections for Parliament under the Constitution by virtue of Section 2 (1) © of the Sixth Schedule to the Constitution which suspends Article 129 to 155 of the Constitution.**

3. Consequently Section 29 (2) of the sixth Schedule to the Constitution does not apply to the appointment of the Director General.

4. Accordingly, the only available law providing for the appointment or re-appointment of the Director General is the National Security Intelligence Service Act 1988 (hereinafter referred to as the Act)**. This is one of the laws in force by virtue of Section 7 of the Sixth Schedule to the Constitution of Kenya.**

5. Section 6(1) (2) of the Act provides that, "there shall be a Director of the service who shall be appointed by the President, on such terms and conditions of service as the President may, in consultation with the Public Service commission determine". Therefore the President is the sole appointing authority of the Director General and the President followed this process strictly in appointing the Director General.

6. The challenge of the appointment of the Director General is therefore mischievous, incompetent, unfounded and an abuse of the court process for the following reasons:-

a) Provisions of Article 232 in general and Article 232 (12) (g) (h) (i) and (2) in particular of the Constitution have not been breached in the reappointment in any event, Parliament has not enacted the legislation to define and give full effect to the values and principles set out in the said Article.

b) The re-appointment of the Director General is and was governed by Section 6(2) of the Act which states that "the director General shall hold office for one term of five years, but shall be eligible for appointment for a further term of a period not exceeding five years."

c) The reappointment of the Director General is not a new appointment as envisaged under Section 29 (1) of the Sixth Schedule to the Constitution of Kenya.

d) The National Security Intelligence Service Act being part of the existing laws in force after the effective date following the promulgation of the Constitution of Kenya 2010, is an elaborate law enacted "to provide for the establishment of the National Security Intelligence Service, to define its powers, functions and duties, to regulate the administration and control of the service, to provide for the issue of warrants authorizing certain actions to be taken in the National Interest" as envisaged in its long title.

e) Further the re-appointment of the Director General is in consonance with the provisions of Section 31(2) of the Sixth Schedule.

f) Article 239(6) of the Constitution mandates Parliament to enact legislation to provide for the functions, organization, and administration of the National Security Organs. Under the Fifth Schedule to the Constitution the contemplated legislation for the National Security Organs shall be

enacted within two years.

g) Until Parliament enacts the legislation contemplated in the said Article, the National Security and Intelligence Act continues to regulate the National Security Intelligence Service and the appointment of the Director General thereof.

7. The National Security Intelligence Service **plays a critical role in the enhancement and furtherance of security and stability or the nation and the safety and well being of the people of Kenya.**

8. The grant of the Conservatory Order sought under prayer 1 would destabilize the leadership of the National Security Intelligence Service and thereby threaten peace, security and stability of the Republic of Kenya.

9. The Conservatory Order sought should not be granted as the Director General has been appointed and is already in office and can only be removed if at all, after the full hearing of this Petition.

10. The Conservatory Order is coached in terms of an interim declaration which the court has no jurisdiction to grant.

11. The Conservatory Order sought is also coached in terms of a mandatory injunction and/or and order of prohibition. The material presented to this honourable court by the petitioners falls far below the threshold required to grant a mandatory injunction or prohibition at the ex-parte stage.

12. The balance of convenience militates against the grant of the order sought in prayer 1 as such order would undermine the proper functioning of the National Security Intelligence service which is essential for the maintenance of national security stability and the well being of the people Kenya.

The application came up for hearing on 10th February, 2011, inter partes when Counsel made elaborate oral submissions.

I propose to deal with the orders sought against the 1st and 2nd Respondents first and then thereafter with those against the 3rd Respondent.

At the outset, it was clear that strictly the case or claims against the 1st and 2nd Respondent on one part and the reliefs/remedies sought against them were not based on the same facts, and law as those against the 3rd Respondent. The basis of the joinder of the Respondents and prosecution of the causes of action in the same petition was not quite clear to the court, if not puzzling.

The two claims did not appear to have any legal symmetry or strict connection except that the petitioners were the same as were the Respondents and that they were based on Constitutional provisions. Even the time that the events complained of took place were different. However, upon inquiry by the court, the Petitioner's counsel submitted that he had already received instructions to file the petition in respect of the 3rd Respondent but before he acted upon it, the events relating to the 1st and 2nd Respondent arose and took place and for convenience decided to lodge one petition.

Despite what I have said about the lack of strict relevance or connection between the two aspects or claims, and the suitability of prosecuting or determining them in the same Constitutional Petition, strictly, there is no apparent legal bar for them not to be heard together. Be that as it may it may create inconvenience and practical challenges at time of the trial of the Petition. In any case, as there was no objection by the Respondents on this aspect, i.e. lack of synchronity, the court deems that the parties wish to proceed with the matter as it has been presented. The trial court may deal with the issues relating to the

mode of trial, and the sequence and any other direction before setting down the petition for hearing.

As of now, what I am required to deal with is whether the Applicants/Petitioners are entitled to conservatory and/or Interim Orders pending the full hearing of the Petition and whether the court should grant the same at this stage and if so on what terms and conditions.

The first question that the court has to deal with is the criteria or principles applicable for the grant of Conservatory Orders in Constitutional applications. In **Petition No. 16 of 2011, Nairobi – CENTRE FOR RIGHTS EDUCATION AND AWARENESS (CREAW) & 7 OTHERS** Hon. Justice Musinga 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 the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."

I would agree with my Brother, that an applicant seeking Conservatory Orders in a Constitutional case must demonstrate that he has a "*prima facie* case with a likelihood of success." However, I think that it would be important for me to refer to a case from the Privy Council, **ATTORNEY GENEAL –V- SUMAIR BANSRAJ (1985) 38 WIR 286** in which Braithwaite J.A. guided as 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 the1976 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."

The aforesaid principles which can be applied for guidance by a Constitutional Court was 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** which was cited in this court by Counsel for the 3rd Respondent. 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 without supreme law. It would be wrong in my view to extradite the claimants while this issues is pending in effect and which will render the matter of the Constitutionality of the legislation academic."

From a careful reading of the aforesaid decisions and that of the Honourable Justice Musinga in the **CREAW CASE**, I am inclined to suggest that this court be guided by a criteria guided by the aforesaid decisions. However, before doing so, I think I ought to deal with two preliminary points of law which touches on jurisdiction and which must form the basis for the proceedings. While no express or specific objections were raised but some submissions were made on them. The first is the power or authority of the court to grant "Conservatory Orders." And the second the "*locus standi*" of the Petitioner.

I will deal with the issue of "locus standi". Happily in Kenya today, the judicial debate on "*locus standi*" has for once and for all been resolved by Article 22 of the Constitution of Kenya, 2010. The relevant part provides inter alia, that:

"Enforcement of Bill of Rights.

22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedoms in the Bill of Right has been denied violated or infringed, or is threatened.

(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."

The said provisions are clear, express and unambiguous. They speak for themselves. The 1st Respondent as an association or body, of Non-governmental Organization is entitled in its own right to file and prosecute this Petition for its members or for the public interest.

Needless to say that the Second and Third Applicants as individuals or person have their right to institute court proceedings for enforcement of the Bill of Rights recognized and provided at the first instance.

Under Article 23 (3) the High court is given the power and conferred with the jurisdiction to grant, inter alia a Conservatory Order. Article 23 (1) and (3) provide as follows:-

"23 (1) The High Court has jurisdiction in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedoms in the Bill of Rights.

(2) ___

(3) In any proceedings brought under Article 22, a Court may grant appropriate relief, including:-

(a) a declaration of rights;

(b) and injunction,

(c) a conservatory order

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order of compensation; and

(f) an order of judicial review."

Article 23 (3)(c) gives this court the power and discretion to grant "**a Conservatory Order**." In the fullness of time, the Kenyan Courts will have to define and construe what is meant by the relief of a "Conservatory Order" under New Constitution. Under the Old Constitution in Section 84 (1) (b) the High Court was given power to:-

"…….make such orders issue, such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of Sections 70 to 83 (inclusive)

It was through judicial interpretation and innovation that the High Court granted redress at the interlocutory stage through injunctions and later "Conservatory Orders" which to my recollection was first applied in Kenya by the Honourable Justice J. Nyamu (as he then was) in several ground-breaking – Constitutional cases that few legal practitioners and scholars have yet to appreciate.

What is clear to me form the authorities is that strictly a "Conservatory Order is not an injunction as known in Civil matters orgenerally in other legal proceedings but is an order that tends to and is intended to preserve the subject-matter or set of circumstance that exist on the ground in such a way that the Constitutional proceedings and cause of action is not rendered nugatory. Through a Conservatory Order the court is able to "give such directions as it may consider appropriate for the purpose of securing of … the provisions of the Constitution (see – **BANSRAJ** above)". A Conservatory Order would enable the court to maintain the status quo or existing situation or set of facts and circumstances so that it would be still possible that the rights and freedoms of the claimant would still be capable of protection and enforcement upon determination of the Petition and the trial was not a futile academic discourse or exercise.

In view of the foregoing and applying the reasoning in the authorities, it is my view that the criteria to be applied in considering whether to grant a Conservatory Order or not are:-

(i) <u>Discretion</u>

Article 23 (3),© confers on the court discretion to grant a Conservatory Order. The exercise of discretion as is usually the case must be exercised judiciously and not capriciously taking into account all the facts and circumstances of the case. The court in exercise of the discretion must act cautiously and with a great degree of care but still with reasonableness or flexibility and fairness to promote the enhancement and enforcement of fundamental rights and freedoms of the individual and the public at large, where appropriate. As stated in the **<u>BANSRAJ CASE</u>** the Constitutional Court must carryout a balancing act in the exercise of this discretion. That is what the judge meant when he said:-

"……On the other hand, however, the state has its rights too… The critical factor in case of this kind in 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."

(ii) <u>Arguable Case</u>

In order for the court to grant Conservatory Order the Applicant claim or case must on a prima facie be arguable. For an application or claim to be arguable does not to me, mean that it is debatable. Almost any issue can be debatable. To have an arguable case in my opinion is that it raises serious if not fundamental and/or substantial issues or question that ought to be given a reasonable or fair chance to be heard articulated and ventilated in a court of Law.

As was said in **BANSRAJ CASE** "Constitutional Challenge to the Act made in this case is on the face a serious one."

(iii) Whether the application or case will be rendered nugatory or useless, if the conservation is not granted – RETRIEVABILITY

One of the considerations by a court when considering whether to grant or refuse a Conservatory Order is whether, if the order is not given, the Application and claim will be rendered nugatory, useless or academic. Will there be anything left for the court to revisit at the trial to be able to grant the reliefs sought if the applicant is successful? I propose to call this, the degree of irretrievability. In other words, if the Conservatory Order is not granted, would it be possible that at the end of the trial of the Petition it will be possible that the subject matter is not lost or irretrievably lost and is capable of being retrieved. Here we cannot speak about whether a person has suffered irreparably that he cannot be compensated by damages or not. This is because there are many Constitutional and fundamental freedoms and rights if violated, *stricto sensu*, are not capable for being given back and are also in themselves not capable of being compensated. For instance a violation of Constitutional provisions there are not matters for compensation but there are matters of retrievability. Also there are certain violations that involve the action/and public interest that one cannot speak of compensability of a single claimant. It is not a private right per se and belongs to all and therefore non-negotiable.

(iv) Balance of Convenience

Upon consideration of all maters herein including the submissions and principles enunciated in some of the authorities cited, it would be reasonable to state that in certain Constitutional interlocutory applications which seek Conservatory Orders then the court may also consider the Balance of Convenience as between the Applicant/Claimant and the Respondent and in particular where it may involve the national and/or public interest. In the **BANSRAJ case** which involved extradition proceedings of the claimant to the U.S.A. from Trinidad and Tobago under an International Extradition Treaty between the two countries, the Judge observed that:-

"……The Constitutional court must hold the scales of justice evenly between the claimants and the state. There are competing and powerful interests at stake in this case. The right of the claimants to their liberty and the freedom of movement on the one hand and on the other the public interest in the prosecution of the crime, the comity of the nations, attendant obligations under International treaties with foreign nations.

……

This court must therefore be astute to balance these competing interests in the interim while it deals with the substantial complaint of the Claimants".

It is therefore necessary that in certain cases if not all, the court may have to assess and determine in whose favour the balance of convenience tilts or what directives or decisions the balance of convenience in fact demands.

In an application for interim orders of the nature of Conservatory Orders or even one for an injunction, the court is not hearing and/or being called upon to determine the main Petition. The Constitutional court is being called upon to preserve the status quo pending the hearing of the Constitutional Petition or motion. The court does not have to take and hear all the evidence and delve into the entire case on its merits. The hearing of the Petition and determination of all issues and questions in

dispute will be done at the "trial" and upon completion thereof when a final judgment is to be delivered.

As a result, at this stage I am not obligated to go into all the evidence and even consideration of all the matters of law. My function is to have a reasonable overview to enable me decide on the criteria or principles applicable when considering an application for a Conservatory Order and to what extent and principles are applicable to the facts and circumstances of this case.

The court must be careful for it not to reach final conclusions and to make final findings. By the time the application is decided, all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis- a-vis the case of either parties. This principle is similar to that in temporary at or interlocutory injunctions in civil matters.

This is a cardinal principle and happily makes my function and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side.

I will now deal with specifically with the application as against the 1st and 2nd Respondents and thereafter that against the 3rd Respondent.

1. APPLICATION AS AGAINST THE 1ST AND 2ND RESPONDENT

As stated earlier hereinabove the Applicant has placed its case before the court through its Petition and the affidavit in support of the Application. This is the main pleading on behalf of the Applicant. By the time the application was heard by this court, none of the Respondents had filed or presented any Replying Affidavits which would have constituted their respective Defences in the Petition.

With regard to the application for Conservatory Orders, the applicants filed their Chamber Summons herein and supported by an affidavit setting out some brief facts and basis for the interim reliefs sought. The Respondents filed respective grounds of opposition substantially therefore raising matters of law.

The Applicants' counsel referred to the provisions of the New Constitution set out in Applicants pleadings to show the court the provisions allegedly which have been violated by the actions of the President of the Republic of Kenya and the actions and/or omissions of the 1st and 2nd Respondents in not advising the President accordingly. The Applicants are in effect questioning the Constitutionality of the process through which His Excellency the President nominated the persons to be considered to the officers of Chief Justice of the Republic of Kenya, the Attorney General of the Republic of Kenya and the Director of Public Prosecutions.

Mr. Njoroge for the 1st and 2nd Respondents submitted inter alia that:-

- The application and supporting affidavit lacks adequate evidence.
- Credible evidence is necessary for the grant of Conservatory Orders.
- The statements of fact in the affidavit must be within the knowledge of the Petitioner
- He referred to the affidavit of the deponent Hussein Khalid Khamis.
- That the said deponent does not say that he has the authority of the 1st Petitioner when swearing or making the affidavit.
- Some of the paragraphs in the affidavit contain points of law or submissions thereof and not statement of facts.
- That the said Khamis is not a lawyer and should have stated that he is advised.
- There are no grounds set out and the source of information are lacking
- The contents of the affidavit are inadmissible in evidence.
- The affidavit is based on presumptions and there is no evidence of the Government's unwillingness to be bound by the Constitution.
- Adoption of the affidavit in support of the Petition is not permissible in law.

- The entire affidavit should be expunged.
- The Respondents could not reply to matters of law hence the absence of a Replying Affidavit
- The affidavit in support being based on matters of law or incapable of being responded to by an affidavit based on matters of fact.
- The court should strike out the affidavit and the application.
- That there is no material before the court to show or prove that the 1st Respondent has abdicated or failed in his Constitutional duties bestowed upon him by Article 156 (4) (c) of the Constitution and the orders sought cannot issue in law.
- There is no evidence to show whether the Attorney General did advice the President and the 2nd Respondent or not.
- That Article 31 of the 6th Schedule that provides for transition and consequential provisions deals with existing offices.
- The process of appointment of the state officers is to be finalized within one year.
- The President appointed the said state officers in accordance with the powers conferred on him by the Constitution.
- The Respondents do not know the case they are to meet in this application.
- There must be factual material before the court.
- The Applicant has not disclosed from what provisions the duty to make publication came from.
- Is the President obliged to make any publication?
- No legal provisions have been preferred to.
- There can be no vacuum in respect of the office of the Chief Justice.
- When the Chief Justice retires under Article 24 of the 6th Schedule a new Chief Justice must be appointed.
- The appointment of the Chief Justice is not subject to any vetting under the Constitution.
- It is not known when the vetting law will be in place.
- It is only Parliament which is able to deal with the legislation relating to vetting of judges.
- There can be no vacuum and certain rights might be prejudiced.
- Prayer 2 is not tenable.
- To whom is the prohibitory order going to be directed.
- Prayer 3 must be disallowed as the Judicial Service Commission knows its duties. No grounds in support of prayer 3. This must fail.
- The same arguments ought to apply to the Director of Public Prosecutions.
- The Applicants have not proved or demonstrated they have a case.
- It is only the Applicants who know their case.
- The Respondents must be given particulars of the claim and time to respond effectively.
- The application and the prayers therein should not be granted.
- The court ought to exercise its powers to strike out the petition.
- Precious judicial time will be saved.

I have considered the submissions by both counsels for the Applicants and for the 1st and 2nd Respondents.

The first issue to consider is whether the affidavit sworn by the Executive Director of the 1st Petitioner, MUHURI, one Hussein Khalid Khamis contains enough evidentiary material to have enabled the 1st and 2nd Respondents to effectively respond by filing a Replying Affidavit and to enable this court grant any Conservatory Orders.

The deponent stated clearly in his affidavit that he relied and adopted what was sworn by the 2nd Petitioner in support of the Petition herein to support the application for Conservatory Orders. It is true that strictly a deponent in one affidavit cannot be deemed to know the facts or have any information of any facts n any affidavit. He must have personal knowledge, have information and believe in the truthfulness of the statement and also must disclose the source of information. However, it must be noted that it is a requirement of the Rules herein that a Petition must be supported by an affidavit. Mr. Khelef Abdurahaman Khalifa is a co-petitioner who has sworn the affidavit in support of the Petition. The 1st Petitioner through its Executive Director is entitled to rely and adopt the contents of the supporting affidavit to the Petition as the Petition also belongs to it. It is a co-petitioner. The Supporting affidavit belongs to all the three Petitioners.

At this interlocutory stage, the court is obliged to refer to the Petition and its Supporting Affidavit

which when taken together are the Originating pleadings. I do hold that the Chamber Summons and the affidavit in support thereof cannot be looked at and considered separately and independently of the petition and its supporting affidavit. If the said pleadings and application and both affidavits are read together which must be done, then, it is possible to know and understand the Applicants/Petitioners claims and the basis for seeking Conservatory Orders.

The facts set out in the Petition, supporting affidavit, Chamber application and its supporting is quite simple and straight forward. The facts that come out are that:-

1. The President of the Republic of Kenya has nominated Hon. Justice Alnashir Visram for consideration as a person to be considered as the Chief Justice of the Republic of Kenya.
2. The President of the Republic of Kenya has nominated Prof. Githu Muigai to fill the position of Attorney General of the Republic of Kenya and Mr. Kioko Kilukumi as the Director of Public Prosecutions, respectively.

These are the simple facts deponed to in the two affidavits and set out in the Petition and the Chamber summons. These facts are not disputed or challenged by the 1st and 2nd Respondents. The said Respondents did not file any affidavit to rebut or challenge these simple facts. In fact to the contrary they are not denied and are therefore admitted facts.

If there was any doubt which is not there, this court as a Constitutional court takes judicial notice that as a matter of national and public interest and notoriety, indeed the President has in fact appointed the said persons to the said offices purportedly after consultation with the Prime Minister and has referred the appointment for the approval of the National Assembly as required by Section 24 of the Sixth Schedule to the New Constitution which is part of the "Transitional and Consequential Provisions". This is a matter in the public domain that has led to wide public and national debate in the print and electronic media and is now also the subject matter of deliberations discussions, debate and proceedings in the \august House, the National Assembly, the Parliament of the Republic of Kenya.

Despite the clear and unambiguous statements of facts in the pleadings and affidavits, the 1st and 2nd Respondents in this case have chosen to and elected not to file a simple Replying Affidavit to deny the publication and/or nominations of the said state officers and Constitutional office-holders.

As a result of the foregoing, I do find and hold that the applicants through the application and affidavit in support thereof read together with the Petition and its affidavit sufficiently and adequately placed before this court enough material for the court to be able consider the application for Conservatory Orders. The 1st and 2nd Respondents have deliberately and quite strangely elected not to respond by affidavit to assist the court know the 1st and 2nd Respondents' answers, if there was a different position.

Section 24 of Schedule 6 provides for the appointment of the Chief Justice after the New Constitution came into effect on 27th August 2010, the effective date:-

"Chief Justice

24 (1) The Chief Justice in office immediately before the effective date shall, within six months after the effective date, vacate office and may choose either –

(a) To retire from the judiciary; or

(b) Subject to the process of vetting under Section

23, to continue to serve on the Court of Appeal

(2) A new Chief Justice shall be appointed by the President, subject to the National Accord and Reconciliation Act, and after consultation with the Prime Minister and with the approval of the National Assembly.

(3) Subsection (2) also applies if there are further vacancies in the office of Chief Justice before the first General Elections under this Constitution." (Emphasis mine)

Section 29 of the Schedule 6 of the Constitution provides for the appointment of the Attorney General and the Director of Public Prosecutions as read with Articles 156 and 157of the Constitution respectively. Section 29 reads as follows:-

"New appointments

29 (1) The process of appointment of persons to fill vacancies arising in consequence of the coming into force of this Constitution shall begin on the effective date and be finalized within one year.

(2) Unless this schedule prescribes otherwise, when this Constitution requires an appointment to be made by the President with the approval of the National Assembly, until after the first elections under the Constitution, the President shall, subject to the National Accord and Reconciliation Act appoint a person after consultation with the Prime Minister and with the approval of the National Assembly."

(emphasis mine)

Vacancies arise in consequence of the coming into force of the Constitution with regard to the offices of the Attorney General and Director of Public Prosecutions and must be finalized within one year of the Effective Date or coming into force/operation of the Constitution, 2010 to wit, 27th August, 2010. This process of appointments to these two offices can begin at any time and must be completed before the one year. It is in pursuance of these provisions that the President must have commenced the process by proposing the names of the 2 persons to fill the said positions.

As a result of the Petition herein, it is my opinion that the questions that the Constitutional court will be called upon to decide include but are not limited to the following issues/questions:-

1. Whether His Excellency the President complied with an/or adhered to and guided by the provisions of Section 24 (2) of Schedule 6 of the Constitution of Kenya 2010 when he appointed the Hon. Justice Alnashir Visram to the office of the Chief Justice of the Republic of Kenya.

2. Whether His Excellency the President complied with and/or adhered to and guided by the provisions of Section 29 (1) and (2) of the 6th Schedule of the Constitution of Kenya, 2010, when he appointed Prof. Githu Muigai and Mr. Kioko Kilukumi to the offices of the Attorney General and Director of Public Prosecutions respectively.

3. (i) Whether the said three appointments were made subject to or in accordance with the spirit, objectives and/or provisions of the National Accord and Reconciliation Act, 2008.

(ii) In this regard, what is the effect of Section 8 of the National Accord and Reconciliation Act which reads:-

"8 This Act shall cease to apply upon the dissolution of the tenth Parliament, if the coalition is dissolved, or a new Constitution is enacted, whichever is the earlier.

(iii) Whether the National Accord and Reconciliation Act was entrenched in the Constitution of 2010 as envisaged by the Agreement on the Principles of Partnership of the Coalition Government and if so to what extent?

4. Whether His Excellency the President had consultations with the Prime Minister before the appointments of the said 3 persons were made to the offices of the Chief Justice, Attorney General and Director of Public Prosecutions expressly stipulated in Sections 24 and 29 of the 6th Schedule of the

Constitution?

5. (i) What is the Constitutional definition and Interpretation of the

Term 'Consultations'.

(ii) How were the consultations carried out and what is the Principles or mode of demonstrating to Kenyans and the world at large that effective and efficacious consultations took place.

(iii) Whether "consultations in Section 24 and 26 envisaged and require "Concurrence" and/or agreement by the two Principals the Partnerships of the Coalition Government set out in schedule 9 of the National accord headed ***"Acting together for Kenya"*** *and the 6th Schedule of the Constitution?*

6. Whether the President and the Prime Minister must consult on the state appointments established by the Constitution and that in the event there is no concurrence in the consultations, a written Memorandum be presented to Parliament with details on convergence and divergence?

7. In respect of the office of the Chief Justice, whether the Judicial Service Commission the 2nd Respondent is obliged to originate through a competitive process of a name or names of persons recommended to be nominated by the President with requisite consultation with the Prime Minister during the transitional period recognized under the consultation?

8. Whether the National Values and Principles of governance set out in Article 10 of the Constitution are binding on the President, the Prime Minister and Parliament in considering the ultimate appointment of state officers to the offices of the Chief Justice, Attorney General and the Director of Public Prosecutions. Article 10 of the Constitution provides as follows:-

"National Values and Principles of governance in this Article binds 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.

(2) The National Values and Principles of government include –

a). patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.

b) human dignity, equity, social justice, inclusiveness, equality, human rights, non- discrimination and protection of the marginalized;

c). Good governance, integrity, transparency, and accountability, and

d). Sustainable development.

9. Whether the 1st Respondent, the Attorney General is bound by the Constitution under Article 156 (6) to promote, protect and uphold the Rule of law and to defend public interest.

10.Whether the functions of the 2nd Respondent, the Judicial Service Commission include recommending to the President persons to be appointed Chief Justice, Deputy Chief Justice and Judges and to effectively promote and facilitate the Independence of the Judiciary and the efficient, effective and transparent Administration of Justice.

11.Whether the nomination of the named persons to the offices of the Chief Justice, Attorney General and director of Public Prosecutions were unlawful, illegal, unconstitutional null and void ab initio?

As stated hereinabove, these are some of the questions/issues which have been placed before the court for determination. They emanate from the Petitions and the affidavit in support thereof together with the present application. They are certainly grave, serious, substantive and fundamental issues of the greatest Constitutional significance,

In view of the aforesaid, this court must exercise its DISCRETION and decide whether it ought/should or not grant the Conservatory Orders. I have now considered all the facts, circumstances and law in the Petition and their inter-play and implications.

The specific Conservatory Orders which the Applicants/Petitioners seek in Chamber Summons dated 2nd February, 2011 in respect of the offices of the Chief Justice, Attorney General and Director of Public Prosecutions are:-

"1. _____

2. A Conservatory Order be and is hereby issued against the Publication of the names of Mr. Justice Alnashir Visram as a person nominated for consideration as Chief Justice until and unless Mr. Alnashir Visram is vetted in accordance with Article 23 (1) of the Transitional and Consequential Provisions of the Constitution.

3. An Order directing the Judicial Service Commission to immediately establish and institute mechanism of transparency and accountably sourcing for suitable candidates for the appointment as Chief Justice and Deputy Chief Justice.

4. A Conservatory Order be and is hereby issued restraining the 1st Respondent, on behalf of the Government of Kenya from presenting or in any way publishing names of any person including those of Prof. Githu Muigai and Kioko Kilukumi as persons nominated to fill the position of Attorney General or Director of Public Prosecutions respectively until the hearing and determination of this Petition.

5. _____"

The question of the vetting of Judges and in particular whether the vetting of the Hon. Justice Alnashir Visram was not specifically in accordance with Article, 23 (1) of the "Transitional and Consequential Provisions of the Constitution" strictly was not pleaded with particularity or specifically in the Petition. However, if it is a Constitutional requirement that a sitting Judge of the High Court or Court of Appeal must be vetted under the said provisions, then I do hold that this question would fall under the Declaration sought in Prayer 22 (a) of the Petition which reads as follows:-

"(a) a declaration that the 1st Respondent has the duty to advice the Executive, especially the President that they are bound by the Constitution at all times and regarding all matters of State."

This prayer is under-pinned on, inter alia, paragraphs 16 and 17 of the Petition in which the Petitioners plead that:-

"……16. Your humble Petitioners aver that all persons, institutions or public officers are bound by the Provisions of the Constitution. Therefore the appointments referred to herein above were made without due regard to the Constitution.

17. Your humble Petitioners contend that in failing to uphold the Constitution with regard to appointments of State officers as stated above, in the context of competitive sourcing of candidates for nomination, active, meaningful and principled consultations during the transitional period

recognized by the Constitution, then any nomination and particularly the nomination and purported appointment is illegal, unlawful and unconstitutional thus null and void."

Article 23 of Schedule 6 of the Constitution which deals with the vetting of Judges provides as follows:-

"23 (1) Within one year after the effective date, Parliament shall enact legislation, which shall operate despite Article 160, 167 and 168 establishing mechanisms and procedure for vetting, within a time-frame to be determined in the legislation, the suitability of all judges and magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in Articles 10 and 159."

This court takes Judicial Notice of the fact that by the time of the appointment of the Hon. Justice Alnashir Visram as a person to take up and fill the office of the Chief Justice of the Republic of Kenya, the legislation for the vetting of Judges who are in office to continue to serve in the Judiciary had not been passed, or enacted or legislated by Parliament. The said law has been brought to the floor of Parliament but is yet to be passed to date.

This court takes judicial Notice of the fact that no Judge including the Hon Justice Alnashir Visram has been vetted in accordance with the Constitution and I do therefore hold that there will be questions for the determination by the Constitutional Court in this regard and which may include:-

(i) Whether the President could in law under the Constitution appoint the Hon Justice Alnashir Visram as the Chief Justice of Kenya before the law for vetting of Judges had been passed.

(ii) Whether the President could in law under the Constitution appoint the Honourable Alnashir Visram before he was vetted as to be able to continue to serve as a Judge in the first place before he was legible to be appointed as the Chief Justice.

(iii) Whether such an appointment in the circumstances was in accordance with the values and principles set out in Articles 10 and 159 and including but not limited to the principles of non-discrimination, equity and inclusiveness vis-à-vis the other Judges of the Court of Appeal and the High Court who have equal and similar rights to aspire for and fairly compete for the office of the Chief Justice of the Republic of Kenya?

I therefore do find and hold that these also are serious, substantive and fundamental Constitutional questions which cry out to be resolved and determined by the Constitutional court in this Petition.

In exercise of the court's discretion, I do hold that the Applicants/Petitioner have sufficiently demonstrated that they have on a *prima facie basis an* arguable case which must as a matter of Constitutional necessity be heard on the merits. The questions raised are serious and are grave issues which must be given a reasonable and fair chance to be presented, articulated and ventilated before the Constitutional Court, the High court of Kenya. As held in the **BANSRAJ CASE**, the Constitutional challenges to the appointment of the three(3) persons herein to the respective offices are on the face of them serious ones indeed. This is the second criteria.

This brings me to the third principle or criteria proposed in this ruling for the grant or otherwise of a Conservatory Order to wit, whether the Petition will be rendered nugatory or useless, if the Conservatory Order is not granted, otherwise, referred to as retrievability.

Upon careful consideration of the facts, circumstances and the law, I do find it quite certain and obvious that if the order of conservation with regard to the appointment of the three offices is not granted, the Petition herein and the Constitutional claims will be rendered nugatory, useless or academic. If the names are presented to the National Assembly for approval, there will be nothing left for the Constitutional Court to revisit at the trial. This court would have no control or supervisory authority over the National assembly due to the principles and tenets of the separation of Powers. This court would in

effect have abdicated its Constitutional mandate and jurisdiction under Articles 165 (3) (b) and (d) which provide that:-

"165 ___

(3) subject to clause (5) the High Court shall have -

(a) __

(b) jurisdiction to determine the question whether a right or fundamental freedom in the bill of Rights have been denied, violated, infringed or threatened,

(c) ____

(d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of ___

(i) The question whether any law is inconsistent with or in contravention of this Constitution;

(ii) The question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of this Constitution.

(iii) ____

(iv) _____

……..."

This court cannot afford to take the course of abdicating of its Constitutional functions and jurisdiction. I do find and hold that if the nomination or appointments herein are actualized in any manner and they are approved by the National Assembly before the said questions are determined in accordance with the Constitution by a Constitutional court then the subject matter herein i.e. will not be capable of being retrieved. If the Petitioners succeed then the violation of the Constitution will not be capable of being retrieved and corrected. The subject matter will be lost leading to possible Constitutional crisis and breakdown of the Rule of Law. The degree of irretrievability herein possible would be total or absolute. I also have considered that the matter herein are not violation of private, or purely individual rights or freedoms. They involve public rights, and interest. They belong to all Kenyans and others who live or are in Kenya. They are matters of National Interest that cannot be taken lightly by this court.

This court is also entitled to consider the Balance of Convenience as between the Applicants on the one part and the 1st Respondent and the 2nd Respondent on the other part.

In considering the balance of convenience, I am compelled to admit a Press Statement issued by 2nd Respondent, the Judicial Service Commission. On 31st January 2011 Mr. Ndubi presented a copy of the said Press Statement from the bar as it was not part of the exhibits in any of the Applicant's/Petitioners' affidavits.

Mr. Njoroge objected to the 'production' or presentation of the said 'Press Statement' as it was not part of the record.

I have considered the objections by Mr. Njoroge for the 1st and 2nd Respondents. I think that it is a matter of serious and great concern to the court once it read the contents. The said press statement was made by the 2nd Respondent as the Judicial Service Commission which is Constituted by the sitting chief Justice as Chairman and the Attorney General as a member and/or Commissioner therein. The 2nd Respondent is established by the Constitution of Kenya 2010 in Article 171 which reads:-

“Part 4 – Judicial Service Commission Establishment of the Judicial Service Commission

171 (1) __

(2) (a) the Chief Justice, who shall be the chairperson of the Commission.

(b) One Supreme Court judge elected by the judges of the Supreme Court;

(c) One Court of Appeal judge elected by the judges of the Court of Appeal

(d) One High Court judge and one magistrate, one a woman and one a man, elected by the members of the association of judges and magistrates;

(e) The Attorney-General

(f) Two advocates, one a woman and one a man, each of whom has at least fifteen years’ experience, elected by the members of the statutory body responsible for the professional regulation of advocates;

(g) One person nominated by the Public Service Commission; and

(h) One woman and one man to represent the public, not being lawyers, appointed by the President with the approval of the National Assembly.

(3) The Chief Registrar of the Judiciary shall the Secretary to the Commissioner

(4) Members of the Commission, apart from the Chief Justice and the Attorney-General, shall hold office, provided that they remain qualified, for a term of five years and shall be eligible to be nominated for one further term of five years.

The functions of the Judicial Service Commission are set out in Article 172 which provides:-

“172

(1) The Judicial Service Commission shall promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice and shall –

(a) Recommend to the President persons for appointment as judges;

(b) Review and make recommendations on the conditions of service of –

(i) Judges and judicial officers, other than their remuneration; and

(ii) the staff of the Judiciary;

(c) Appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament;

(d) Prepare and implement programs for the continuing education and training of judges and judicial officers; and

(e) Advise the national government on improving the efficiency of the administration of justice.

(2) In the performance of its functions, the Commission shall be guided by the following –

(a) Competitiveness and transparent processes of appointment of judicial officers and other staff of the judiciary; and

(b) The promotion of gender equality.

It is therefore clear that the said Judicial Service Commission has been properly and validly been enjoined in these proceedings. The Attorney General's office is established by Article 159 and is the Principal legal Adviser to the Government and is included in the Judicial Service Commission in this capacity,

As a result of the forgoing, any press statement made by the Attorney General in any capacity and the Judicial Service Commission are not simple matters to be swept under the carpet.

The Presiding Judge in this matter as a person living in Kenya and keeping abreast on daily events also read a news item on the issue. As a result, this court takes Judicial Notice that the Press Statement was indeed published and made. The said Public Statement which was signed by the members of the Commission including the Hon. Chief Justice, His Lordship J.E. Gicheru and the Attorney General, Hon. Amos Wako stated as follows:-

"PRESS STATEMENT BY THE JUDICIAL SERVICE COMMISSION ON 31.01.2011

We members of the Judicial Service Commission (JSC) express our grave concern and misgivings about the nomination for the Chief Justice that was made by the President last week. We note that the President states that he consulted the Prime Minister prior to the nomination. We have also noted the views expressed by the Prime Minister that he was not consulted prior to the nomination.

As we implement and internalize the new Constitution, we the Judicial Service Commission is of the view that both the Judiciary and Kenyan People must start the new era heralded by the Constitution on the right footing. Both the letter and the spirit of the new Constitution must be adhered, to in our view.

In light of the divergent views coming from the Principals, we are of the view that the Principals need to reconsider their respective positions. There is an urgent need for a rethink of the matter and to put the country first. That entails a withdrawal of the nominations and a fresh start. On our part, it is our view that in order to give the process of appointing Judicial Officers legitimacy, public confidence, ownership and acceptance by the People of Kenya, the JSC must play an integral role in the process.

It is our view that Articles 171 (1) (e) and (2) read together with Article 166 (1) and Schedule 6 Section 24 gives the J.S.C. powers to play that important role.

Such a process, in our view will depoliticise and provide the much needed legitimacy and acceptance of the nominees.

Signed by: Name Signature

1. J.E. Gicheru signed

2. S. Amos Wako signed

3. R.S.C. Omolo signed

4. Emily Ominde signed

5. Titus J.K. Gatere signed

6. Isaac Lenaola signed

7. **Florence Mwangangi signed**

8. **Ahmednasir Abdullahi signed**

9. **Prof. Christine A. Mango signed"**

In the said Press Statement, the 2nd Respondent in which the 1st Respondent is a Commissioner and was at the Press Conference and appended his signature thereto, both requested the President and the Prime Minister to rethink or reconsider their positions and to put the Country first. They concluded that:-

"It is our view that Articles 171 (1) (e) and (2) read together with Article 166 (1) and Schedule 6, Section 24 gives the Judicial Service Commission Powers to play that important role.

Such a process in our view will depoliticize and provide the much needed legitimacy and acceptance of the nominees."

This shows clearly that the 1st Respondent sitting in the Commission and the Commission itself did not confine themselves to the offices of the Chief Justice but to all 3 offices in question which are the subject matter of this Petition in so far as the 1st and 2nd Respondent are concerned.

The Hon. Justice Musinga in the **CREAW CASE** captured this incident succinctly. The record in the said case also speaks for itself and shows that the Attorney General had conceded to some of the submissions and claims of the Applicants therein. Hon. Justice Musinga said as follows in regard:-

"……..Miss Mbiyu on behalf of the Attorney General conceded that the President ought to have received recommendations from the Judicial service Commission before he made the aforesaid nominations. It is in the public domain that the Attorney General who is a member of the Judicial Service Commission, signed a joint statement of the Commission to that effect. That was done just about four days ago. Under Article 156(1) o the Constitution, the Attorney General is the Principal Legal Adviser to the Government. The qualifications for appointment as an Attorney are very high, they are the same as for appointment of a Chief Justice. He is a person who is highly learned and experienced in laws. The President is therefore supposed to take his advise seriously.

On the basis of the concession made by the Attorney General, who is the Respondent in this Petition, it must be accepted that the said nominations did not comply with the Constitutional requirements of Article 166 (1) (a) as read together with Section 24 (2) of Schedule six of the Constitution. To that extent, the Petitioners have proved that the nomination was unconstitutional…"

The purpose of setting out the statements and findings of the Hon. Justice Musinga in the **CREAW CASE** is not necessary to reach the same conclusions or rely on the basis for any findings but to do three-fold:-

1. Demonstrate that indeed the 1st and 2nd Respondent herein were indeed as the Judicial Service Commission the makers of the Public Statement.

2. One cannot extricate the Attorney General – qua – Attorney General from the said Public Statement and therefore they must be deemed to be the position of the Attorney General.

3. The Attorney General did make concessions in the CREAW CASE during the hearing of the Application for Conservatory Orders and took a position which is diametrically opposed to the position he took in the application in this Petition. In the present Application the Attorney General opposed all prayers, and went further to oppose the application to the hilt without any explanations being given for the new stance in all aspects.

The courts have frowned on the practice of inconsistent positions taken by parties in different cases in particular when they are Public institutions or officers that are supposed to be impartial and support the Constitution and the Rule of Law. The Court of Appeal in **KIBAKI –V- MOI (NO. 3) (2008) 2 KLR EP 35,** had these to say in respect with inconsistency of positions taken by parties in different cases:-

"**The 2nd and 3rd Respondents must remain impartial in matters of elections. The law binds them to be impartial. But when they are sued and allegations of impropriety or wrong-doing is made against them, then unless they admit improper conduct or wrong-doing on their part, they must somehow challenge those allegations. If they are sued, then they become parties to the suit in which they are sued, and as parties surely they must be partisan in the defence of their interest. They are, in the position of parties, entitled to make whatever submissions they like to make and leave the decision of their submissions to the presiding judge or judges. That is how the adversarial system of justice operates. We would, however state that once a party has in a previous case, taken a particular stand on an issue of law, then good practice would demand that if the position previously taken is being changed, the party ought to disclose that a contrary view and the reason or reasons for the change that there had been a change and the reason or reasons for the change stated."**

In view of the foregoing, I do find that the Attorney General has been questionably inconsistent and could legitimately be subject to censure by the court. The entire situation on such a matter touching on the Constitution and public and National interest amounts to an abuse of the court process.

In the premises, I am inclined to hold this against the Attorney General when considering the Balance of convenience. The Attorney General in the **CREAW MATTER** made concessions which clearly influenced the court in granting the Conservatory Orders. He is estopped now coming before me to submit that the balance of convenience ought to be decided in the 1st and 2nd Respondent's power.

In any case, even on the merits, I am convinced and do hold that the balance of convenience tilts in favour of the Applicants.

The net result is that I am inclined to grant the Conservatory Orders against the 1st and 2nd Respondents in respect of prayers 2 and 4 of the application with appropriate and necessary variations.

Prayer 3 is in the nature of a **Mandatory Injunction** i.e that:-

"3. An order directing the Judicial Service Commission to immediately establish and initiate mechanisms of transparently and accountability sourcing for suitable candidates for the appointment as Chief Justice and Deputy Chief Justice."

First and foremost, such an interim order of injunction is not squarely based on the pleadings i.e. the Petition. In respect of the office of the Chief Justice and Deputy Chief Justice, the Petitioners only seek Declaratory Orders. There is no substantive prayer for the Mandatory injunction sought in the chamber Summons dated 2nd February 2011. The Petitioners are bound by their pleadings and cannot obtain orders or reliefs which they did not ask for as a substantive relief. In any case not at the interlocutory stage even if they intend to persuade the Constitutional court that will ultimately hear the Petition that such a relief should be granted after the full and fair trial/hearing on its merits.

Secondly, just like in civil matters, a Constitutional Court ought to be extremely careful in considering the grant of a mandatory injunctive orders at the interlocutory stage.

I am of the view that there must be compelling and exceptional circumstances to warrant such drastic and final orders of the kind sought herein before the hearing and determination of the Petition. It must be in the clearest, obvious and certain circumstances of the case that the court may grant such compulsive, coercive, mandatory orders that is in its nature final orders.

If such a prayer is appropriately and expressively pleaded and a foundation laid for it, it ought to be

considered to be granted at the end-tail of a fully and fairly concluded proceedings where all the evidence has been considered.

In the premises, I do hold that this is not an appropriate case for the grant of Mandatory injunctions for process of recruiting the Chief Justice to commence at this interlocutory stage. I have no hesitation in declining to grant order No. 3 of the Chamber Summons herein.

APPLICATION AGAINST 3RD RESPONDENT

Finally this brings this court to the portion of the application and claims against the 3rd Respondent, the Director General, National; Security Intelligence Service.

In the Petition, the prayer of order sought against the 3rd Respondent is as follows:-

"22 __

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(e) An order that the position of Director General National Security Intelligence Service be advertised and filled in accordance with the Constitution and more particularly Article 232 (1) (g), (h), (i) and (2) thereof."

In the Petition, the specific averments and claims against the 3rd Respondent, the Director General, National Security Intelligence Service are inter alia, that:-

"……..11. Your Humble Petitioners aver that the appointment of the Director General of the National Security Intelligence Service (Maj. General Michael Gichangi) effected on 15th January 2011 vide Gazette Notice Number 450 to serve for another term of five years done directly under the NSIS Act 11 of 1998 without obligation to the Constitution of Kenya is unlawful, illegal, unconstitutional, null and void ab initio."

The other claims and allegations on the lack of due process and unconstitutionality in the appointments made by the President in respect of the offices of Chief Justice, Attorney General and the Director of Public Prosecutions in the Petition have also been applied and invoked to the office of the Director General, NSIS by the Petitioners. There is no need to respeat them at this stage as they have been referred to in detail hereinbefore.

In the affidavit in support of the Petition, the Petitioners state that:-

"…….

10. THAT under Article 242 of the Constitution establishes the National Intelligence service and recognizes the Director General thereof as a state officer under the Interpretation clause found in Article 260 of the Constitution.

11. THAT I believe that the appointment of any person under the new Constitutional regime to the position of Director General ought to follow the values and procedures stated in the Constitution otherwise such appointment would be illegal, unlawful and unconstitutional thus null and void.

12. THAT in establishing the National Intelligence Service, the Constitution did replace the previously existing National Security Intelligence Service otherwise known and the NSIS by acronym.

13. THAT Article 7 of the Transitional Clause in the Constitution declares that the Laws existing would apply after the effective date though they would need to be construed with such alterations, adaptations, qualifications and exceptions necessary to bring such law into conformity with the Constitution.

14. THAT I am advised by my counsel on record which advise I verily believe to be true that the appointment of the Director General must be made inconformity to the Constitution.

15. THAT in disregard of the construction the President with or without the necessary legal advice of the 1st Responded, did on 15th January 2011 vide Gazette Notice Number 450 purported to appoint one Maj. General Michael Gichangi to be Director General NSIS (which otherwise should be NIS) (Annexed herewith is a copy of the Gazette Notice marked "KAK 1"

16. _

17. _

18. _

19. _

20. _

21. _

22. _

23. _

24. _

25. THAT the reappointment of Maj. General Michael Gichangi as Director General of the 3rd Respondent was and remains, illegal and unconstitutional thus the position must be reactivated and a process that is Constitutional and enjoy public confidence began afresh.

…… ……. ."

In the Chamber Summons dated 2nd February 2011, the Applicants seek an Order in the following terms:-

"1 A Conservatory Order be and is hereby issue restraining Maj. General Michael Gichangi from in any way directly or indirectly acting as the Director General of the National Intelligence Service until the Petition is heard and determined."

The Director General through his Counsel filed Grounds of Opposition which I have already set out in full in this Ruling at the beginning. The said 3rd Respondent did not file any Replying Affidavit to the interlocutory application or the Petition by the time the application was heard. As a result the facts presented by the Applicants that such re-appointment took place is not disputed. In fact, the Applicants have annexed a copy of the Gazette Notice No. 450 published in the Kenya Gazette Notice of 21st January 2011 through which the 3rd Respondent was appointed by His Excellency the President on 15th

January 2011. The said Gazette Notice reads as follows:-

"GAZETTE NOTICE NO. 450

THE CONSTITUTION OF KENYA
THE NATIONAL SECURITY INTELLIGENCE

SERVICE ACT (NO. 11 OF 1998)

IN EXERCISE of the powers conferred by Section 6(1) of the National Security Intelligence Act, I, Mwai Kibaki, President and Commander-in-chief of the Kenya Defence Forces of the Republic of Kenya, appoint – MAJ. GENERAL MICHAEL GICHANGI to be Director – General of the National Security Intelligence Service for a period of five (5) years with effect from 15th January 2011.

Dated the 15th January 2011

MWAI KIBAKI
PRESIDENT"

In the light of the Prayer in the Petition and the claims allegation, and considering the response through the 3rd Respondents Grounds of Opposition the Petition raises several questions or issues for the determination of the Constitutional court. Some of the questions or issues raised are:-

1. Whether the appointment of the Director General of the National Security Intelligence Service on 15th January 2011 was unlawful, illegal, unconstitutional, null and void ab initio.

2. Whether the office of the Director General on the date of appointment was strictly, "a Constitutional Office" e.g. akin to the Attorney General, Chief Justice etc aside from being a "State Office" as defined in Article 260 (o)?

3. Whether the office of the Director General of the National Security Intelligence Services which was filled by the appointment of Maj. General Michael Gichangi was a new appointment and whether the said "vacancy" arose as a consequence of the coming into force of this Constitution on the effective date and which must be filled within one year under Schedule 6 "the Transitional and Consequential Provisions" of the Constitution, or a reappointment under legislation.

4. Whether as at the time of the appointment of the Director General, he was appointed under the new Constitution or the National Security Intelligence Act 1998?

5. Whether the State officer referred to under Article 132 (2) (f) of the Constitution will be vetted by the National Assembly or not before the final announcement of all the results of the first elections for Parliament under the Constitution by virtue of Section 2 (1) © of the 6th Schedule to the Constitution which suspends Articles 129 to 155 of the Constitution.

6. Whether the National Security Intelligence Service Act 1998 is part of the existing laws in force after the effective date following of the promulgation of the Constitution of Kenya 2010.

7. Whether the appointment of the Director General was in consonance with the provisions of Section 31 (2) of the 6th Schedule.

8. Whether Article 239(6) of the Constitution mandates Parliament to enact legislation to provide for the functions of organizations and administration of the National Security Organs.

9. Whether under the 5th Schedule to the Constitution the contemplated legislation for the National Security Organs shall be enacted within two years.

10. Whether until parliament enacts the legislation contemplated in the said Articles the National Security and Intelligence Service Act continues to regulate the National Security Intelligence Service and the appointment of the Director General?

I do find and hold that in general the aforesaid questions are important questions of law to be heard and determined by the court. They raise serious and substantive Constitutional issues and questions. They possibly raise an Arguable case. However, to appreciate the degree of serious challenge to the appointment of Maj. General Michael Gichangi and the National Security Intelligence Service Act 1998 the court must consider the following facts, claims and matters:-

- Under Article 239 (9) of the Constitution, one of the National Security Organs is the National Intelligence Service.

- Article 239 (b) provides that "Parliament shall enact legislations to provide for the functions, organization and administration of the National Security Organs.

- Under Article 261 (1) read together with the Fifth Schedule, the legislation intended to regulate the National Intelligence Service ("NIS") is to be enacted within two years from the effective date.

- The National Security Intelligence Service (N.S.I.S.) Act 1998 is still in force under the provisions of Article 6 of Schedule 6.

- The appointment by the President , certain Constitutional office holder and state officers intended to be created by the Constitution have been suspended until the final announcement of all the results of the first elections for Parliament under the Constitution by virtue of Section 2 (1) of the 6th Schedule.

- Section 4 of the National Security Intelligence Service Act No. 11 of 1998 provides that:-

"4. Establishment and Composition of the Service

(1) There is established a service to be known as the National Security Intelligence Service.
(2) The Service shall comprise of:
(a) The Director General under Section 6.
(b) –
(c) - "

- Section 6 of the Act provides that"-

"**there shall be a Director General of the Service who shall be appointed by the President on such terms and conditions of Service as the President may, in consultation with the Public Service Commission determine……"**

- The said Act still in force and part of the legislation of the Country.

- The President invoked s. 6 of the Act when he appointed the Director General.

On the basis of the foregoing, I do find that while on a prima facie

basis that the Applicants/Petitioners have shown some Arguable case, the degree of serious challenge is put to question by the factual and legal findings of this court and in particular the provisions of the Constitution and Act.

I am of the view that while the Applicants have a right to pursue and prosecute the Petition against the Director General, I am doubtful whether on this basis they would be entitled to the Conservatory

Orders they seek in the application.

This brings me to the other criteria of Retrievability and Balance of Convenience.

Retrievability – It is a fact that His Excellency has already appointed Mr. Maj. General Michael Gichangi as the Director General of the National Security Intelligence Service for a period of 5 years with effect of 15th January 2011. The said appointment which is being referred to as a

re-appointment by the 3rd Respondents Counsel was duly gazetted and taken legal effect through Gazette Notice 450. The appointment is done.

It is a fact that Maj. General Michael Gichangi was in office in the same capacity for the last 5 years and this is an appointment for a second term. As a result Maj. General Gichangi was in office and continues in office from 15.01.2011. The appointment was in exercise of the President Powers of the President Powers in S.6 of the Act. This is a statutory appointment in the circumstances until it is shown otherwise.

In the circumstances, can it be said that if the purported Conservatory Order is not given the Applicant's claims will be rendered nugatory?

I do not think that the claims/cause of action will be rendered nugatory as this Petition can be heard and disposed of within one – three months if parties are committed and serious and take all necessary steps to expeditiously dispose of the Petition. The office of the Director General is still there and it has been filled but it does not place the claim beyond retrievability . If the Applicants/Petitioners succeed in their claim then this court has the power, authority and jurisdiction to nullify and revoke the appointment of the said Director General.

The Applicant came to this court after the appointment of the Director General and when the office had been occupied. It is a different scenario from that of the Chief Justice, Attorney General and the Director of Public Prosecutions which have not taken effect and where there are no doubts that they are Constitutional office holders which places the said officers at a different level applying the law as it stands.

Last but not least, in whose favour does the Balance of Convenience operate? First and foremost, upon careful reading of the orders being sought herein, it is clear that what the Applicant is seeking is the removal of Maj. General Michael Gichangi from the office of Director General of the National Security Intelligence Services. It is in effect a "Mandatory Injunction that the Applications seek herein and not a "Conservatory Order". This court has explained the differences between injunctions and in particular mandatory injunctions and Conservatory Orders. This court has explained and stated why it is abhorrent in granting mandatory injunctions unless an Applicants proves that such an order is truly and genuinely warranted to prevent violation or threatened violation of Constitutional rights and freedoms or contraventions of the Constitution itself.

I do accept the submissions of Counsel for the 3rd Respondent on this question of balance of convenience. The National Security Intelligence Service plays a critical role in the enhancement and furtherance of security and stability of the Nation and the safety and well being of the people of Kenya. The grant of the Mandatory injunctive orders camouflaged under the term of "Conservatory Order" under Prayer 1 would destabilize the leadership of the National Security Intelligence Service and thereby threaten peace, security and stability of the Republic of Kenya. The Orders sought ought not be granted by the court as the Director General has been appointed and is already in office and should only be removed if at all after the full hearing of the Petition. The material presented to this court by the Applicants falls far below the threshold required to grant a mandatory injunction or prohibition at the interlocutory stage. The balance of convenience militates against the grant of the Order sought in Prayer 1 as such the Order would undermine the proper functioning of the National Security Intelligence Service which is essential for the maintenance of National Security, stability and the well being of the people of Kenya.

The upshot of all the foregoing is that I am now able to proceed to deal with the substantive application and in particular the orders sought therein.

I do hereby make the following **ORDERS:-**

1. I do hereby dismiss the purported Conservatory Orders sought against the 3rd Respondent, the Director General, National Security Intelligence Service in Prayer 1 of the application.

2. I do hereby grant a Conservatory Order in terms of Prayer 2 of the application but accordingly varied, to wit, a Conservatory Order be and is hereby issued against the publication of the names of Mr. Justice Alnashir Visram, as a person nominated for consideration as the Chief Justice of the Republic of Kenya pending the hearing and determination of the Constitutional Petition herein or until further orders of the Constitutional court. For the avoidance of doubt, it follows that it is hereby ordered that the Attorney General and the Judicial Service Commission whether acting on their own respectively or jointly or through their servants, and/or agents or otherwise howsoever be restrained and a Conservatory Order is hereby granted restraining them or each of them from acting in pursuance of implementing and/or enforcing the said appointment or any consequential purported validation and/or approval by any person, body or authority acting in pursuance of or subsequent to the said appointment herein pending the hearing and determination of the Constitutional Petition herein or further Orders of the Constitutional court.

3. I do hereby dismiss prayer 3 of the application which sought an order directing the Judicial Service Commission, the 2nd Respondent, to immediately establish and initiate mechanisms of transparently and accountably sourcing for suitable candidates for appointment as Chief Justice and Deputy Chief Justice.

4. I do hereby grant a Conservatory Order in terms of Prayer 4 of the applications but accordingly varied to wit, a Conservatory Order be and is hereby issued restraining the 1st Respondent on behalf of the Government of Kenya from presenting or in any way publishing names of any person including those of Prof. Githu Muigai and Kioko Kilukumi as persons nominated to fill the position of Attorney General or Director of Public Prosecutions respectively until the hearing and determination of this petition or further orders of the Constitutional Court. For the avoidance of doubt, it follows that it is hereby ordered that the Attorney General whether acting on his own or through his servants and/or agents or otherwise howsoever be restrained and a Conservatory Order is hereby granted restraining them or each of them from acting in pursuance of implementing and/or enforcing the said appointments or any consequential purported validation and/or approval by any person, body or authority acting in pursuance of or subsequent to the said appointments herein pending the hearing and determination of the Constitutional Petitions herein or further orders of the Constitutional.

5. I do hereby grant Prayer 5 of the application to wit, an order directing that the Petition herein be heard on priority basis within the earliest opportunity until final determination.

6. In terms of the provisions of Article 165 of the Constitution of Kenya 2010, I do certify the Petition as Urgent and refer this Petition to the Honourable Chief Justice to empanel a Constitutional Court and for the matter to be heard as a matter of National Urgency and considering the provisions of Section 24 (1) of Schedule 6 of the Constitution.

7. I hereby direct that the issue of costs herein be reserved until the hearing of the Petition Orders accordingly.

DATED and DELIVERED at MOMBASA this 23rd day of February 2011.

M.K IBRAHIM
J U D G E

Coram

Ibrahim, J
Kazungu – court clerk
For the applicants: - Mr. Ndubi
For 1st and 2nd Respondents: - Mr. Njoroge
For the 3rd Respondent: - Mr. Waweru Gat onye