



**Gishinga & 9 others (Suing of their Own Accord and on Behalf of APDK-ATTIC/Articulatted ClasS “CE” and Public Service Drivers Class “A” of heavy trucks and Public Service Vehicles Licenced by the Republic of Kenya) v National Transport and Safety Authority & 17 others (Constitutional Petition E046 of 2023) [2024] KEHC 482 (KLR) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 482 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CONSTITUTIONAL PETITION E046 OF 2023**

**OA SEWE, J**

**JANUARY 19, 2024**

**IN THE MATTER OF ARTICLES 10, 19, 20, 22, 23, 27, 28, 29, 35, 39, 40,  
41, 43, 46, 47, 48, 50, 165 AND 258 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF PROPRIETARY RIGHTS UNDER  
ARTICLE 40 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE TRAFFIC ACT, CHAPTER 403 OF THE LAWS OF KENYA  
AND THE NATIONAL TRANSPORT AND SAFETY AUTHORITY ACT, 2012**

**AND**

**IN THE MATTER OF ECONOMIC AND SOCIAL RIGHTS  
UNDER ARTICLE 43 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF CONSUMER RIGHTS UNDER ARTICLE 46 OF THE  
CONSTITUTION OF KENYA AND THE CONSUMER PROTECTION ACT, 2012**

**BETWEEN**

**ROMAN WAEMA GISHINGA ..... 1<sup>ST</sup> PETITIONER  
SUDI KAULI MWATELA ..... 2<sup>ND</sup> PETITIONER  
MOHAMED ATHUMAN BAHERO ..... 3<sup>RD</sup> PETITIONER  
ABDUL KARIM HASSAN ..... 4<sup>TH</sup> PETITIONER  
SHEM OCHIENG KAZAMBIA ..... 5<sup>TH</sup> PETITIONER  
PATRICK LUMUMBA AMUKAMWA ..... 6<sup>TH</sup> PETITIONER**



JULIUS MWANYIKA MWAMIDI ..... 7<sup>TH</sup> PETITIONER  
SAMSON MULWA KITAKA ..... 8<sup>TH</sup> PETITIONER  
HASSAN JUMA SAID ..... 9<sup>TH</sup> PETITIONER  
ERIC MMBEYI MACHANJA ..... 10<sup>TH</sup> PETITIONER  
SUING OF THEIR OWN ACCORD AND ON BEHALF OF APDK-ATTIC/  
ARTICULATED CLASS “CE” AND PUBLIC SERVICE DRIVERS CLASS “A”  
OF HEAVY TRUCKS AND PUBLIC SERVICE VEHICLES LICENCED BY THE  
REPUBLIC OF KENYA

AND

THE NATIONAL TRANSPORT AND SAFETY AUTHORITY .... 1<sup>ST</sup>  
RESPONDENT  
THE CABINET SECRETARY, MINISTRY OF ROADS AND  
TRANSPORT ..... 2<sup>ND</sup> RESPONDENT  
THE CABINET SECRETARY, MINISTRY OF INTERIOR AND NATIONAL  
ADMINISTRATION ..... 3<sup>RD</sup> RESPONDENT  
THE CABINET SECRETARY, MINISTRY OF LABOUR AND SOCIAL  
PROTECTION ..... 4<sup>TH</sup> RESPONDENT  
THE HON. SPEAKER, NATIONAL ASSEMBLY ..... 5<sup>TH</sup> RESPONDENT  
THE HON. ATTORNEY GENERAL ..... 6<sup>TH</sup> RESPONDENT  
THE HON. INSPECTOR GENERAL NATIONAL POLICE  
SERVICE ..... 7<sup>TH</sup> RESPONDENT  
THE HON. DIRECTOR OF PUBLIC PROSECUTIONS ..... 8<sup>TH</sup> RESPONDENT  
MR. NICHOLAS MBUGUA, GENERAL SECRETARY, KENYA LONG  
DISTANCE DRIVERS AND ALLIED WORKERS UNION .... 9<sup>TH</sup> RESPONDENT  
MR. HASSAN ABDALLA, ACTING NATIONAL CHAIRPERSON,  
KENYA LONG DISTANCE DRIVERS AND ALLIED WORKERS  
UNION ..... 10<sup>TH</sup> RESPONDENT  
MRS. GRACE NYAMBURA, TREASURER, KENYA LONG DISTANCE  
DRIVERS AND ALLIED WORKERS UNION ..... 11<sup>TH</sup> RESPONDENT  
MR. ELIJAH NYAGA, CHAIRMAN, KENYA LONG DISTANCE DRIVERS AND  
CONDUCTORS ASSOCIATION ..... 12<sup>TH</sup> RESPONDENT  
MR. ANTONY MUTUA, CHIEF EXECUTIVE OFFICER,  
KENYA LONG DISTANCE DRIVERS AND CONDUCTORS  
ASSOCIATION ..... 13<sup>TH</sup> RESPONDENT  
MR. ELVIS COLLINS OTIENO, GENERAL SECRETARY,  
KENYA LONG DISTANCE DRIVERS AND CONDUCTORS  
ASSOCIATION ..... 14<sup>TH</sup> RESPONDENT



<b>MR. JOSEPH MWANGI, CHAIRPERSON, KENYA LONG HAUL TRUCKERS ASSOCIATION .....</b>	<b>15<sup>TH</sup> RESPONDENT</b>
<b>MR. PETER THINWA NGARI, CHAIRPERSON, TRUCKERS ASSOCIATION OF KENYA NAIROBI CHAPTER .....</b>	<b>16<sup>TH</sup> RESPONDENT</b>
<b>MR. BENSON MWENDA, CHAIRPERSON MATATU TRANSPORT VEHICLES ASSOCIATION .....</b>	<b>17<sup>TH</sup> RESPONDENT</b>
<b>MRS. MERCY IRERI, CHIEF EXECUTIVE OFFICER, KENYA TRANSPORTERS ASSOCIATION .....</b>	<b>18<sup>TH</sup> RESPONDENT</b>

## RULING

- [1] The Notice of Motion dated 7<sup>th</sup> September 2023 was filed by the petitioners under a Certificate of Urgency pursuant to various provisions of the *Constitution* of Kenya, including Article 159(2)(d) as well as Rules 23 and 24 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 (otherwise known as “*the Mutunga Rules*”). It seeks orders that:
- (a) The application and the annexed Petition be certified urgent and service thereof be dispensed with in the first instance. (Spent)
  - (b) The Court be pleased to grant leave to the petitioners to present these proceedings of their own accord as well as in a representative capacity on behalf of all qualified ATTIC/Articulate Class “CE” Commercial and Public Service Vehicle Class “A” drivers.
  - (c) That by dint of the extreme urgency of this matter and the prevailing circumstances currently obtaining, the Court be pleased to grant leave to the petitioners to serve all process herein electronically through the parties’ email addresses provided herein where necessary.
  - (d) That pending the inter partes hearing of the application, the Court be pleased to grant conservatory orders in the following terms:
    - (i) That there be immediate unconditional suspension and/or stay of execution of the 1<sup>st</sup> and/or 2<sup>nd</sup> respondent’s directive that all commercial Class “CE” and public service vehicles Class “A” drivers undergo mandatory re-testing with effect from 19<sup>th</sup> June 2023 and/or any other dates.
    - (ii) That there be immediate unconditional suspension and/or stay of execution of the deletion/ erasure/removal or any and all class qualifications and/or endorsements from the driving licences of the petitioners and all affected parties without sanction of the court, conviction of any affected party or prior notification to any affected party.
    - (iii) That there be immediate unconditional suspension and/or stay of execution of the unilateral amendment to the express provisions of either or all of Sections 30, 31, 34, 36, 37, 39, 41, 76, 78, 98 and 99 of the *Traffic Act*, Cap 403, Laws of Kenya by either or both the 1<sup>st</sup> and/or 2<sup>nd</sup> respondents through either or all of the 1<sup>st</sup> respondent’s Press Statement dated 19<sup>th</sup> June 2023 and/or the 2<sup>nd</sup> respondent’s Press Statement dated 11<sup>th</sup> July 2023.
    - (iv) That there be immediate unconditional suspension and/or stay of execution of the arrest and/or detention and/or arraignment and/or conviction of any and/or all of the petitioners and affected parties on account of the acts and/or omissions of either or both of the 1<sup>st</sup> and/or 2<sup>nd</sup> respondents subject hereof.



- (v) That there be immediate unconditional suspension and/or stay of execution of the appointment and/or selection and/or nomination of the 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup> and/or 18<sup>th</sup> respondents to the Stakeholder Multi-Agency Committee constituted by the 1<sup>st</sup> and/or 2<sup>nd</sup> respondents.
  - (vi) That there be immediate unconditional suspension and/or stay of execution of the entirety of Stakeholder Meetings/Sessions held between the 1<sup>st</sup> and/or 2<sup>nd</sup> respondents and the 9<sup>th</sup> to 18<sup>th</sup> respondents.
  - (vii) That an order do issue restraining the respondents, whether by themselves, their agents, servants, employees, assigns or whosoever claiming through them from harassing, intimidating, threatening the petitioners and affected parties and/or causing a threat to the petitioners' and affected parties' security, liberty and wellbeing, and/or acting in a manner adverse to the interests of the petitioners and affected parties.
  - (e) The orders subject of prayer [d] above do persist until the hearing and determination of the application and ultimately the Petition.
  - (f) That, alternatively and without prejudice to Prayer [e] above, by dint of the extreme urgency of this matter and the peculiar circumstances pertaining hereto, the Court be pleased to direct, upon grant of the conservatory orders sought herein, the hearing of the Petition itself be expedited and heard forthwith, and in any event, within the next 7 days.
  - (g) That costs of the application be at the Court's discretion.
- [2] The application was premised on the grounds that, vide a statement published on 19<sup>th</sup> June 2023, the 1<sup>st</sup> respondent directed an immediate re-test of all public service and commercial vehicle drivers with effect from 20<sup>th</sup> June 2023, upon expiry of their driving licences. The petitioners complained that the impugned statement did not include in its body or otherwise, the justification for selective re-testing of already qualified drivers, the criteria to be employed in the conduct of the selective re-testing, professional qualifications or competence of the individuals to conduct the re-test or information on the involvement of representatives of the affected parties, stakeholder unions and organizations in the decision for the selective re-testing.
- [3] Accordingly, the petitioners averred that the subject exercise commenced arbitrarily with effect from 20<sup>th</sup> June 2023 under the express directive of the 2<sup>nd</sup> respondent, targeting public service vehicles and commercial drivers; and was executed by the 3<sup>rd</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents through unconscionable arrests, detention and arraignment of drivers. They further asserted that, with effect from 1<sup>st</sup> March 2023, the 1<sup>st</sup> respondent had commenced a covert exercise by directly deleting/erasing/removing the Attic/articulate Class from the driving licences of already qualified commercial drivers.
- [4] At paragraph 27 of the Notice of Motion, the petitioners averred that, thereafter on the 11<sup>th</sup> July 2023, the 2<sup>nd</sup> respondent purported to unilaterally amend the restrictions on the various clauses of licences prescribed under the *Traffic Act*, suspended the ongoing driver re-test exercise and unilaterally selected a committee of stakeholders for engagement as regards the driver re-test exercise. Likewise, at paragraph 28 the petitioners complained that there was no public participation in any way, manner or form prior to the directives by the 1<sup>st</sup> and 2<sup>nd</sup> respondents to conduct the selective re-test exercise; or to delete/erase/remove various classes from the driving licences of the already-qualified drivers.
- [5] At paragraphs 32 to 37 of the Notice of Motion, the petitioners set out the provisions of the *Constitution* and its derivative Acts of Parliament that were violated by the respondents. They



accordingly prayed that their application be allowed and the orders sought granted by the Court. The petitioners' grounds were well reiterated and explicated in their Supporting Affidavit and the documents annexed thereto.

- [6] The application was resisted by the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> respondents. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed Replying Affidavits while the 5<sup>th</sup> respondent filed Grounds of Opposition. In the 1<sup>st</sup> respondent's affidavit, the affiant, Mr. Isaac Silali, adverted to the mandate and functions of the Authority. He was emphatic that whatever the petitioners are seeking to stay has been suspended pending the outcome of a report from a taskforce appointed to look into the contentious issues. Mr. Silali also asserted that the re-test is anchored in law and that the suspension of the exercise was only done in reaction to public outcry at the commencement of the implementation of the new rules.
- [7] As for the deletions/erasures/removals of certain classes from the driving licences of already qualified drivers, Mr. Silali explained that it was due to system error in that, initially members of the public used to apply for driving licences through Transport Integrated Management System (TIMS) but that later, the services were migrated to the e-citizen platform. He added that the Authority is in the process of clearing that error and the affected persons are also at liberty, where necessary, to visit their offices for the errors to be cleared. Thus, the 1<sup>st</sup> respondent posited that the application is not only premature, but also unmerited.
- [8] In the 2<sup>nd</sup> respondent's affidavit, sworn by Mr. Mohamed Daghar on 21<sup>st</sup> September 2023, it was pointed out that, due to the increased frequency of road accidents involving long distance trucks, the 2<sup>nd</sup> respondent directed the 1<sup>st</sup> respondent to undertake a re-test of all long-distance truck drivers to ensure that they possessed the necessary competence to undertake their jobs. It was further averred that, following the directive, the 2<sup>nd</sup> respondent received grievances from the Kenya Long Distance Truck Drivers and Allied Workers Union on the challenges facing its members; whereupon the respondent suspended the re-testing exercise following discussions held with the union officials.
- [9] Hence, the 2<sup>nd</sup> respondent posited that the conservatory orders prayed for by the petitioners are moot, granted that the re-testing exercise has been suspended to allow for the multi-agency committee to look into the contentious issues and present its report on the best way forward.
- [10] On its part, the 5<sup>th</sup> respondent relied on its Grounds of Opposition dated 24<sup>th</sup> September 2023 to the effect that:
- (a) To the extent that petitioners allege failure of the 5<sup>th</sup> respondent to oversight the respondents over the impugned actions, the petitioners herein have failed to exhaust alternative mechanisms under Article 119 of the Constitution, the Petitions to Parliament Act and the National Assembly Standing Orders to petition Parliament to consider the impugned issues which are within the authority of the National Assembly.
  - (b) The role of the Speaker having been clearly laid down under Article 108 of the Constitution of Kenya as a neutral presiding officer of the proceedings before the National Assembly, the Speaker of the National Assembly has been improperly sued in the proceedings herein.
  - (c) The suit does not disclose a reasonable cause of action as against the Speaker of the National Assembly.
  - (d) The suit herein does not meet the test laid down by the Court of Appeal in Anarita Karimi Njeru v Republic [1979] eKLR as it has not pleaded a violation of the Constitution with reasonable degree of precision.



- (e) The process of removal of the Speaker of the National Assembly having been laid down in the [Constitution](#) and the National Assembly Standing Orders, the prayer to have the 5<sup>th</sup> respondent declared unfit to hold office would result in violation of the doctrine of separation of powers.
- (f) The application does not meet the test set out for the grant of conservatory orders as set by the Supreme Court in [Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others](#) [2014] eKLR.
- [11] The application was urged orally on 9<sup>th</sup> October 2023 after Mr. Ngonze confirmed that indeed the re-testing that had culminated in arrests and arraignment of the targeted group of drivers had been suspended by the 2<sup>nd</sup> respondent. He however insisted that the other prayers in the Notice of Motion dated 7<sup>th</sup> November 2023 are still live and ought to be determined on their merit. He relied on the Supporting Affidavit and pointed out that the deletions complained of were admitted by the 1<sup>st</sup> respondent.
- [12] I note that, in his submissions, Mr. Ngonze impugned the Replying Affidavit on the ground that no authority was given by the 1<sup>st</sup> respondent authorizing Mr. Silai to swear the affidavit on behalf of the Authority. He argued that since the Authority is a body corporate, its Board ought to have sworn the affidavit and given authority to someone to make the deposition on its behalf. Mr. Ngonze proffered the same arguments in respect of the affidavit of the 2<sup>nd</sup> respondent's Replying Affidavit and prayed that both affidavits be struck out.
- [13] I however have no hesitation in rejecting that argument, granted the clear provisions of Article 159(2)(d) of the [Constitution](#) and Rule 10 of the [Mutunga Rules](#) in terms of form. Rule 10(3) states:  
 ...the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.”
- [14] Article 159(2)(d) of the [Constitution](#) lays emphasis, not on form, but on substance. There is therefore no place or requirement for such authority in the Mutunga Rules. I accordingly endorse the viewpoint of Hon. Musyoka, J. in [Francis Angueyah Ominde & another v Vihiga County Executive Committee Members Finance Economic Planning and 3 others; Controller of Budget and 10 others \(Interested Parties\)](#) [2021] eKLR that:  
 ...it should be pointed out that the constitutional petitions are governed and regulated by the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#), 2013, so far as procedures and processes are concerned. They are not subject to the Civil Procedure Rules, which governs processes that are brought under the [Civil Procedure Act](#), Cap 21, Laws of Kenya. So far as procedure is concerned, the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#), 2013 the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#), 2013, captures the spirit of Article 159(2)(d) of the [Constitution](#), which is an injunction against constitutional proceedings being hostage to technicalities of procedure, and which enjoins courts to protect and promote the principles of the [Constitution](#). The focus is trained on substance rather than process. the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#), 2013 are more flexible compared with the provisions of the Civil Procedure Rules, with respect to who may bring proceedings and the manner of initiating the proceedings.
12. Two issues are raised with respect to the above. One, it is about the 1<sup>st</sup> petitioner initiating the proceedings jointly with the 2<sup>nd</sup> petitioner, but without filing



an authority executed by the 2<sup>nd</sup> petitioner to include him in the petition. I have carefully and scrupulously scoured through the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#), 2013, and I have been unable to find a provision or rule which requires such an authority. It is a requirement under the Civil Procedure Rules, but the proceedings before me were not initiated under the [Civil Procedure Act](#), and they are not subject to the Civil Procedure Rules, but the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#), 2013”

- [15] The same position was taken by Hon. Makau, J. in [Offshore Trading Company Limited v Attorney General & 2 Others](#) [2021] eKLR thus:

...the matter pending before this Court is a Constitutional Petition in which Civil Procedure Rules are not applicable in regard to filing of Constitutional Petitions. The applicable law and procedure of filing Constitutional Petitions is provided for under “The Protection of Rights and Fundamental Freedoms, Practice and Procedure Rules, 2013, otherwise known as Chief Justice Mutunga Rules which provide the procedure for filing of Constitutional Petitions and which have no requirement that the Petitioner must exhibit a board resolution or swear a verifying Affidavit. In addition thereto the [Constitution](#) abhors Technical objections of this nature expressly at Articles 22, 3(b)(d) and 159 of the [Constitution](#).

31. In the instant Petition, I note that the deponent of the Supporting Affidavit has expressly deponed at paragraph 1 of the supporting affidavit that he is duly authorized by the Board of Directors of the Petitioner to swear the Affidavits. The 3<sup>rd</sup> Responded cannot question that averment without offering contrary evidence. The Turquand Rule in Company Law enjoins third parties dealing with a company to presume that the company has complied with all its internal requirements and procedures. There is therefore no basis for the 3<sup>rd</sup> Respondent’s objection in the absence of evidence to the contrary.

...

33. In view of the [Mutunga Rules](#) and authorities cited herein above, I find that even if the filing of Resolution was a requirement in Constitutional Petition, I would find that it would be against Article 48 of the [Constitution](#) on access to justice...”

- [16] Moreover, it is not in every case that that authority of the board is required. Indeed, Order 4 Rule 1(4) of the [Civil Procedure Rules](#) expressly makes specific mention of situations “...where the Plaintiff is a corporation...” there appears to be no indication, either in that provision or elsewhere in the Rules, that such a requirement is applicable to a corporate defendant or respondent. Accordingly, in [Saraf Limited v Augusto Arduin](#) [2016] eKLR the Court of Appeal held:

...We know of no law that makes it a requirement for a limited liability company that has been sued to furnish proof or to demonstrate that its Board of Directors or its shareholders have authorized it to defend the suit. If this were the law, logistical reasons would render it difficult or near impossible for companies to defend suits having regard to the strict time-lines within which appearance and defence must be filed...”



[17] In the premises, there is plainly no merit in Mr. Ngonze’s argument. In my finding, the two Replying Affidavits are validly before the Court. That said, the next issue for consideration is whether the petitioner has made out a prima facie case. What amounts to a prima facie case was discussed in *Kevin K Mwiti & others v Kenya School of Law & others* (*supra*), thus:

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. 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.

[18] I have, accordingly given careful consideration to the applications, the responses thereto as well as the submissions made by Counsel for the parties, including the authorities cited by them. It is imperative to bear in mind that at this stage, the Court need not examine closely the merits of the petitioners’ case. The need for caution to not delve into the merits prematurely was aptly expressed thus by Hon. Ibrahim, J. (as he then was) in the *Muslim for Human Rights & 2 Others v Attorney General & 2 Others* [2011] eKLR:

In an application for interim orders of the nature of Conservatory Orders or even one for an injunction, the court is not hearing and/or being called upon to determine the main Petition. The Constitutional court is being called upon to preserve the status quo pending the hearing of the Constitutional Petition or motion. The court does not have to take and hear all the evidence and delve into the entire case on its merits. The hearing of the Petition and determination of all issues and questions in dispute will be done at the “trial” and upon completion thereof when a final judgment is to be delivered. As a result, at this stage I am not obligated to go into all the evidence and even consideration of all the matters of law. My function is to have a reasonable overview to enable me decide on the criteria or principles applicable when considering an application for a Conservatory Order and to what extent and principles are applicable to the facts and circumstances of this case. The court must be careful for it not to reach final conclusions and to make final findings. By the time the application is decided, all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-a-vis the case of either parties. This principle is similar to that in temporary or interlocutory injunctions in civil matters.”

[19] The same position was taken in Nairobi High Court Petition No. 16 of 2011: *Centre for Rights Education & Awareness (CREAW) & 7 Others v Attorney General*, thus:

At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the *Constitution*.”



[20] Expressing itself on the matter of conservatory orders, the Supreme Court, in the case of *Gatirau Peter Munya vs. Dickson Mwenda Gitbinji & 2 Others* [2014] eKLR offered the following viewpoint (at paragraph [86]):

Conservatory orders bear a more decided public-law connotation; for these are orders to facilitate ordered functioning within the 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 Applicant’s case for order 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 cases.”

[21] Hence, it is now settled that an applicant for conservatory orders for purposes of Article 22 and 23(3) (c) of the *Constitution* must satisfy the Court as to the following three considerations:

- (a) That he/she has a prima facie case with a high likelihood of success;
- (b) That the Petition will be rendered nugatory;
- (c) That public interest weighs in his/her favour.

[22] As pointed out herein above, the gist of the petitioner’s case is to be found at paragraphs 22 to 32 of the Notice of Motion in which they complained about what it perceived to be:

- (a) The directive to conduct selective re-testing of already qualified drivers;
- (b) The arbitrarily deletion/erasure/removal of class qualification from the driving licences of all already-qualified drivers.
- (c) The formulation of law to conduct selective re-testing without the necessary prior public participation; and,
- (d) The arbitrary selection of the 9<sup>th</sup>-18<sup>th</sup> respondents as stakeholder representatives in the stakeholder forum.

[23] When the parties appeared before this Court for the first time on 19<sup>th</sup> September 2023, Ms. Sirai made it plain that, although the implementation of the contentious directives was to commence from July 2023, the same had been suspended by the 2<sup>nd</sup> respondent and a taskforce formed to look into the issues that had arisen around implementation. She also pointed out that the taskforce was yet to complete its work and submit a report. Because Mr. Ngonze doubted that position, given that the suspension had lapsed and the targeted drivers were still being arrested and arraigned before court, the Court granted the respondent’s time to confirm the status and report back.

[24] On the 27<sup>th</sup> September 2023, both Ms. Sirai and Ms. Langat for the respondents reported that the Cabinet Secretary was intent on extending the suspension. They had no doubt that with the extension of the suspension, the petitioners’ apprehensions around the re-testing exercise would dissipate. It came to pass that the extension was made; a fact that Mr. Ngonze confirmed on 9<sup>th</sup> October 2023. Indeed, Mr. Ngonze conceded that the extension of the suspension took away the first limb of the instant application. Although he insisted that there are three other limbs of the application which are still contentious, the issue of erasures was well-explained at paragraph 12 of the 1<sup>st</sup> respondent’s Replying Affidavit; that it was due to system migration from Transport Integrated Management System (TIMS)



to e-citizen and that the 1<sup>st</sup> respondent was in the process of clearing the error as of 20<sup>th</sup> September 2023 when the affidavit was sworn. Indeed, in her submissions, Ms. Sirai told the Court from the bar that the issue had been addressed and the deletions rectified.

[25] It is manifest then that most of the issues of concern to the petitioners have been overtaken by events and are therefore moot. In particular, it is no longer in contention that the directive to conduct selective re-testing of already qualified drivers and the arbitrarily deletion/erasure/removal of class qualification from the driving licences of all already-qualified drivers have been suspended/corrected. It would be pointless to grant the orders sought by the petitioners in connection with the foregoing concerns.

[26] Indeed, according to *Black's Law Dictionary*, Tenth Edition, at page 1161, a "moot case" is defined as "A matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights." Thus, in *Daniel Kaminja & 3 Others (supra)* in which Hon. Mativo, J. (as he then was) addressed the issue of mootness in detail, it was held:

23. A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact. 24. It is trite that as a general principle, the rights and liabilities of parties to any judicial proceedings pending before court are determined in accordance with the law as it was at the time when the suit was instituted and by applying the facts to the law and circumstances. Time and again, it has been expressed that a court should not act in vain.[15]

25. No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose. A suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity. [16]

26. A case or issue is considered moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use. In such instance, there is no actual substantial relief which a petitioner or applicant would be entitled to, and which would be negated by the dismissal of the case. Courts generally decline jurisdiction over such cases or dismiss them on grounds of mootness, save when, among others, a compelling constitutional issue raised requires the formulation of controlling principles to guide the bench, the bar and the public; or when the case is capable of repetition yet evading judicial review."

[27] I have similarly considered the submissions of Mr. Ngonze in connection with public participation and what the petitioners consider to be arbitrary selection of stake-holder representations for that purpose. Again, I would agree with the respondents that, not everybody can sit in the task force; and that if there is internal wrangling amongst the membership and/or officials of the associations of the affected class of drivers, a conservatory order to stop the entire exercise is not the solution. The solution lies elsewhere, as it is not the remit of a constitutional court to determine who are the bona fide representatives of the affected parties. Moreover, in so far as the door to public participation has not been closed it would appear premature to me for the court to issue pronounce itself on the issue. Indeed, it is my finding that in this regard, the Court was addressed on matters that would best be resolved at the hearing of the Petition itself.

[28] In the result, I find no merit in the application dated 7<sup>th</sup> September 2023. The same is hereby dismissed with no order as to costs.



It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 19<sup>TH</sup> DAY OF JANUARY  
2024**

**OLGA SEWE**

**JUDGE**

