REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E234 OF 2025

BETWEEN

KATIBA INSTITUTE……………………………………………….1ST PETITIONER

THE INSTITUTE FOR SOCIAL ACCOUNTABILITY…………2ND PETITIONER

CENTRE FOR ENHANCING DEMOCRACY AND GOOD GOVERNANCE……………………………………………..3RD PETITIONER

TRANSPARENCY INTERNATIONAL-KENYA…………………4TH PETITIONER

KENYA HUMAN RIGHTS COMMISSION………………………5TH PETITIONER

VERSUS

ATTORNEY-GENERAL…………………………………….1ST RESPONDENT

THE NATIONAL ASSEMBLY……………………………..2ND RESPONDENT

THE SENATE…………………………………………3RD RESPONDENT

CONTROLLER OF BUDGET…………………………….4TH RESPONDENT

AND

INUKA KENYA NI SISI…………………………..1ST INTERESTED PARTY

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ELIUD MATINDI...2ND INTERESTED PARTY

R U L I N G

Introduction

1. The Petitioners filed a Petition dated 2nd May 2025. The gravamen of the Petition emanates from a Memorandum dated 9th December 2022 wherein His Excellency President William Ruto, requested the Parliament to embark on constitutional amendments to address implementation of the two thirds gender rule, establish the office of the leader of opposition and entrench into the Constitution certain funds including the Constituency Development Fund, Senate Oversight fund and National Government Affirmative Action fund.

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2. Consequently, the Petitioners in the Petition seek the following reliefs:

   a) A declaration that the proposed Constitution of Kenya (Amendment) Bill, 2025 is superfluous and redundant and violates Articles 201 (d) & (e) as read with Article 10 (2) (c) & (d) of the Constitution mandating the prudent and responsible use of public resources, good governance and sustainable development.

   b) A declaration that the proposed amendments under Article 204A and 204B

are inconsistent with the letter and spirit of the Constitution.

c) ***A declaration that the proposed amendments under Article 204C are constitutionally redundant as the NGAAF is capable of implementation, and is indeed presently being lawfully implemented, within the confines of Article 206(1)(a) of the Constitution.***

d) ***A declaration that the constitutional imperatives under Articles 201(d) & (e) as read with Article 10 (2) (c) & (d) dictate that constitutional amendments should not be initiated to provide for issues that the Constitution already sufficiently considers and makes provision for.***

e) ***A declaration that Parliament bears a positive obligation to sieve proposed constitutional amendments and ensure that the issues sought to be addressed are only those not capable of being adequately addressed within the confines of the existing Constitution so as to preserve the sanctity of the Constitution and ensure the prudent and responsible use of public resources***

f) ***A declaration that the failure by Parliament to enact a referendum law is a violation of the right to vote in referenda.***

g) ***A declaration that Parliament's failure to enact a referendum law after 14 years is an abdication of responsibility and, therefore, unconstitutional for violating Articles 10, 94, 95 and 96 of the Constitution.***

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h) A declaration that the National Assembly and Senate have violated Articles 10, 38, 47, 201, 259(8) and 261 of the Constitution of Kenya for failing to enact a referendum law after 14 years since the promulgation of the Constitution.

i) An order of mandamus be issued to operate as a condition precedent that before any further action can be taken in regard to processing and/or consideration of any constitutional amendments, including the Constitution of Kenya Amendment Act, 2025 (the impugned Bill), Parliament must enact the legislation required under Article 82, and also recommended by this Court, regulating constitutional amendments and referenda.

j) An order of Prohibition restraining the Respondents and any other state agency from introducing in parliament or considering a constitutional amendment bill without a referendum law having been enacted.

k) A declaration that the referendum law enacted by Parliament should among other things ensure that a mechanism is provided for contesting the classification of a Constitution Amendment Bill as either relating to or not relating to the entrenched provisions.

l) A declaration be issued that the Constitution of Kenya Amendment Act, 2025 (the impugned Bill) is unconstitutional for failure to include an explanation on whether the proposed amendments touch on entrenched

ORIGINAL

provisions hence would require approval in a referendum.

m) ***A structural interdict directing the Respondents to report to the Court after six months to update the Court on the status of compliance with order i and j above.***

n) ***Any other orders this Court deems fit.***

3. The Petitioners alongside the Petition filed their Application of even date seeking conservatory orders and empanelment of a bench. The 2nd Respondent in reaction to the Petition filed its Notice of Preliminary Objection dated 20th May 2025.These two are the subject of the instant of the legal brief.

Application

4. The Petitioners in their Notice of Motion application seek orders that:

i. ***Spent.***

ii. ***Pending the hearing and determination of the Application, a conservatory order do issue suspending the public participation exercise scheduled for 5th May 2025 to 7th May 2025.***

iii. ***Pending the hearing and determination of the Application, a conservatory order do issue restraining the Controller of Budget from approving the withdrawal of any funds for any expenditure related to the conduct of the scheduled public participation.***

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iv. Pending the hearing and determination of the Petition, a conservatory order do issue suspending the public participation exercise scheduled for 5th May 2025 to 7th May 2025.

v. Pending the hearing and determination of the Petition, a conservatory order do issue prohibiting Parliament from forwarding the Constitution of Kenya (Amendment) Bill, 2025 to the President for assent.

vi. Pending the hearing and determination of the Petition, a conservatory order do issue restraining the Controller of Budget from approving the withdrawal of any funds for any expenditure related to the conduct of the scheduled public participation.

vii. Pending hearing and determination of the Petition, a conservatory order do issue restraining the President from assenting to the Constitution of Kenya (Amendment) Bill, 2025.

viii. The Court be pleased to certify that the Petition raises substantial questions of law under Article 165(4) of the Constitution warranting the empanelment of an uneven number of judges (not less than three) to hear and determine the matter.

ix. Costs of the application be borne by the respective parties given the public interest nature of this Petition.

5. The application is supported by the 1st Petitioner's Litigation Manager, Emily Kinama's affidavit, sworn on even date and the grounds on the face of the application.

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6. She depones that the Kenya is currently operating in a constrained fiscal environment which is a threat to the provision of basic services and the realization of rights yet contrary to this context and the constitutional imperatives under Article 10 (2)(c) & (d) and 201 (d) & (e) of the Constitution, the National Assembly has proposed constitutional amendments over matters that are either being lawfully implemented presently or that can rightly be implemented within the confines of the current constitutional framework. She states that the amendments proposed under the *Constitution of Kenya (Amendment) Bill, 2025* seek to entrench three funds in the Constitution namely: National Government Constituencies Fund (NGCF), National Government Affirmative Action Fund (NGAAF) and the Senate Oversight Fund (SOF).

7. She avers that the proposed NGAAF is currently being implemented through the Public Finance Management Act (National Government Affirmative Action Fund) Regulations, 2016 while various court decisions, including that of the Supreme Court, have emphasized that the proposed NGCF can lawfully be implemented within the confines of the current Constitution. On the other hand, SOF is presently implemented through the budgetary provisions relating to Parliament under the Constitution.

ORIGINAL

8. It is asserted that despite this, the National Assembly proceeded to schedule public hearings in all the 290 constituencies and which were set to take place between 5th May and 7th May 2025. She contends that public participation is for an ordinary legislative proposal as opposed to a constitutional amendment. She avers that the exercise which costs between 10 million and 100 million will not only strain the already scarce public resources but is being utilized on a constitutionally superfluous process which runs afoul the established constitutional principles.

9. She equally asserts that the constitutional amendment contemplated under chapter sixteen of the Constitution is an arduous and convoluted process that cannot be undertaken without first setting the guiding statutory and procedural rubric. It is highlighted that the timelines within which such legislation was to be passed as per Article 261 of the Constitution, as read together with the fifth schedule of the Constitution, was within 5 years from the date of promulgation of the Constitution which was not done. It is stated that when the impugned Memorandum was issued, the President knew that there was no legislation governing the process.

10. Consequently, she avers that the first step ought to have been requesting Parliament to enact the legislation. More so since lack of legislation has created a gap in how referenda

ORIGINAL

is to be understood and conducted. Accordingly, it is stressed that Parliament, by initiating an amendment to the Constitution before passing the required legislation on referenda overlooked the constitutional requirement to enact legislation governing the constitutional amendment process.

11. It is postulated that if the sought orders are not issued the Petition will be rendered nugatory because, *the constitutional obligation and commandment to use public resources prudently will be violated, the superfluous and redundant provisions that are inconsistent and in disharmony with the letter and spirit of the Constitution will be passed and assented to, the Constitution will be amended without a referendum law that sets out legal safeguards and procedures on amending the Constitution, the Constitution of Kenya (Amendment) Bill, will be passed without a referendum, yet it contains amendments touching on entrenched provisions that require one, the Constitution of Kenya (Amendment) Bill, will be passed and assented to and will not be subject to a challenge before any Court of law* and *public resources once used in the public participation exercise cannot be recovered*.

12. Furthermore, it is argued that Petition raises substantial questions warranting the empanelment of a bench of an uneven number of judges as follows:

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i. *Whether the Constitution can be amended to introduce amendments which conflict with existing constitutional provisions and principles.*

ii. *Whether constitutional amendments can be initiated to provide for issues that the Constitution sufficiently considers and makes provision for.*

iii. *Whether Parliament bears a positive obligation to sieve proposed constitutional amendments and make a determination on whether the issues sought to be addressed through the proposed amendments are capable of being adequately addressed within the confines of the existing the Constitution so as to preserve the sanctity of the Constitution and ensure the prudent and responsible use of public resources.*

iv. *Whether a constitutional amendment can be initiated, considered and passed without a referendum law to govern the process.*

v. *Whether the memorandum accompanying a constitutional amendment bill should declare whether the bill touches on the entrenched provisions, hence should be subjected to a referendum.*

vi. *Whether the referendum law should provide for a mechanism for contesting the classification of an amendment Bill as either relating to or not relating to the entrenched provisions.*

ORIGINAL

1st Respondent's case

13. The 2nd Respondent in rejoinder filed grounds of opposition dated 12th May 2025 on the basis that:

i. *The prayers sought under (b) and (d) have been overtaken by events.*

ii. *Prayers (c), (e), (f), and (g) are inviting the Court to venture into the constitutional mandates of other arms of government in violation of the principle of separation of powers.*

iii. *The Application does not disclose with the requisite specificity, the right violated by the Respondents.*

iv. *The Application is premature as the same is based on mere suspicion rather than actual violation.*

v. *The Application is frivolous, vexatious, incompetent and improperly before court and an abuse of the Court process.*

2nd Respondent's Case

14. The 2nd Respondent in rebuttal filed its Replying Affidavit through its Clerk, Samuel Njoroge, C.B.S sworn on 29th May 2025.

15. On a preliminary note, he avers that the Petitioners failed to exhaust the remedies provided under Article 119 of the Constitution to the Petition Parliament if aggrieved by its decision. He notes that the Petitions to Parliament (Procedure) Act provides the procedure to be followed by an aggrieved person, which the Petitioners did not utilize. On this premise, Counsel argued that this Court lacks jurisdiction to entertain this matter.

16. It is further stated that Parliament has the unfettered constitutional mandate to legislate. In this case, in line with Article 256(2) of the Constitution, the 2nd Respondent has

ORIGINAL

been collecting views from the public. He points out that this Article provides for the amendment of the Constitution through a Parliamentary initiative.

17. He depones that the Constitution of Kenya (Amendment)Bill, was read for the first time in the 2nd Respondent on 12th March 2025 and thereafter committed to the Departmental Committee on Justice and Legal Affairs for consideration and facilitation of public participation. Members of the public were invited to issue their memoranda on 15th March 2025. Additionally, public hearings on the Bill were conducted between 5th and 9th May 2025. At the time of making this response, he informs that the Committee was still receiving views and memorandum from the public concerning the Bill.

18. He depones also that at the time the impugned Bill was yet to be read for a second time before the 2nd Respondent and legislative process completed. By virtue of this, the Petition is adjudged to be premature and Petitioner's apprehensions unfounded as the Bill is in its infancy.

19. Moreover, he argues that the Petition violates the principle of separation of powers by seeking to have this Court interfere with the constitutional mandate of the Respondents. Considering this, the Court is urged to exercise judicial restraint in this matter. Additionally, he argues that the Petitioners rights as against those of the public lies in favour of the general public.

ORIGINAL

20. It is asserted that before the Petitioners can be granted conservatory orders they must satisfy the set threshold. That is a prima facie case and unless the orders are granted the matter would be rendered nugatory. It is contended that a prima facie case has not been established as Article 256 of the Constitution lays down the process for the amendment of the Constitution by Parliamentary initiative. As such, it is argued that the Petitioners have not laid down a basis for any apprehension that the Petition will be rendered nugatory. Likewise, it was underscored that it is in public interest that the Respondents continue to carry put their constitutional mandate.

The Preliminary Objection

21. The 2nd Respondent in its Notice of Preliminary Objection opposes the Petition on the grounds that:

    i. ***The instant Application and Petition which seeks to interfere with the legislative mandate of the National Assembly under 95 (3) and 256 (1) (a) of the Constitution and is therefore defective. The Petition seeks to influence the decision of the National Assembly to accede to the demands of the Petitioner in contravention of Article 1 (3), (4) and Article 2 (1) of the Constitution.***

    ii. ***The Petitioners' Notice of Motion and Petition are not justiciable for violating the doctrine of ripeness. The Constitution of Kenya (Amendment) Bill, 2025 (hereinafter 'the Bill) is still undergoing the legislative***

ORIGINAL

process hence the Petitioner is yet to exhaust the avenues for redress and has a forum to air its views on the Bill through the public participation forum and is therefore prematurely before this Court.

iii. ***The Notice of Motion application and Petition herein violate the Constitution which requires public participation in legislative processes under Article 1(3), (4), 10, 118 and 256 of the Constitution. Article 256 (2) provides: "(2) Parliament shall publicise any Bill to amend this Constitution, and facilitate public discussion about the Bill."***

iv. ***The Petitioners' Notice of Motion and Petition are based on speculation and address potential future scenarios rather than current or likely events regarding the passage of the Constitution of Kenya (Amendment) Bill, 2025. The Court should exercise restraint and refrain from engaging in the uncertain prediction of the success of the Constitution of Kenya (Amendment Bill), 2025. It is essential to allow the National Assembly to fulfil its legislative duties without unnecessary interference, in accordance with the doctrine of avoidance. As such, the application and petition herein is unconstitutional is speculative and lacks legal basis.***

v. ***The jurisdiction of this Court to determine challenges to constitutionality of a Bill under Article 165(3) (d) of the Constitution are limited to challenges to a Bill often focused to procedural irregularities such as lack of public participation, violation of legislative processes or failure to meet constitutional requirements before enactment. As held by***

ORIGINAL

the Supreme Court of Kenya in Senate of The Republic of Kenya & 3 others v Speaker of The National Assembly of The Republic of Kenya & 10 others; Fund Board (Interested Party) (Petition 19(E027) of 2021) [2022] KESC 20 (KLR) (Paragraph 157).

vi. ***This Court lacks jurisdiction to interrogate the constitutionality of the substantive provisions of the Constitution of Kenya (Amendment) Bill (National Assembly Bill No. 4 of 2025) before its enactment. (As held by the Supreme Court of Kenya in Senate of The Republic of Kenya & 3 others v Speaker of The National Assembly of The Republic of Kenya & 10 others; Fund Board (Interested Party) (Petition 19(E027) of 2021) [2022] KESC 20 (KLR) (Paragraph 157).***

vii. ***The Petitioner's application violates the principle of separation of powers under Articles 1(3) and 175(a) which provides that no person shall direct another in the performance of their duties by purporting to use judicial craft to compel the National Assembly not to involve Members of the Public in their consideration of their legislative mandate contrary to Article 10 and 118 of the Constitution.***

viii. ***The Application and Petition herein violate the provisions of Article 1 (3) and 4; Article 2 (2); Article 95 (3); Article 118 and Article 256 of the Constitution which provide for the exercise of sovereign power through Parliament and the facilitation of public discussion on a bill under Article 256 of the Constitution.***

ORIGINAL

ix. ***The orders sought herein violate the Constitution, as they attempt to usurp the powers of the National Assembly to propose constitutional amendments through a Parliamentary Initiative under Articles 95 and 256 of the Constitution.***

x. ***In light of the foregoing, the Petition and the Application herein are bad in law, frivolous, vexatious and an abuse of the court process and liable to be struck out by this Court with costs to the 2nd Respondent.***

Other Parties Case

22. There were no responses to the Application both in the Court file and the online Court platform (CTS) by the rest of the Parties that are named in the Petition.

Petitioner's Submissions

23. The Petitioner filed submissions dated 3rd June 2025 through their Counsel, Joshua Malidzo Nyawa who identified the issues for determination as: *whether this Court has jurisdiction to hear and determine the Application and the Petition, whether the Applicants have met the threshold to warrant this court to grant conservatory orders and whether the Applicant has met the test for certification under Article 165(4) of the Constitution*.

24. Counsel referring to the 2nd Respondent's Preliminary Objection in the first issue submitted that the Objection lacks merit as only the High Court can determine the

ORIGINAL

constitutionality of an action and not the 2nd Respondent as advanced by purportedly seeking to rely on Article 119 of the Constitution. Counsel submitted that this Article does not oust the jurisdiction of the Court and that this Court should not abdicate its role.

25. Reliance was placed on **William Odhiambo Ramogi & 3 others v Attorney-General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR** where it was held that:

> *"Where a suit primarily seeks to enforce fundamental rights and freedoms, and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court."*

26. Comparable dependence was placed on **NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) (Petition 16 of 2019) [2023] KESC 17 (KLR), Independent Electoral & Boundaries Commission Vs. Jane Cheperenger & Two Others [2015] eKLR** and **Nicholus Abidha v Attorney-General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023) [2023] KESC 113 (KLR)**.

ORIGINAL

27. On ripeness and separation of powers, Counsel submitted that the doctrine of ripeness is a pre-2010 doctrine and so must be read in line with Articles 22 and 258 of the Constitution which allow parties to approach the Court when there is a threat to the Constitution. As such, Kenyans can approach Court before the harm has crystallized. Counsel stressed that the instant Petition and Application demonstrate crystallization and looming threats to the Constitution.

28. Counsel underscored that this was also the finding of this Court in **HCCHRPET/E269/2025 Kelvin Roy Omondi and Bonface Mwangi Vs National Assembly and Chief Of Staff & Head Of Public Service And 8 Others** where it was held that:

> *"Under the Constitution, even a threat to violation of the Constitution can be actionable if it is demonstrated that the threat is imminent, is real and is not imaginary or fictional. The set of facts or circumstances relied upon must credibly demonstrate the looming threat of violation."*

29. Like dependence was placed in **Aperera v Officer Commanding Langata Police Station & 2 others; Maina (Interested Party) [2025] KEHC 4472 (KLR)**.

30. Counsel further argued that Parliament cannot be shielded from the reach of the Constitution as long as acts outside the constitutional limits. Reliance was placed in **Doctors for**

ORIGINAL

Life International v Speaker of the National Assembly and Others (CCT 12/05) [2006] ZACC 11 where it was held that:

> *"under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament 'must act in accordance with, and within the limits of, the Constitution', and the supremacy of the Constitution requires that 'the obligations imposed by it must be fulfilled.' Courts are required by the Constitution 'to ensure that all branches of government act within the law' and fulfil their constitutional obligations."*

31. Like dependence was placed **in the Matter of the Speaker of the Senate & another [2013] eKLR**.

32. Moving on to the second issue, Counsel submitted that the Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014]eKLR** guided that to obtain a conservatory order, an applicant must show that the petition is arguable and not frivolous, unless the conservatory order is granted, the petition would be rendered nugatory, and that it is in the public interest that the order be granted.

33. Comparable dependence was placed in **Mwangi Wa Iria & 2 others v Speaker Murang'a County Assembly & 3 others[2015] eKLR, Nkunja v Magistrates and Judges Vetting Board & another (Petition 154 of 2016) [2016] KEHC 7269 (KLR), Centre for Human Rights Education**

ORIGINAL

and Awareness (CREAW) & 7 others v Attorney-General (2011) eKLR, Kevin K Mwiti & others v Kenya School of Law & others [2015] eKLR, saiah Luyara Odando & another v Kenya Revenue Authority & 6 others; Nairobi Branch Law Society of Kenya (Interested party) [2022] eKLR, etition No. E031 Of 2024 As Consolidated with Petitions Nos. E032 & E033 Of 2024, The Cabinet Secretary For The National Treasury And Planning and others vs Okiya Omtata and others, and **Dari Limited & 5 Others vs. East African Development Bank Petition (Application) No. E012 of 2023 and Application No. E017 of 2023**.

34. In this matter, Counsel submitted that the Petitioners had demonstrated various arguable constitutional issues which have a likelihood of success being *whether the Constitution can be amended to introduce amendments which conflict with existing constitutional provisions and principles, whether constitutional amendments can be initiated to provide for issues that the Constitution sufficiently considers and makes provision for, whether Parliament bears a positive obligation to sieve proposed constitutional amendments and make a determination on whether the issues sought to be addressed through the proposed amendments are capable of being adequately addressed within the confines of the existing the Constitution so as to preserve the sanctity of the Constitution and ensure the prudent and responsible use of*

ORIGINAL

public resources, whether a constitutional amendment can be initiated, considered and passed without a referendum law to govern the process, whether the memorandum accompanying a constitutional amendment bill should declare whether the bill touches on the entrenched provisions, hence should be subjected to a referendum, whether the referendum law should provide for a mechanism for contesting the classification of an amendment Bill as either relating to or not relating to the entrenched provisions and *whether the failure to enact a referendum law amounts to a violation of the right to vote under Article 38 of the Constitution*.

ORIGINAL

35. Counsel submitted that if the orders are not issued the Petition would be rendered nugatory as amendments passed become part of the Constitution and therefore immune to a challenge before any court of law. Counsel further contended that there is no greater public interest than observing strict adherence to the Constitution. In this case, it was argued that the constitutional amendments are issues of great public interest.

36. Reliance was placed in **David Ndii & others v Attorney General & others [2021] eKLR** where it was held that:

> *"It is however argued that in the event that the President takes the view that the said Bill does not touch on the protected articles of the Constitution that requires a referendum, he may well proceed to assent*

to the same thus triggering article 2(3) of the Constitution. Article 2(3) provides that:

> *The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.*

34. *This constitutional provision has the effect of insulating the validity or legality of the Constitution from being questioned before a court of law. As to whether questioning the process leading to the presidential assent to a Constitutional Amendment Bill once given is the same as challenging the validity or legality of the Constitution, is again a matter that is not properly before us in the consolidated petitions. While the parties herein are not all agreed as to the effect of the presidential assent, the Applicants' apprehensions are not unfounded: the applicants are simply saying that the view that presidential assent might inoculate the new constitutional amendments from legal challenge is a reasonable one which may well prevail hence irrevocably defeating the core of their claims in the consolidated petitions before this court. It is a risk, they essentially argue, that they are not willing to take given the implications for the Constitution and the prevailing Social Contract Kenyans have with the State.*

35. *The respondents, however, contend that the application is premature and speculative as there is no evidence that the president conducted himself in such a manner as to clearly indicate that he will not seek the constitutionally required approval of the people in a national referendum, when circumstances require that he so does. In other words, it is contended that no crystallised threat is, as yet, evident.*

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> *36. In our view, a relief based on a threat of contravention of the Constitution or violation of a fundamental right or freedom cannot be denied simply on the basis that the supplicant has not proved that the respondent intends to violate the Constitution or fundamental rights and freedoms. As long as a person presents reasonable apprehension based on credible evidence of the likelihood of the impugned action and where the apprehended happening is likely to lead to irreparable or irrevocable consequences if they were to occur, this court cannot overlook that apprehension that hat the Constitution is likely to be violated or that person's fundamental rights and freedoms are likely to be contravened. The court ought not just twiddle its thumbs or wring its hands and mutter, perhaps breathlessly, that the court is helpless as long as the respondent has not given any indication that he intends to contravene the Constitution or violate the fundamental rights or freedoms of that person. Where it is credibly demonstrated, as has been done in this court, whether rightly or wrongly, that the respondent has two options, one of which if taken is likely to lead to the apprehensions coming to reality, in our view, it would be better for the court to err on the side of caution. The case for this course of action is strengthened where, as here, no serious prejudice – other than passage of time – is visited on the respondent."*

37. On the final issue, Counsel submitted that the Petitioners had clearly set out the substantial questions attributable to the Petition. Counsel contended that the issues raised in the Petition are matters of immense public importance and interest that ought to compel a certification by this Court for empanelment. Counsel added that this area of law remains

ORIGINAL

uncertain and open to opinion and interpretation as they are yet to be settled by the Supreme Court.

38. To Buttress this point reliance was placed in a number of authorities being **Katiba Institute v Judicial Service Commission & 2 others; Kenya Magistrates and Judges Association & 2 others (Interested Parties) [2022] KEHC 438 (KLR), J Harrison Kinyanjui v Attorney General & Another [2012] eKLR, kiya Omtatah Okoiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others [2015] eKLR** and **Sir Chunilal V. Mehta and Sons Ltd vs. The Century Spinning and Manufacturing Co. Ltd 1962 AIR 1314 1962 SCR Supl. (3)**.

ORIGINAL

1st Respondent's Submissions

39. State Counsel, Jackline Kiramana filed submissions dated 20th June 2025 and highlighted the issues for discussion as follows: *whether the Application meets the threshold for interim conservatory orders* and *whether the present petition raises a substantial question of law to warrant empanelment of an uneven bench*.

40. On the first issue, Counsel submitted that the Petitioners must establish that there is an arguable case that if the orders sought are not granted they are likely to suffer an

irreparable harm. Reliance was placed in **Gatirau Peter Munya (supra)** where the Supreme held as follows:

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

41. Like dependence was placed in **Martin Nyaga Wambora -vs- Speaker of The County Assembly of Embu & 3 Others Petition No. 7 of 2014, Wycliff Indalu Adieno v Attorney General & 2 others [2014] eKLR, Board of Management of Uhuru Secondary School vs. City County Director of Education and 2 others (2015) eKLR, Ahmed Issack Hassan v Law Society of Kenya Disciplinary Tribunal & 2 others [2018] eKLR** and **Kizito Mark Ngaywa V Minister of State For Internal Security and Provincial Administration & another [2011]eKLR**.

42. In this matter, Counsel submitted that the Petitioners had failed to meet this test and so the Court should be reluctant to grant the Orders sought as they are against the public

ORIGINAL

interest. Counsel noted that the Petitioners are asking the Court to stop Parliament from forwarding the impugned Bill to the President for assent and the President from assenting to the Bill which is essentially an invite to the Court to venture into the Legislature and the Executive in blatant disregard of the constitutional doctrine of separation of powers and take away the powers of the other arms of government, before the matter is heard on its merit. This is argued to be against public interest as such orders would cause irreparable harm to the public whose funds are already being spent. As such Counsel argued that grant of conservatory orders at this stage would be premature and render the ongoing process an academic exercise.

ORIGINAL

43. On the second issue, Counsel relying in **Chunilal V. Mehta (supra)** stated that the Supreme Court of India determining whether a matter raises a substantial question of law underscored the following tests:

> *"i. whether, directly or indirectly, it affects substantial rights of the parties, or*
>
> *ii. whether the question is of general public importance, or*
>
> *iii. whether it is an open question, in the sense that the issue has not been settled by pronouncement of the Supreme Court or the Privy Council or by the Federal Court, or*
>
> *iv. the issue is not free from difficulty, or*

v. It calls for a discussion for alternative view."

44. Comparable reliance was placed in **Wycliff Ambetsa Oparanya & 2 Others vs Director of Public Prosecutions 7 Anor (2016) eKLR** and **J.Harrison Kinyanjui V Attorney General & Another [2012] eKLR**.

45. Counsel submitted that going by the underscored test, every case dealing with the interpretation of the Constitution or application of the bill of rights would be a substantial question of law as it affects the rights of the parties. However, the same would occasion a grave burden to the already threatened judicial resources to the extent that the value of obtaining justice without delay under Article 159(2)(b) would never be realized. Counsel argued that in this matter which largely seeks to stop the passage of a Bill to amend the Constitution, does not raise a substantial question of law for empanelment of a bench of an uneven number of judges.

ORIGINAL

2nd Respondent's Submissions

46. The 2nd Respondent in response to the Petitioner's Application and support of its Preliminary Objection filed submissions dated 9th June 2025 through its Counsel Mitchelle Omuom. The issues highlighted for determination were: *whether the orders sought by the Petitioner are in violation of the doctrine of exhaustion of remedies, whether the dispute before the Court is ripe for determination before*

the Court, whether the interlocutory orders sought by the Petitioner herein are final in nature and will have the effect of determining the petition herein and *whether the Petitioner has met the requirements for the grant of conservatory orders sought in the Petition*.

47. On the first issue, Counsel submitted that the 2nd Respondent under Article 94 (5) of the Constitution is vested with the unfettered constitutional mandate to legislate. Furthermore, Article 119 of the Constitution lays the basis for members of the public to approach Parliament to consider matters within its authority. Counsel stressed that the Petitioners were required to exhaust these provisions before approaching this Court but failed to demonstrate that they did so. Equally that the Petitioners have not shown that they participated in the public participation process that the 2nd Respondent is required to undertake. For this reason, it was argued that the Petition offends the doctrine of exhaustion.

48. Reliance was placed in **Speaker of National Assembly v Karume [1992] KLR** where the Court of Appeal held that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

49. Like dependence was placed in **Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR**.

ORIGINAL

50. On the second issue and separation of powers, Counsel submitted that the application and the petition are an attempt by the Petitioner to interfere with the legislative process by moving this Court to violate the principle of separation of powers. Equally, that they violate the public interest and the rights of Kenyans to be heard. On this premise Counsel urged the Court to exercise restraint and refrain from engaging in the uncertain prediction of the success of the Constitution of Kenya (Amendment Bill), 2025.

51. Nonetheless, Counsel submitted that this Court lacks jurisdiction to interrogate the constitutionality of the substantive provisions of the Constitution of Kenya (Amendment) Bill (National Assembly Bill No. 4 of 2025) before its enactment. Counsel as well argued that the application and Petition are speculative and lack legal basis. Accordingly, Counsel submitted that application and Petition are not justiciable for violating the doctrine of ripeness.

52. Reliance was placed in **Speaker of the Senate & Another [2013] eKLR** where it was held that:

> *"The Supreme Court, however, cautioned against undue interference with running processes in other arms of Government. The Court thus pronounced itself [paragraph 61]:*
>
> *"This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity*

ORIGINAL

between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another".

53. Like dependence was placed in **Abidha Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) [2023] KESC 113 (KLR)**.

54. On grant of conservatory orders, Counsel submitted on the onset that Prayers a, b, c, d and f in the application have since been overtaken by events. That said, Counsel submitted that the Supreme Court in **Gatirau Peter Munya** (supra) set out the elements of this order. That is, the Petitioner must demonstrate to the Court that they have a prima facie case. Additionally, they must show that if the requested stay order is not granted, the matter will be rendered nugatory. Lastly, it must be established that the issue at hand is of significant public interest.

55. Counsel submitted that the impugned Bill had been commenced under the authority granted under Article 256 of the Constitution. Further that this process was carried out in line with this Article and the National Assembly Standing Order No. 127 as detailed in the 2nd Respondent's Affidavit. Considering this, Counsel submitted that the orders sought by the Petitioner if granted at this stage will render the consideration of the impugned Bill superfluous by

ORIGINAL

interrupting the logical conclusion of the process as provided for under the Constitution.

2nd Interested Party's Submissions

56. The 2nd Interested Party in reaction to both the Application and Preliminary Objection filed submissions dated 4th June 2025.

57. The 2nd Interested Party submitted that the Application sufficiently identifies violations or threats of violation of the Constitution as provided by Articles 22(1) and 258(1) of the Constitution. He argued that the principle of separation of powers cannot prevent this Court from adjudicating a dispute concerning violation or threats of violation of the Constitution. Reliance was placed in **Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10; others [2015] KEHC 7074 (KLR)** where it was held that:

> *"The doctrine of separation of powers does not prevent this Court from examining whether the acts of the Legislature and the Executive are inconsistent with the Constitution as the Constitution is the supreme law."*

58. He further submitted that the issues in the Application and Petition are ripe for determination as the President opined

ORIGINAL

that in his view amending the Constitution to entrench Constituency Development, Senate Oversight and National Government Affirmative Funds, would not require a constitutional amendment referendum in accordance with Articles 255(1) and 256(5) of the Constitution, which the Petitioners are disputing. Reliance was placed in **Coalition for Reform and Democracy (CORD) & 2 others** (supra) where it was held that:

> *"However, we are satisfied, after due consideration of the provisions of Article 22, 165(3) (d) and 25 of the Constitution, that the words of the Constitution, taken in their ordinary meaning, are clear and render the present controversy ripe and justiciable: a party does not have to wait until a right or fundamental freedom has been violated, or for a violation of the Constitution to occur, before approaching the Court. He has a right to do so if there is a threat of violation or contravention of the Constitution."*

ORIGINAL

59. According to him, unlike an ordinary amendment Bill and resulting Act of Parliament which can be subject to judicial challenge, once assented to by the President and caused to be published in accordance with Article 256(4) of the Constitution, a constitutional amendment Act becomes part of the Constitution and is not subject to challenge by or before any Court thus necessitating the instant challenge.

60. With regard to the Preliminary Objection, the 2nd Interested Party submitted that it does not meet the established principles of a preliminary objection because the Court would

have to interrogate each of the said objections to determine whether they are made out. As such, this disqualifies the Preliminary Objections as they are not pure points of law.

Analysis and Determination

61. It is my considered view that the issues that arise for determination are:

    i. ***Whether the Petition meets the threshold for grant of conservatory orders.***

    ii. ***Whether the Petition raises substantial questions of law meriting certification before the Chief Justice for the empanelment of an uneven Judge bench.***

    iii. ***Whether the 2nd Respondent's Preliminary objection is merited on account that the instant Petition offends the doctrine of exhaustion, ripeness and separation of powers***

ORIGINAL

Whether the 2nd Respondent's Preliminary Objection is merited on account that the Instant Petition offends the doctrine of exhaustion, ripeness and separation of powers

62. The principles of exhaustion of remedies, ripeness and separation of powers doctrine have been applied by the Courts in Constitutional litigation and are now very well settled.

63. In **Waity vs Independent Electoral & Boundaries Commission and Three Others [2019] KESC 54 (KLR), the Supreme Court** elaborating the doctrine of exhaustion of remedies stated as follows:

> ***"[63] Where the Constitution or the law, consciously confers jurisdiction to resolve a dispute, on an organ other than a court of law, it is imperative that such dispute resolution mechanism, be exhausted before approaching the latter. Were it not so, parties would bide their time, overlooking the recognized forums, and later springing a complaint at the courts. Such a scenario would be a clear recipe for forum shopping, an undertaking that must never be allowed to fester in the administration of justice. We are fortified in this regard, by the persuasive authority by the Court of Appeal, in Geoffrey Muthinja Kabiru & 2 Others; [2015] eKLR; wherein the Appellate Court observed:***
>
> ***"It is imperative that where a dispute resolution mechanism exists outside the Courts, the same be exhausted before the jurisdiction of the Courts be invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews…The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts."***

64. The Supreme Court reiterated this position in **Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their**

ORIGINAL

capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Munyao & 148 others (Suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) [2019] KESC 83 (KLR) where it held thus:

> ***"[118] In the pursuit of such sound legal principles, it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.***
>
> ***[119] Such a deferred jurisdiction and the postponement of judicial intervention and reliefs until the mandated statutory or constitutional bodies take action rests, not alone on the disinclination of the judiciary to interfere with the exercise of the statutory or any administrative powers, but on the fact of a legal presumption that no harm can result if the decision maker acts upon a claim or grievance. Such formulation underlies the analogous cases, frequently cited for the exhaustion doctrine, in which the court refuses to enjoin an administrative official from performing his statutory duties on the ground that until he has acted the***

ORIGINAL

complainant can show no more than an apprehension that he will perform his duty wrongly, a fear that courts will not allay. Such cases may be expressed in the formula that judicial intervention is premature in the absence of administrative action."

65. The doctrine of ripeness on the other hand stresses that a Court of law should not be involved in adjudication of premature or imaginary disputes that are yet to occasion any demonstrable injury or harm. In **County Assembly Forum & 6 others v Attorney General & 2 others; Senate of the Republic of Kenya [2021] KEHC 304 (KLR)** noted as follows:

> ***"171.The Ripeness doctrine is one facet of the larger principle of non-justiciability. It is a jurisdictional issue that bars a Court from considering a dispute whose resolution has not crystallized enough as to warrant Court's intervention. Its operation is informed by the idea that there exist other fora with the capacity to resolve the dispute other than Court process.***
>
> ***172. The operation of the doctrine was discussed by a multi-Judge Bench of the High Court in Nairobi Constitutional Petition No. 254 of 2019, Kiriro wa Ngugi & 19 Others v Attorney General & 2 others [2020] eKLR in the following manner: -***
>
> ***107. The doctrine focuses on the time when a dispute is presented for adjudication. The Black's Law Dictionary 10th Edition, [supra] at page 1524 defines ripeness as:***

ORIGINAL

The state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made

108. Courts should therefore frown upon disputes that are hypothetical, premature or academic which have not fully matured into justiciable controversies … The Court is prevented from determining an issue when it is too early or is simply out of apprehension, hence the principle of ripeness. An issue before Court must be ripe, through a factual matrix for determination."

66. The Supreme Court in **Attorney-General & 2 others v Ndii & 79 others; Prof. Rosalind Dixon & 7 others [2022] KESC 8 (KLR)** stated as follows:

> ***"61. The doctrine of ripeness focused on when a dispute had matured into an existing substantial controversy deserving of judicial intervention. The doctrine of ripeness prevented a party from approaching a court before that party had been subject to prejudice, or the real threat of prejudice, as a result of the legislation or conduct challenged.***
>
> ***63. Ripeness discouraged a court from deciding an issue too early. It therefore required a litigant to wait until an action was taken against which a judicial decision could be grounded and a court was able to issue a concrete relief. That approach shielded a court from dealing with hypothetical issues that had not crystalized."***

ORIGINAL

67. On the separation of powers doctrine, this Court had the following to say in **<u>Benjamin v Gitiri & 4 others; Chairman Council of Legal Education & 4 others (Interested Parties) [2025] KEHC 17026 (KLR)</u>**:

> ***"93. In adjudication of constitutional disputes, the court ensures that it does not usurp the powers and responsibilities of other constitutional or public bodies hence under the justiciable principle, the court can examine if the matter properly falls within its scope or is a mandate of another constitutional organ or public body.***
>
> ***94. If it is apparent to the Court that the matter deserves to be considered elsewhere rather than before the Court, it will decline the invitation to entertain the matter the court does not exist in Constitutional vacuum.***
>
> ***95. The above position resonates with the holding of the Supreme Court in Benson Ambuti Ambega & 2 Others v Kibos Distillers Limited (2020) eKLR where the Court observed thus:***
>
> > ***"[51] Judicial abstention, as with judicial restraint, is a doctrine not founded in constitutional or statutory provisions, but one that has been established through common law practice. It provides that a Court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination,***

ORIGINAL

if there would be other appropriate legislatively mandated institutions and mechanism…"

96. Applying the same principle, the High Court in the case of Law Society of Kenya v Attorney General & Another; National Commission for Human Rights & Another (Interested Parties) (2020) eKLR held as follows:

"…Where the Constitution has reposed specific functions in an institution or organ of the State, the Court must give those organs sufficient time or leeway to discharge their constitutional mandate and only accept an invitation to intervene when those organs or bodies have demonstrably been shown to have acted contrary to their constitutional mandate or in contravention of the constitution…"

97. Courts are thus careful not intrude into matters that generally fall within the area of responsibility of other institutions or agencies of Government."_

ORIGINAL

68. On this very principle, the Supreme Court in **Mate & another v Wambora & another [2017] KESC 1 (KLR)** held:

"[62] A clear inference to be drawn is that, it was the Supreme Court's stand that no arm of Government is above the law. This being a constitutional democracy, the Constitution is the guiding light for the operations of all State Organs. The Court's mandate, where it applies, is for the purpose of averting any real danger of constitutional violation.

> ***[63] From the course of reasoning emerging from such cases, it is possible to formulate certain principles, as follows:***
>
> *i.* ***each arm of Government has an obligation to recognize the independence of other arms of Government;***
>
> *ii.* ***each arm of Government is under duty to refrain from directing another Organ on how to exercise its mandate;***
>
> *iii.* ***the Courts of law are the proper judge of compliance with constitutional edict, for all public agencies; but this is attended with the duty of objectivity and specificity, in the exercise of judgment;***
>
> *iv.* ***for the due functioning of constitutional governance, the Courts be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interests attending each case;***
>
> *v.* ***in the performance of the respective functions, every arm of Government is subject to the law.”***

69. In the South African Constitutional court case of **Doctors for Life International v Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11** it was held as follows:

ORIGINAL

"The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle 'has important consequences for the way in which and the institutions by which power can be exercised'.. …..

But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. <u>When it exercises its legislative authority, Parliament 'must act in accordance with, and within the limits of, the Constitution', and the supremacy of the Constitution requires that 'the obligations imposed by it must be fulfilled'. Courts are required by the Constitution 'to ensure that all branches of government act within the law' and fulfil their constitutional obligations. This Court 'has been given the responsibility of being the ultimate guardian of the Constitution and its values."</u>

70. In yet another South African decision **<u>Hugh Glenister vs. President of the Republic of South Africa & Others Case CCT 41/08; [2008] ZACC 19</u>** the Court affirmed as follows:

"In our constitutional democracy, the courts are the ultimate guardians of the constitution. They not only have the right to intervene in order to

ORIGINAL

prevent the violation of the Constitution, they also have the duty to do so. It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds."

71. In Kenya, the supremacy of the Constitution was also affirmed by the Supreme Court in **Speaker of National Assembly -vs-Attorney General and 3 Others (2013) eKLR** by holding thus:

"Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court, to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and

FINAL

moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering his Opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act... Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signaled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of "right" and "wrong" in such cases, short of are solution in plebiscite, is only the Courts."

72. It was the Respondent's case that the Petition offends the doctrine of exhaustion since the Petitioners ought to have raised these issues with the Parliament under Article 119 of the Constitution in the first instance. Such a contention has been judicially considered and there is precedent on this issue, that is the right to Petition the Parliament under Article 119 vis-a-vis the right to petition the Court under Article 22 of the Constitution. The Court in **Katiba Institute & another v Attorney General & another [2017] KEHC 4648 (KLR)** held as follows:

> ***"103… Under Article 165(3)(d)(i) and (ii) the High Court is clothed with the jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether***

any law is inconsistent with or in contravention of the Constitution; and, 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, the Constitution.

104. Therefore whereas the legislative authority vests in Parliament and the County Assemblies, where a question arises as to whether an enactment is inconsistent with the Constitution or is passed in contravention of the Constitution, the High Court is the institution constitutionally empowered to determine the issue. This is of course subject to the appellate jurisdiction given to the Court of Appeal and the Supreme Court. There is nothing like supremacy of the legislative assembly outside the Constitution. Under Article 2(1) and (2), the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government. No person may claim or exercise State authority except as authorised by the Constitution.

105. Therefore there is only supremacy of the Constitution. Accordingly, every organ of State performing a constitutional function must perform it in conformity with the Constitution. It must follow that where any State organ fails to do so, the High Court, as the ultimate guardian of the Constitution, will point out the transgression. The contrary argument, in our view, runs counter to the constitutional provisions with respect to the jurisdiction of this Court.

115. It is therefore clear that the mere fact that Parliament has the power pursuant to a

ORIGINAL

petition under Article 119 of the Constitution to enact, amend or repeal legislation, does not bar this Court from carrying out its constitutional mandate; or, to fashion out an appropriate remedy."

73. Likewise, the Court in **Council of Governors & 3 others v Senate & 53 others [2015] KEHC 6965 (KLR)** addressed its mind on the issue as follows:

> ***71. It is useful, however, in closing on jurisdictional questions, to address ourselves to the provisions of Article 119(1) of the Constitution. The AG submits that the petitioners ought to have approached Parliament in accordance with the provisions of Article 119(1) prior to filing its petition. Article 119(1) and (2) are in the following terms:***
>
> ***"Every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal legislation.***
>
> ***2. Parliament shall make provision for the procedure for the exercise of this right."***
>
> ***72. The question is whether this provision is intended to take away the right of a party to question the constitutionality of an Act of Parliament, or indeed any action taken by the legislature, guaranteed under Articles 22 and 258. Further, whether it can also be taken as ousting the jurisdiction of the Court under Article 165(3)(d) to determine any question respecting the interpretation of the Constitution, including "the question whether any law is inconsistent with or in contravention of" the Constitution, or under***

ORIGINAL

Article 165(3)(d)(iii), to determine any matter "…relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government""

73. ***In our view, the answer must be in the negative. Doubtless, Article 119(i) will serve a useful purpose in allowing citizens to petition Parliament to consider matters of concern to them that are within the purview of Parliament, including the repeal or amendment of legislation. It appears to us, however, that Article 119 is not intended to cover situations such as is presently before this Court. The question of the constitutionality of the impugned CGAA was raised with Parliament prior to its enactment. As deposed by Mr. Charles Nyachae, the Chairman of CIC, in his affidavit sworn on 19th September 2014, the issue had been brought to the attention of Parliament through CIC's Advisory Opinion in the month of August 2014, prior to the enactment of the CGAA. Parliament, nonetheless, appears to have disregarded the concerns raised regarding its conformity with the Constitution and proceeded to enact the legislation.***

74. ***It would therefore be, in our view, for the Court to abdicate its responsibility under the Constitution to hold that a party who considers that legislation enacted by Parliament in any way violates the Constitution is bound to first petition Parliament with respect to the said legislation. The constitutional mandate to consider the constitutionality of legislation is***

ORIGINAL

> ***vested in the High Court, and Articles 2(4) and 165(3(d)(i) mandate this Court to invalidate any law, act or omission that is inconsistent with the Constitution. This is in harmony with the mandate of the courts to be the final custodian of the Constitution."***

74. On the strength of the ratio in the above precedents, it is the finding of this Court that the right to Petition the Court is a fundamental constitutional right that is not ousted by Article 119 on the right to petition Parliament. It is only the Court that is constitutionality mandated to adjudicate questions of constitutionality of action or omissions.

75. Turning now to question of ripeness and separation of powers, the Petitioners grievance is that the Respondents are in the process of enacting the Constitution of Kenya (Amendment) Bill, 2025 yet Parliament has failed to enact a referendum law as required by the Constitution.

76. The 2nd Respondent in its objection which was supported by the other Respondents contended that the Petition is premature and violates the doctrine of separation of powers. This is because the Petition was filed in respect of an ongoing legislative process that relates to the impugned Bill.

77. This Court's jurisdiction to entertain constitutional matters is spelt out under Article 165(3) (d) (i) and (ii) of the Constitution as follows:

ORIGINAL

(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 this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

78. On the other hand, Article 22 (1) provides as follows:

> ***"Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, <u>or threatened</u>."***

ORIGINAL

79. The Petitioner's position is that Article 22 and 258 of the Constitution gives the right to institute Court proceedings where even a threat of violation of the Constitution can be demonstrated to prevent such violation from being actualized. In other words, taking preemptive action as opposed to reactive action.

80. The question therefore is whether in the circumstances of this case, the doctrine of ripeness applies.

81. As already demonstrated by the reading of Article 22 which has already been highlighted in the foregoing, a Constitutional action can be sustained when if it can be shown that the threat is real and not just illusory and unless

prevented, it is most certain likely to occur. In such instances, such a dispute cannot be barred by the doctrine of ripeness. The case of **Martin NyagaWambora vs. Speaker of The County of Assembly of Embu & 3 Others [2014] eKLR** explains this very clearly:

> ***"To those erudite words I would only highlight the importance of demonstration of "real danger". The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention."***

82. In the instant case, that the process of amending the Constitution through Parliamentary initiative is ongoing. The Petitioners have identified some of the risks that this process portends and argued that unless the Court directs its mind to the same and pronounces itself on their constitutionality, that may not be reversed given that should the impugned bill sail through and eventually becomes law, for its legality will not be subject to challenge by or before any court as it will now form part and parcel of the Constitution itself. The Petitioners have pointed out those breaches that they fear are violative of the laid Constitutional standards.

83. In my view, having gone through the Petition closely and aware of the possible consequences should this process go through without the Court addressing these concerns, I do

ORIGINAL

not think that those contentions can dismissively be labeled as idle. It is my considered view that the Petitioner has demonstrated that the threats they have cited deserve to be considered fully by this Court, hence the doctrine of ripeness is not a bar to this Petition.

84. **On the same breath,** the argument that this Petition offends the doctrine of separation of powers does not persuade me. It is true that the Respondents have autonomy in the manner in which they conduct their mandate to legislate under Article 94 of the Constitution but this particular process is admittedly not about an ordinary legislation, it is a process that is directed to the amendment of the Constitution itself, which the Supreme law in the Republic.

ORIGINAL

85. This Court has a Constitutional duty to intervene and ensure that questions raised regarding the constitutionality of the process that could lead to amendment of the Constitution conform with the standards prescribed by the Constitution even as the Court guards itself from directing or interfering with the Parliamentary mandate. The Petitioner who has an obligation under Article 3 of the Constitution to defend the Constitution should thus get a hearing from the Court before the process can be allowed to run fully to a point that whatever is done is considered irreversible. This Court thus has jurisdiction to entertain this dispute for if the Court is to

determine if the procedures or the processes adopted meet the constitutional threshold.

86. For this reason, it is my humble view that the Petition is not invalidated either by the doctrine of separation of powers or the doctrine of ripeness.

Whether the Petition meets the threshold for grant of conservatory orders.

87. The law on issuance of conservatory orders in constitutional petitions has the Constitutional underpinning in Article 23(2)(c) of the Constitution. Further **Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules**, **2013** states:

Conservatory or interim orders.

vi. Despite any provision to the contrary, a Judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim orders.

vii. Service of the application in sub rule (1) may be dispensed with, with leave of the Court.

viii. The orders issued in sub rule (1) shall be personally served on the respondent or the advocate on record or with leave of the Court, by substituted service within such time as may be limited by the Court.

ORIGINAL

88. In **Invesco Assurance Co v MW (Minor suing thro' next friend and mother (HW) [2016] KEHC 5318 (KLR)** the Court explained what a conservatory order entails as follows:

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

89. And on threshold for granting conservatory orders, the case of **Nkunja v Magistrates and Judges Vetting Board (2016) KEHC 7269** encapsulated the three main principles as follows:

> ***"a. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.***
>
> ***b. Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and***
>
> ***c. The public interest must be considered before grant of a conservatory order."***

90. Likewise, in **Board of Management of Uhuru Secondary School (supra)** the Court stated that:

ORIGINAL

"25. Foremost, the applicant ought to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice….

26. It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis….

28. Once the applicant has established to the court's satisfaction a prima facie case with a likelihood of success the court is then to decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights….

29. Thirdly, flowing from the first two principles, is whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is indeed the business of the court to ensure and secure so far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice….

30. The fourth principle which emerges from the various cases and is well captured by the Supreme Court of Kenya in the case of Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others [2014] eKLR is that the court must consider conservatory orders also in the face of the public interest dogma.

ORIGINAL

> ***31. Finally, the court is to exercise its discretion in deciding whether to grant or deny a conservatory order. The court must consequently consider all relevant material facts and avoid immaterial matters. The court will consider the applicants credentials, the prima facie correctness of the availed information, whether the grievances are genuine legitimate and deserving and finally whether the grievances and allegations are grave and serious or merely vague and reckless."***

91. Further, on public interest, the Supreme Court in **<u>Munya (supra)</u>** guided as follows:

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

92. A thorough examination of the pleadings and submissions of the Parties shows that the Petition is founded on the Respondents' action of undertaking a process intended to amend the Constitution through the enactment of the

ORIGINAL

Constitution of Kenya (Amendment) Bill that seeks to introduce/amend the Constitution in several ways. The Petitioners are aggrieved because the Respondents are embarking on that process before enacting a referendum law which omission they say has created confusion as it is not clear whether the process will require a referendum or not.

93. In an application for conservatory order, the Court is not looking for the concrete/conclusive proof of what the Petition is advancing, but examining it to see if the Petition on the face of it raises serious/ arguable Constitutional questions as opposed to frivolous contestations. The issue of whether what is alleged is actually true will will eventually be proved at the trial. In **Kevin K Mwiti & others v Kenya School of Law & others [2015] KEHC 2294 (KLR)** it was held that:

> ***"51. A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success.***

ORIGINAL

> ***Accordingly in determining this application, the Court is not required-indeed it is forbidden- from making definite and conclusive findings on either fact or law. I will therefore refrain from making any determinations whose effect would be to prejudice the hearing of the main Petitions/Application."***

94. It goes without saying that the Respondents are State Organs and are thus bound in discharging their mandate to uphold and comply with the Constitution and the law else they would be in violation of fundamental constitutional principles.

95. In this matter, it is alleged that the Respondents are seeking to make amendments to the Constitution without paying regard to constitutional values and principles. The Petitioner vividly demonstrated manner that unless this Court intervenes to ensure there is clarity in the manner the process to amend the Constitution is being pursued by the Respondents, there is imminent danger that the Constitution will be mutilated. The fact that the process lacks clarity on whether or not it would require a referendum, the absence of referendum law or any other law to guide the process in my view is clear proof that these are fundamental Constitutional questions that show that Petition presents a prima facie and/or arguable constitutional case.

ORIGINAL

96. On issue of the prejudice or the real danger that the Petitioners will be exposed should the order not be granted, a perusal of the Petitioners' case discloses that should the respondents proceed and conclude the Constitutional amendments, if enacted, the changes will become Constitutional provisions which by dint of Article 2 (3) will be beyond any legal challenge. This because under this Article;

> ***"the validity or legality of this Constitution is not subject to challenge by or before any court or other State organ"***

97. It means if changes take place, the process would be irreversible unless effected by another Constitutional amendment. The Court thus finds that should it not grant the conservatory order at this stage, the Petition even assuming it is eventually successful, the same will become nugatory. The prejudice that is likely to be suffered will in fact be real hence necessitates immediate action by the Court.

98. I further take it that Constitutional amendments are matters of significant public interest and thus granting a conservatory order to examine and ascertain that the processes comply with the Constitutional dictates is justifiable. Suspending what is reasonably apprehended to be an improper constitutional amendment process serves the public better than proceeding with a doubtful process which could lead to problematic constitutional amendments that fundamentally alter the Constitution's core principles. It

ORIGINAL

thus my considered view that public interest in this matter favours the granting of conservatory orders. For these reasons, it is my take that the Petitioners have satisfied the threshold for grant of conservatory orders.

Whether the Petition raises substantial questions of law meriting certification before the Chief Justice for the empanelment of an uneven Judge bench.

99. The law on empanelment of a bench is provided under Article 165 (4) of the Constitution which provides that:

> ***"Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice."***

100. The Court in **Kinyanjui (supra)** held:

> ***"8. Therefore, giving meaning to "substantial question" must take into account the provisions of the Constitution as a whole and need to dispense justice without delay particularly given a specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter. It must also be remembered that each High Court judge, has authority under Article 165 of the Constitution, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of Article 165(4), the decision of a three Judge bench is of equal force to that of a single judge exercising the***

ORIGINAL

same jurisdiction. A single judge deciding a matter is not obliged to follow a decision of the court delivered by three judges."

101. The Court went on to note that:

> ***"10. A matter may raise complex issues of fact and law but this does not necessarily imply that the matter is one that raises substantial issues of law. Judges are from time to time required to determine complex issues yet one cannot argue that it means that every issue is one that raises substantial questions of law. Thus, there must be something more to the "substantial question" than merely novelty or complexity of the issue before the court. It may present unique facts not plainly covered by the controlling precedents. It may also involve important questions concerning the scope and meaning of decisions of the higher courts or the application of well-settled principles to the facts of a case."***

102. Furthermore, the Court in **Magare Gikenye J Benjamin v Salaries and Remuneration Commission & 146 others; Senate & 9 others (Interested Parties) [2021] KEHC 13290 (KLR)** citing the set jurisprudence in this area as outlined in a number of authorities, rehashed as follows:

> ***"9. The application under consideration relates to certification in the High Court; that is under Article 165 (3) and (4) of the Constitution.The manner in which a single Judge of the High Court certifies that a matter raises a substantial question(s) of law so as to warrant the empanelment of an expanded bench has, on several instances, been dealt with by the Superior Courts.***

ORIGINAL

10. The Supreme Court of Kenya in Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone [2013] eKLR established the principles for certification under Article 163(4)(b) of the Constitution. However, those principles were adopted, with modification, by the Court of Appeal in Okiya Omtatah Okoiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR when the Court of Appeal dealt with an appeal against a refusal by the High Court to certify a matter as raising substantial questions of law under Article 165(4) of the Constitution.

11. The Supreme Court summed up the principles as follows: -

In summary, we would state the governing principles as follows:

- ***i. for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;***
- ***ii. where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;***
- ***iii. such question or questions of law must have arisen in the Court or Courts***

ORIGINAL

below, and must have been the subject of judicial determination;

iv. ***where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;***

v. ***mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163 (4)(b) of the Constitution;***

vi. ***the intending applicant has an obligation to identify and concisely set out the specific elements of "general public importance" which he or she attributes to the matter for which certification is sought;***

vii. ***determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.***

12. As said, the Court of Appeal applied the above principles in Okiya Omtatah Okoiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR and expressed itself thus: -

ORIGINAL

42. ***In Hermanus Phillipus Steyn v Giovanni Gnechi- Ruscone [2013] eKLR the Supreme Court of Kenya pronounced governing principles for purposes of certification under Article 163(4)(b) some of which are relevant in the context of certification under Article 165(4). Drawing therefrom, we adopt, with modification, the following principles:***

For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the Court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;

The applicant must show that there is a state of uncertainty in the law;

The matter to be certified must fall within the terms of Article 165 (3)(b) or (d) of the Constitution;

The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought.

43. ***It is our judgment therefore, that whether a matter raises a substantial point of law for purposes of Article 165(4) of the Constitution is a matter for determination on a case-by-case basis. The categories of factors that***

ORIGINAL

should be taken into account in arriving at that decision cannot be closed.

13. The High Court has as well severally dealt with the matter. In Republic v Public Service Commission & Keriako Tobiko Ex parte Nelson Havi [2017] eKLR the Court stated that: -

> ***42. Whereas this Court appreciates that the decision of an enlarged bench may well be of the same jurisprudential value in terms of precedent or stare decisis principles as a decision arrived at by a single High Court judge, the Constitution itself does recognise that in certain circumstances it may be prudent to have a matter which satisfies the constitutional criteria determined by a bench composed of numerically superior judges…***
>
> ***46. In the circumstances, I hereby certify that this matter raises a substantial question of law to warrant reference of the same to the Chief Justice as required under Article 165(4) of the Constitution.***

14. In Philomena Mbete Mwilu v Director of Public Prosecution & 4 others [2018] eKLR the High Court had the following to say: -

> ***29. I fully agree with the above views on the jurisprudential value of decisions by a bench or a single judge of this court. Although the present petition can be heard by a single judge of this court and also being fully aware that a bench would sometimes require resources both personnel and financial as well as more time to resolve a petition than if it***

ORIGINAL

> ***were heard by a single Judge, the present petition is the kind of petition that this court should exercise its discretion in favour of an expanded bench due to its public importance and significance in our constitutional democracy. The issues sought to be decided are not mere questions of law, they are substantial questions of law and their resolution will have a material bearing on the 1st respondent's decision to arrest and prosecute the petitioner and the independence of the judiciary."***

103. A party might strongly feel that a matter ought to be adjudicated by an expanded bench under Article 165(4) of the Constitution but that is discretion vested on the Court which is empowered to do so upon addressing its mind to the established principles. The Court must satisfy itself on the existence of *'a substantial question of law'*. The Petitioners have singled out what they consider to be substantial questions of law which I need not restate here save to say that from the running theme, it is evident that they fundamentally challenge the constitutionality of the Respondents' actions on the proposed Constitution of Kenya (Amendment) Bill and the intended amendments as against the constitutional principles and Parliament's failure to enact a referendum law.

104. The issues raised carry great public interest and a determination will be useful in guiding the course that such

ORIGINAL

processes are undertaken to obviate the apprehension that has characterized the present attempt and also protect public resources from being wasted in opaque initiatives that may not yield proper constitutional outcomes. There is uncertainty in the law with regard to the issues raised which will require clarity from the court. I thus opine that this is a matter that ought to be forwarded to the Honourable the Chief Justice for empanelment of an uneven number of Judges to hear and determine.

105. It is my humble opinion that the Petitioners have satisfied the threshold for certification for empanelment of a bench hence this matter will be forwarded to the Chief Justice to assign uneven number of Judges to hear and determine it.

106. The upshot of the foregoing therefore is that the Petitioners have satisfied the threshold for grant of the conservatory orders and certification to the Chief Justice for assignment of uneven number of Judges to hear and determine this Petition under Article 165 (4) of the Constitution.

107. I thus make the following orders:

a) That pending the hearing and determination of this Petition, a Conservatory Order is hereby issued forbidding and/or preventing the forwarding of the Constitution of Kenya (Amendment) Bill 2025 to the President for assent and, if assented to, the same shall

ORIGINAL

not take legal effect until the instant Petition is heard and determined.

b) This file is hereby forwarded to the Chief Justice for empanelment of an uneven number of Judges to hear and determine the Petition pursuant to provisions of Article 165(4) of the Constitution

c) Costs shall be in the cause.

Dated, signed and Delivered virtually at Nairobi this 18th day of September, 2025.

..

L N MUGAMBI

JUDGE

ORIGINAL