Gikenyi B & 3 others v Committee & 23 others (Petition E011 of 2025) [2025] KEHC 5823 (KLR) (12 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5823 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

PETITION E011 OF 2025

RN NYAKUNDI, J

MAY 12, 2025

IN THE MATTER OF: THE ILLEGAL, IRREGULAR AND UNCONSTITUTIONAL ESTABLISHMENT BY CS HEALTH-THE NATIONAL HEALTH INSURANCE FUND(NHIF) PENDING MEDICAL CLAIMS VERIFICATION COMMITTEE THROUGH GAZETTE NOTICE NO.4069 VOL. CXXVII—NO. 64 OF 28TH MARCH, 2025

IN THE MATTER OF: MATTER OF DEVOLUTION OF HEALTH, DIGITAL HEALTH ACT AND THE DATA PROTECTION ACT, 2019

IN THE MATTER OF: ARTICLES 1,2,3(1) 6(2)10,19,20,21,22, 23,31,73,74,75, 93,94,95,96,159, 165(1), (3) (A, B&(D) (I– III)),185(2),186, 187, 189,190 201,226, 229, 232(1&2), 248, 249(1 AND 2), 250,252,253,254,258(1&2(C), 259(1) & 260 OF THE

CONSTITUTION OF KENYA (2010)

IN THE MATTER OF: ALLEGED VIOLATIONS OF OR THREATS OF VIOLATIONS OF ARTICLES 1, 2(1, 2 &4), 3(1), 10,31,73, 74,75[1],93,

94, 95, 96(1), 159,165,185(2),186, 187,189, 190,201,226(3), 229, 232, 248, 249, 250, 252, 253, 254 (2&3), 259 AND 260 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE CONSTITUTIONAL VALIDITY OF NATIONAL HEALTH INSURANCE FUND(NHIF) PENDING MEDICAL CLAIMS VERIFICATION COMMITTEE THROUGH GAZETTE NOTICE NO.4069 VOL. CXXVII—NO. 64 OF 28TH MARCH, 2025

IN THE MATTER OF: IN THE MATTER OF RULE 4, 10, 11, 13 OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL FREEDOMS)- HIGH COURT PRACTICE AND PROCEDURE RULES 2013)

IN THE MATTER OF: DOCTRINES OF SUPREMACY OF THE CONSTITUTION OF KENYA, BILL OF RIGHTS, CONSTITUTIONALISM,

RULE OF LAW AND LEGITIMATE EXPECTATIONS

BETWEEN

DR. MAGARE-GIKENYI B ..... 1ST PETITIONER

ELIUD KARANJA MATINDI ..... 2ND PETITIONER

DISHON KEROTI MOGIRE ..... 3RD PETITIONER

PHILEMOMON ABUGA NYAKUNDI ..... 4TH PETITIONER

AND

THE NATIONAL HEALTH INSURANCE FUND PENDING MEDICAL CLAIMS VERIFICATION COMMITTEE ..... 1ST RESPONDENT

HON.ADAN DUALE, CABINET SECRETARY HEALTH ..... 2ND RESPONDENT

PRINCIPAL SECRETARY MEDICAL SERVICES ..... 3RD RESPONDENT

HON.ATTORNEY-GENERAL ..... 4TH RESPONDENT

AUDITOR GENERAL ..... 5TH RESPONDENT

JAMES MASIRO OJEE ..... 6TH RESPONDENT

DR. ANNE WAMAE ..... 7TH RESPONDENT

CATHERINE MUNGANIA ..... 8TH RESPONDENT

EDWARD KIPLIMO BITOK ..... 9TH RESPONDENT

MESHACK MATENGO ..... 10TH RESPONDENT

MEBOH ATIENO AWOUR ..... 11TH RESPONDENT

TOM NYAKABA ..... 12TH RESPONDENT

CATHERINE KARORI BOSIRE ..... 13TH RESPONDENT

PAUL WAFULA ..... 14TH RESPONDENT

JAMES OUNDO ..... 15TH RESPONDENT

JACKLINE MUKAMI NJIRU ..... 16TH RESPONDENT

DR. JUDITH AWINJA ..... 17TH RESPONDENT

DAVID DAWE ..... 18TH RESPONDENT

PETER KITHEKA ..... 19TH RESPONDENT

SHAWN MOGAKA ..... 20TH RESPONDENT

DR. CONSOLATA OGOT ..... 21ST RESPONDENT

DR. EMMANUEL AYODI LUSIGI ..... 22ND RESPONDENT

HALIMA YUSSUF ..... 23RD RESPONDENT

WILBERT KURGAT ..... 24TH RESPONDENT

RULING

1. The Petitioners herein filed a Notice of Motion dated 5th April, 2025 expressed under the provisions of Art. 20, 21, 22, 23(3), 48, 50(1), 159(2)(d), 165, 258 and 259(1) of *the Constitution* of Kenya, Rules 3, 4, 8, 10, 11, 13, 15, 18 and 19 of *the Constitution* of Kenya. The petitioners sought orders as follows:

    a. Spent.

    b. Pending the hearing and determination of this Application and the petition, the Honorable Court be pleased to issue a conservatory order suspending National Health Insurance Fund(NHIF) Pending Medical Claims Verification Committee as gazetted in Gazette Notice No.4069 Vol. CXXVII—No. 64 Of 28th March, 2025 or stopping the committee from compiling any report/recommendations or handing over and/or implementation of the recommendation/report finding or doing any actions to do with the report/recommendations whatsoever.

    c. That Pending the hearing and determination of this Application and petition, this Honorable Court be pleased to issue an interim order directing the Respondents, either by themselves, anyone else acting at their behest, instructions or directions or any other person whosoever, from taking any action whatsoever pursuant to or in reliance on or in fulfilment of any duty or obligation or implementation of Gazette Notice No.4069 Vol. CXXVII—No. 64 Of 28th March, 2025 and/or any other document and or any report/recommendations and/or any subsequent actions and/omissions based on the National Health Insurance Fund(NHIF) Pending Medical Claims Verification Committee as gazetted in Gazette Notice No.4069 Vol. CXXVII—No. 64 Of 28th March, 2025 and/or any other document date of any other date.

    d. That having granted prayer (b)&(c) above and considering need for expeditious disposal of the petition and in an effort not to defeat the purpose of the petition, this honorable court is pleased to issue STRICT priority based TIMELINES on hearing and determination of this petition that

        i. Timelines for respondents filing the responses.

        ii. Timelines for petitioners filing the submissions (we need only 3days)

        iii. Timelines for respondents filing submission

        iv. Date for highlighting of submissions (if any) and

        v. Judgement date

    e. That any other order/modification of my prayers in which this honorable court may deem fit to grant for purposes of attaining Justice for all Kenyans.

    f. Costs be provided for.

2. The application is anchored on several grounds, which can be distilled as follows:

3. The petitioners challenge Gazette Notice No. 4069 of 28th March, 2025, contending that the Cabinet Secretary for Health established the National Health Insurance Fund (NHIF) Pending Medical Claims Verification Committee without any proper legal or constitutional foundation. They characterize this establishment as a mere roadside declaration lacking citation of any specific authorizing legislation.

4. At the core of their challenge is the argument that the committee's Terms of Reference, particularly its mandate to scrutinize and audit NHIF claims from July 2022 to September 2024, directly usurps the constitutional role of the Auditor-General under Article 229(4)(g). The petitioners maintain that the sovereign power to audit and verify public funds is explicitly delegated to the Auditor-General, not to ad hoc appointees of a Cabinet Secretary.

5. The petitioners assert that the proper constitutional pathway, if such an audit were required, would be for the Cabinet Secretary to request the Auditor-General to conduct a forensic audit under Article 254(2) and Section 37 of the *Public Audit Act*. By bypassing this established procedure and appointing nineteen individuals to perform functions constitutionally reserved for the Auditor-General, the Cabinet Secretary allegedly violated Articles 226(3), 229(1), (2), and (4)(g) of *the Constitution*.

6. The petitioners further highlight concern about the committee's composition and selection process. The petitioners argue that committee members were appointed at the Cabinet Secretary's whim without transparent competition or merit-based selection required by Article 232(1)(g), and without demonstrating they possess qualifications comparable to those required for the Auditor-General under Article 229(2). This, they contend, contradicts the constitutional design that provides for only one Auditor-General at a time.

7. Issues of accountability and transparency form another pillar of the challenge. Unlike reports prepared by the Auditor-General, which must be published and publicly accessible under Articles 254(2) and (3), the committee's findings would only be submitted to the Cabinet Secretary with no guarantees of public disclosure, a state of affairs the petitioners vehemently contest.

8. The petitioners also raise significant privacy concerns, arguing that allowing committee members who are neither NHIF employees nor public servants to access sensitive medical records violates privacy rights under Article 31 and contravenes the Data Protection Act, as patients have not consented to such disclosure.

9. In response to the application, the 1st – 5th Respondents filed grounds of opposition dated 29th April, 2025 in which they couched the following grounds of opposition:

    a. That the Applicant has not satisfied the legal test for the grant of interim conservative orders under Article 23(3)(c) of *the Constitution*.

    b. That the Petition and the application discloses no prima facie constitutional or legal breach by the Cabinet Secretary. The Applicant mischaracterizes the empanelment of the committee as an unlawful act, despite the clear existence of executive discretion to establish internal advisory structures.

    c. That the committee has no coercive or decision-making authority. It is an internal advisory body constituted to assist the Ministry in addressing performance, compliance, and operational challenges in the health sector. Its role does not encroach upon the mandate of the Auditor-General.

    d. That the applicant has not established that the 2nd Respondent violated any of the principles of procedural fairness, transparency, or accountability under Article 47 of *the Constitution* or the *Fair Administrative Action Act*, 2015 to warrant the issuance orders sought.

    e. That the Applicant has not identified any legal provision that the Cabinet Secretary allegedly contravened in the process of empanelment. The allegations are general, speculative, and unsupported by evidence.

f. That the committee in question was established as matter of urgency to address critical governance, financial and performance issues in the health sector. Suspending its operations at an interim stage would compromise public service delivery and accountability, contrary to the public interest.

g. That the committee addresses urgent and sensitive issues affecting the management and oversight of health institutions and public resources. Halting the process midstream would obstruct critical institutional reforms and risk loss of public funds or deterioration of service delivery.

h. That the court should refrain from interfering with legitimate and lawful executive actions in the absence of illegality, irrationality, or procedural impropriety. There is no constitutional bar against cabinet secretary from initiating internal reviews, audits or administrative action.

i. That Government actions are presumed lawful until proven otherwise. The Applicant's speculative claims are not sufficient to rebut this presumption or justify the exceptional remedy of interim conservative relief.

j. That the Petition has not yet been substantively heard. There is no demonstrated urgency or risk that justifies pre-empting executive decision-making at this preliminary stage.

k. That the Granting the orders would halt or delay legitimate reform processes affecting stakeholders and institutions beyond the Petitioners, undermining efficiency and good governance in the health sector.

l. That the balance of convenience lies in permitting the committee to complete its mandate while preserving the Applicant's right to challenge its findings or outcomes in due course.

m. That the Gazette Notice was issued in accordance with the Cabinet Secretary's constitutional and statutory authority under Article 152 of *the Constitution*, read together with the *Health Act*, 2017, and other enabling laws and regulations that govern ministerial operations and internal oversight.

n. The Gazette Notice was not intended to create binding legal obligations or policy; it was a formal administrative notification of a committee's formation for transparency and accountability, not subordinate legislation requiring anchoring in an Act of Parliament under Article 94(5).

o. The Cabinet Secretary exercised lawful discretion to establish a committee to review matters within the ministry's portfolio, following internal consultation and consistent with constitutional values under Article 10.

p. The committee does not usurp the role of the Auditor-General as enumerated under Article 229 (4) of *the Constitution* or any other oversight body. It is purely advisory and operates internally to assist the Ministry in strengthening governance, compliance, and performance.

q. Granting the interim orders would paralyze the Ministry's internal governance mechanisms and set a precedent of obstructing lawful administrative actions without a full hearing.

r. The orders sought if granted would constitute a usurpation of the executives' constitutional roles and prerogatives contrary to the principle of separation of powers. As was rightly observed

by the Supreme Court in the case of in the Matter of the Speaker of the Senate & another [2013] eKLR Advisory opinion no. 2 of 2013, where the Supreme Court held thus:

> " This Court, I humbly submit, may not go further than to suggest this, as to delve into further details would border dangerously on giving direction to a different arm of Government on its internal processes. This would fly in the face of the doctrine of separation of powers."

s. That the applicants have failed to demonstrate sufficient grounds to warrant the issuance of the orders/reliefs being sought and thus the application ought to be dismissed and or struck out with costs.

10. The respondents filed their submissions dated 7th May, 2025 in which learned counsel Ms. Odeyo submitted that that the only issue for determination is whether the petitioners have met the threshold for conservatory orders to be issued by the court. She submitted that it is trite law on the circumstances under which conservatory orders may be issued. She cited the decision in Kevin K. Mwiti & Others v Kenya School of Law & Others, where Justice Odunga stated that the first issue for determination is whether the Petitioner has established a prima facie case with a likelihood of success. Counsel emphasized that a prima facie case need not be one which must succeed at the hearing, but it must not be frivolous and must disclose arguable constitutional issues.

11. Counsel further relied on Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & 2 Others eKLR, where the Supreme Court stated that conservatory orders bear a more decided public law connotation as orders to facilitate ordered functioning within public agencies and to uphold the adjudicatory authority of the court in the public interest.

12. Citing Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board and Others Nairobi High Court Constitutional Petition No.154 of 2016, learned counsel submitted that there are three main principles for consideration on whether to grant conservatory orders:

    a. An applicant must demonstrate a prima facie case with a likelihood of success

    b. Unless the court grants the conservatory order, there is a real danger of prejudice from the violation or threatened violation of *the Constitution*.

    c. The public interest must be considered before granting a conservatory order

13. Counsel argued that the applicants have not persuaded the court on a prima facie basis that there is basis to issue orders that have the potential to paralyze the operation of a public institution as crucial as the Ministry of Health with all its statutory and constitutional roles.

14. Referring again to Kevin K. Mwiti Others v Kenya School of Law & Others, counsel submitted that the petitioners have failed on this ground as they have not demonstrated or established a credible violation of *the Constitution* or statute.

15. Counsel submitted that even if the court were to find that prima facie case was proven, the petitioners have failed to demonstrate what prejudice they will suffer if the orders are not granted. Citing Centre for Rights Education and Awareness (CREAW) & 7 Others (2017) eKLR, counsel argued that the applicants did not point out with reasonable exactitude the rights allegedly denied, violated or infringed or threatened. Counsel maintained that the mere fact of the committee's appointment does not amount to a violation of rights, especially where no evidence of illegality or bad faith has been adduced.

16. Counsel strongly argued that the public interest overwhelmingly supports the continuation of the verification exercise to safeguard public funds, maintain continuity in healthcare financing, and promote trust in government institutions.

17. Counsel submitted that halting the committee's work would cause disruption to public health administration, delay important policy interventions, and is not in the interest of justice. She noted that no party has been adversely affected or prejudiced by the committee's activities, and no final decisions have been made that would require judicial intervention.

18. Ms. Odeyo argued that the executive power being exercised by the 2nd Respondent enjoys a constitutional mandate and is prima-facie lawful. She submitted that the doctrine of presumption of constitutionality is applicable in this case, making conservatory orders inappropriate. In support, counsel cited Raila Od*inga & Others -v- Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013*.

19. Citing Muslim for Human Rights (MUHURI) & 2 Others v Inspector General of Police & 2 Others [2014] eKLR, counsel emphasized that public interest must override private interest in the issuance of conservatory orders, especially where public governance, health, and safety are involved.

20. Counsel further submitted that the Applicant is improperly seeking conservatory orders that mirror the final reliefs sought in the Petition. In support, she cited Kenya Revenue Authority v. Bank of Africa Kenya Ltd [2021] eKLR, which cautioned that interim reliefs should not be used to determine or dispose of the main issues in the petition.

21. In conclusion, counsel submitted that the application lacks merit and ought to be dismissed as the petitioners have failed to demonstrate a prima facie case. She argued that the court cannot disenfranchise the public of the services being provided by the Respondents and stop an administrative exercise of the executive.

Analysis and determination

22. *The Constitution* of Kenya entrusts the courts with the solemn duty of safeguarding its provisions and ensuring that all exercises of public power conform to its letter and spirit. In the case at bar, I am confronted with a constitutional challenge that strikes at the heart of institutional mandates, separation of powers, and proper governance in the management of public health resources. Dr. Magare Gikenyi B and his fellow petitioners have approached this court to challenge the establishment of the National Health Insurance Fund (NHIF) Pending Medical Claims Verification Committee through Gazette Notice No. 4069 of 28th March, 2025.

23. It cannot be gainsaid that *the Constitution* of Kenya 2010 is a legal, political and social document and it is at the intersection of the legal system of this Republic, the nature of the political system and its governance structures. The reading in and reading out of the chapters of *the Constitution* marries power with justice. It makes the operation of power procedurally predictable to uphold the rule of law and place limits on the abstractness of power. One has to read the preamble and the 1st chapter to appreciate its supremacy as the supreme law of the land and it does provide the standards of ordinary statutes enacted by parliament have to comply. In this same Constitution, the drafters went to a great extent to varying degrees to reflect and shape the Kenyan society as a constitutional democracy by expressing itself on the common identity and aspiration of the people by proclaiming shared values and ideals. Therefore, it should not be lost that *the Constitution* prescribes a country's decision-making institutions, in the same breadth, it identifies the supreme power of the executive without ignoring the

distribution of power to the other arms of government in a way that informs the doctrine of separation of powers.

24. By analogy it can be said that the rules of the game of governance is traceable to *the Constitution* itself, Constitutional governments like the one put in place by the Kenyan people ensures the fair and impartial exercise of power, which enables an orderly and peaceful society protecting the rights of individuals, communities and to promote the proper management of resources. For the geopolitical-socio economic development. In this sense, the horizon of the petition is questioning the ministerial decision making process to establish an Ad-Hoc committee or taskforce to look into the management and governance of the defunct National Hospital Insurance fund as it relates on the service level agreements with the various hospitals or medical centers on generation of claims and reimbursements.

25. In exercising jurisdiction under Art. 165(3b), (c), d), this court would inter-alia interrogate whether the Cabinet Secretary, health in signing the executive order of establishing the impugned Ad Hoc committee did so within the bounds of *the Constitution*. At its core, this dispute interrogates the boundaries of executive power, the sanctity of constitutional mandates, and the protection of both public resources and whether the applicable law made no provision in dealing with the so called questionable pending bills. At the center of this proceedings would be the gazette notice, issued by the Cabinet Secretary for Health, Hon. Aden Duale, establishes a committee of nineteen individuals tasked with scrutinizing and auditing NHIF claims spanning from July 2022 to September 2024. This action has ignited significant contention, with the petitioners questioning not only the procedural propriety of the committee's establishment but the constitutional foundations upon which it rests.

26. I have carefully considered the arguments by both parties. The petitioners passionately argue that the committee's creation represents an unconstitutional usurpation of functions expressly reserved for the Auditor-General under Article 229 of our Constitution. They describe the gazette notice as a mere roadside declaration lacking proper statutory foundation. They raise further concerns about the selection process of committee members, transparency of findings, and potential privacy violations in handling sensitive medical data.

27. The respondents, as led by the Attorney General, firmly maintain that the committee constitutes a legitimate exercise of executive authority. They characterize it as an internal advisory body with no coercive powers, created to address performance and operational challenges in the health sector. They assert that halting the committee's work would compromise public service delivery and important institutional reforms.

28. This contest of perspectives brings into sharp focus fundamental questions of constitutional interpretation. When does legitimate executive action cross into encroachment upon constitutionally designated roles? How do we balance administrative efficiency against constitutional fidelity? What safeguards must be present when committees are formed to examine matters touching on public finances?

29. The application before me seeks conservatory orders to suspend the committee's activities pending the determination of the substantive petition. It demands thoughtful consideration of established principles governing such extraordinary relief, including the existence of a prima facie case, the potential for the petition to be rendered nugatory, and careful weighing of the public interest.

30. The applicable principles for the grant of conservatory orders were set out by the Supreme Court of Kenya in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others, Civil Application no. 5 of 2014, [2014] eKLR, where the court stated at (para. 86) that:

> " Conservatory Orders bear a more decidedly public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders therefore are not, unlike interlocutory injunctions, linked to such private party issue as "the prospects of irreparable harm" occurring during the pendency of the case; or "high probability of success" in the Applicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes."

31. These principles were appreciated in Nairobi Const. Pet. No. 206 of 2016 Satinderjit Singh Matharu V. Armajit Singh Gahir & 5 Others, as follows:

> " Principles for the grant of the conservatory order
>
> 5. Despite varied nomenclatural expressions, the principles upon which the High Court considers application for conservatory orders in constitutional litigation are now settled by several decisions on the point, and may be condensed as follows: -
>
> 1. The applicant must demonstrate prima facie case, or an arguable case, for the grant of the relief sought.
>
> 2. The applicant must stand to suffer an irreparable harm, injury or loss not remediable by any other relief; and
>
> 3. As a remedy in constitutional litigation, the conservatory order calls for consideration of the public interest in the matter, and the balance of convenience between the petitioner's and the respondent's case must favor the grant of the conservatory order.
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> 6. This Court has also previously expressed itself on the matter. See Muslims for Human Rights (MUHURI) & 4 Ors. v. Inspector General of Police & 2 Ors., Mombasa Petition No. 62 of 2014 of 22nd December 2014, where the Court held as follows:
>
> > "The emerging principles for the grant of injunction or conservatory orders under the constitutional litigation, as I understand them, are firstly, that the applicant must demonstrate an arguable case - sometimes called prima facie arguable case - the reference to arguable case distinguishing it from the prima facie test of the Giella v. Casman Brown (1973) EA 385 traditionally applied in regular civil cases; secondly, that the applicant must show that the petition would be rendered nugatory or that the damage that would be suffered in the absence of the conservatory order would be irreversible; and, thirdly, that in constitutional cases, the public interest in the matter would be considered and generally upheld. See Kenya Transport Association Limited v. Cabinet Secretary for

Transport and Infrastructure and Ors., Mombasa HC Petition No. 16 of 2014 where I considered some of the decisions on the matter as follows:

> "The tests for the grant of conservatory orders has been variously expressed by different courts. See Mombasa High Court petition No. 7 of 2011, Muslim for Human Rights and 2 Ors v the Attorney General, per Ibrahim J. (as he then was), Mombasa High Court Petition No. 47 of 2011 Harun Barky Yator v. Judicial Service Commission (JSC), per Okwengu J, (as she then was), Nairobi High Court Petition No. 557 of 2013, per Majanja J, and Mecha Magaga v Jackson Obiero Magaga (2014) eKLR, per Okong'o, J. All the courts require for the grant of conservatory orders a prima facie case or a prima facie arguable case as in Yator's case; irretrievability or irreparability if conservatory order is not granted and the subject matter is irretrievably lost (akin to the irreparability of damage test) and a balancing of the interests of the applicant and the respondents. There arises confusion as to whether the test of standard of the applicant's case is on the prima facie or arguable case. Once accept that the court cannot determine the disputed merits of the case at the interlocutory stage, the correct standard must be the standard of arguable case. See Mbuthia v. Jimba Credit Corporation (1988) KLR 1. I also consider that Under Article 23 (3) of *the Constitution*, the court may make a broad spectrum of orders as conservatory orders to preserve the status quo where circumstances warrant and that may include fashioning a remedy to fit the particular circumstances of the application before the court."

32. Having set out these principles, I must now apply them to the matter at hand. I shall first consider whether the Petitioners have demonstrated a prima facie case with likelihood of success.

33. The threshold for establishing a prima facie case was elucidated in Mrao vs. First American Bank of Kenya Limited & 2 Others (2003) KLR 125, where the court held that a prima facie case includes but is not confined to a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude as in this case that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

34. The petitioners have grounded their challenge on several constitutional provisions, primarily Article 229 of *the Constitution*, which designates the Auditor-General as the officer tasked with auditing public accounts. The mandate of the committee established by the Cabinet Secretary through Gazette Notice No. 4069 includes scrutinizing and auditing NHIF claims spanning from July 2022 to September 2024, a function that appears to raise questions about the constitutional mandate of the Auditor-General.

35. Article 229(4)(g) specifically empowers the Auditor-General to audit and report on the accounts of any entity that is funded from public funds. The NHIF, being a public entity funded largely through statutory deductions, clearly falls within this ambit. The petitioners' assertion that the committee's mandate may interact with the Auditor-General's constitutional preserve raises an arguable constitutional question.

36. Furthermore, Article 226(3) of *the Constitution* provides that the accounts of all governments and state organs shall be audited by the Auditor-General. The petitioners' contention regarding the proper constitutional pathway presents a substantial constitutional question deserving of full adjudication.

37. The petitioners have also raised questions regarding the selection process of committee members, citing Article 232(1)(g) of *the Constitution*. The principle of transparency in public service is a cornerstone of our constitutional order, and questions about its application in this context merit careful consideration.

38. Additionally, the petitioners' privacy concerns under Article 31 and the Data Protection Act regarding the handling of sensitive medical records present another dimension to the constitutional challenge that warrants serious examination in the main petition.

39. I acknowledge the Respondents' argument that the committee is an internal advisory body with no coercive powers. This characterization and its constitutional implications deserve thorough examination during the full hearing of this petition. The respondents contend that the Cabinet Secretary has the constitutional and statutory authority to establish such a committee under Article 152 of *the Constitution*, read together with the *Health Act*, 2017. This assertion and its relationship with specific constitutional provisions that establish independent offices with clearly delineated mandates present complex constitutional questions that require full ventilation.

40. The interaction between executive functions and constitutionally established independent offices raises important questions about our constitutional design that should be thoroughly examined in the main petition. These are not matters that can or should be determined at this preliminary stage.

41. Based on these considerations, I am satisfied that the petitioners have demonstrated a prima facie case. I emphasize that this finding is strictly for the purpose of this application and does not in any way prejudge the merits of the main petition, which will require comprehensive arguments and analysis.

42. The other limb that needs consideration is whether, unless the court grants the conservatory order, there is a real danger that the petition would be rendered nugatory if it were to ultimately succeed.

43. The committee established by the Gazette Notice has been tasked with scrutinizing and auditing NHIF claims spanning a specific period. If the committee proceeds to complete its mandate before the constitutional questions raised in the petition are determined, there would be limited practical remedy available even if the petition were ultimately successful. The constitutional questions raised would risk becoming academic.

44. Moreover, the privacy concerns raised by the petitioners regarding the handling of sensitive medical records present temporal considerations that cannot be overlooked. These matters touch on rights that, once compromised, cannot be fully restored.

45. The Respondents argue that no party has been adversely affected or prejudiced by the committee's activities, and no final decisions have been made that would require judicial intervention. However, the nature of conservatory orders in constitutional litigation, as emphasized in Muslim for Human Rights (MUHURI) & 2 Others v Inspector General of Police & 2 Others [2014] eKLR, is not just

about preventing immediate harm but preserving the status quo to allow for meaningful adjudication of the constitutional questions raised.

46. Conservatory orders are designed to preserve the substratum of the petition pending full hearing. If the committee proceeds with its work before the constitutional questions surrounding its establishment are fully ventilated and determined, there is a substantial risk that the court's ability to grant effective relief, should the petition succeed, would be compromised.

47. It is important to emphasize that conservatory orders do not determine the merits of the petition or suggest any particular outcome. They merely preserve the subject matter of the dispute to ensure that the court's eventual determination, whatever it may be, remains meaningful. While I appreciate the respondents' concerns about efficiency and addressing issues in the health sector, I must balance these against the need to ensure that the constitutional questions raised receive proper judicial consideration. Temporary preservation of the status quo through conservatory orders serves this important judicial function.

48. The public interest in this case lies in ensuring that both the important work of improving healthcare administration and the equally important adherence to constitutional principles receive proper consideration. A temporary pause through conservatory orders achieves this balance. On the face of it there are competing interests and rights as between the public and the health sector wide institutions which had signed Service Level Agreements with the defunct National Hospital Insurance Fund. The question therefore to ponder is whether there is a public interest in this petition. One of the classic definition on public interest is to be found in Black's Law dictionary which defines the concept as follows:

> " As the general welfare for the public that warrants recognition and protection, or something in which the public as a whole has a stake, especially an interest that justified government regulation."

49. Given the background of the petition and subsequent notice of motion, the main contestation seems to hinge as to whether the establishment by the Cabinet Secretary will be a threat or violation of the public interest as envisioned in *the Constitution*. This brings to the fore on the exercise of judicial discretion to decline or grant the conservatory orders which one carries a higher weight to meet the ends of justice. In my view, this petition calls upon the court to delve into the Constitutional imperatives of the Cabinet Secretary, appointment of the task force and its members together with its terms of reference was a decision made in excess of jurisdiction.

50. Having carefully considered the test for granting conservatory orders, I am satisfied that the petitioners have met the threshold. I emphasize again that this determination in no way prejudges the merits of the main petition, which will be determined after full arguments from all parties.

51. I am mindful of the need for expeditious disposal of the petition given the nature of the issues raised and their implications for public health administration. The conservatory orders shall therefore be accompanied by strict timelines for the hearing and determination of the petition.

52. In light of the foregoing, I hereby make the following orders:

    a. Pending the hearing and determination of this Petition, a conservatory order is hereby issued suspending the operation of National Health Insurance Fund (NHIF) Pending Medical Claims Verification Committee as established in Gazette Notice No. 4069 Vol. CXXVII —No. 64 of 28th March, 2025, and restraining the committee from compiling any report, recommendations, or undertaking any actions pursuant to the said Gazette Notice.

b. The Respondents, either by themselves, their agents, or any person acting at their behest, instructions, or directions, are hereby restrained from taking any action whatsoever pursuant to or in reliance on Gazette Notice No. 4069 Vol. CXXVII—No. 64 of 28th March, 2025 pending the hearing and determination of the Petition.

c. To ensure expeditious disposal of the petition, the following timelines shall apply:

   i. The Respondents shall file and serve their responses to the petition within 7 days from the date of this ruling.

   ii. Thereafter, the Petitioners shall file and serve their respective submissions within 7 days upon the respondents

   iii. In adherence to clause one and two above, The Respondents shall file and serve their submissions within 7 days of service of the Petitioners' submissions.

   iv. Highlighting of submissions shall take place on 2nd June, 2025.

   v. The decreed orders shall be served upon the Cabinet Secretary, the Attorney general and the Chairman of the Ad hoc Committee or taskforce who shall bring to the attention of this decision to the respective members of the committee.

   vi. Costs of this application shall abide the outcome of the petition.

53. Orders accordingly.

SIGNED, DATE AND DELIVERED AT ELDORET THIS 12TH DAY OF MAY 2025.

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R. NYAKUNDI

JUDGE

In the Presence of:

Dr. Magare Gikenyi

Mr. Eliud Matindi

Mr. Odeyo for the AG.