



**Ndubai v Attorney General & another (Petition E372 of 2024)
 [2024] KEHC 9785 (KLR) (Constitutional and Human Rights) (2 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 9785 (KLR)

**REPUBLIC OF KENYA
 IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
 CONSTITUTIONAL AND HUMAN RIGHTS
 PETITION E372 OF 2024
 LN MUGAMBI, J
 AUGUST 2, 2024**

BETWEEN

SIMON JONI NDUBAI PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

SPEAKER OF THE NATIONAL ASSEMBLY 2ND RESPONDENT

RULING

1. By a notice of motion application dated 30th July, 2024 brought under Certificate of Urgent and supported by the affidavit of Simon Joni Ndubai, the Petitioner prays for the following orders:
 - i. That the court be pleased to certify the matter urgent, and same be dispensed with in the first instance.
 - ii. That pending he hearing and determination of this application herein interparty, the Honourable court be pleased to grant on order of permanent injunction restraining the 2nd Respondent from vetting and approving, whether by themselves, their agents and any other persons acting on their instructions, the list with names forwarded by the Office of the President containing names of nominees for the position of Cabinet Secretaries.
 - iii. That the Honourable court be pleased to grant the order declaring, the list forwarded by Office of President to the National Assembly for vetting and approval by Parliament unconstitutional and therefore null and void, as it does not adhere to the provisions of the Constitution and various laws stated in the petition.
 - iv. That the honourable court be pleased to grant the order directing the Office of President to prepare a fresh list which should include a man and woman with disability.



- v. That the Honourable Court be pleased to issue an order that each party bear their own costs on the grounds that the petition is in public interest.
 - vi. That the Honourable Court be pleased to issue such further or other orders as it may deem just and expedient for the ends of justice.
2. Upon presentation, the court directed immediate service which was effected.
 3. In response, the 1st Respondent filed grounds of opposition dated 1st August, 2024 which are as follows: -
 1. Application has not been pleaded with precision as it does not provide adequate particulars of the claim relating to any alleged violation of the Constitution and neither is supported with any documentary evidence in support of the allegations.
 2. Application has not met the legal threshold for the grant of conservatory orders.
 3. In *Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board and Others* Nairobi High Court Constitutional Petition No.154 of 2016 (2016) eKLR the Court summarized three main principles for consideration on whether to grant conservatory orders 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.
 4. It is our assertion that the above limbs have not been satisfied in the Application.
 5. The orders sought in the Application are untenable in the circumstances of the case on the owing grounds:-
 - a) A permanent injunction as prayed in prayer 2 of the application cannot be granted at the interlocutory stage;
 - b) Prayers 3 and 4 of the application are Mandatory orders which cannot be granted at the interlocutory stage; and
 - c) The Application is moot as the vetting by the 1st respondent is underway.
 6. Our position was further upheld by the Court in Petition 520 of 2014 *John Harun Mwau v Linus Gitabi & 13 others*.
 4. The 2nd Respondent response was by way of notice of preliminary objection dated 1st August, 2024.
 5. The grounds relied upon on the Notice of Preliminary Objection are:
 1. The Honourable Court lacks jurisdiction to entertain this Petition and Application for Conservatory Orders under Articles 152(2) as read with Article 117 of the [Constitution](#) and the [Public Appointments \(Parliamentary Approval\) Act, 2011](#).
 2. The Honourable Court lacks jurisdiction to entertain this Petition and Application for Conservatory Orders under the doctrines of Separation of Powers, Parliamentary Privileges



and Immunity, Ripeness and deference and the Principals enunciated by the Supreme Court in *Justus Kariuki Mate and Another v Martin Nyagah Wambora & Another* [2017] eKLR.

3. The Petitioner seeks to curtail the exclusive mandate of the National Assembly on the Approval of the nominees for appointment as Cabinet Secretaries under Article 152(2) of the [Constitution](#) and the [Public Appointments \(Parliamentary Approval\) Act, 2011](#).
4. Active Parliamentary proceedings on the approval of nominees for appointment as Cabinet Secretaries are currently underway before the National Assembly.
5. The Petition and Notice of Motion filed is sub judice since the issues raised in the Petition challenging the nominations and the aspect of the validity and legality of H.E. The President's nominations have been raised in three other Petitions. The Petitions are as follows:
 - a. Malindi High Court Constitutional Petition E015 of 2024; *Saitabao Ole Kanchory v The President of The Republic of Kenya, The Speaker of The National Assembly & The Hon. Attorney General (Respondents) & James Opiyo Wandayi, John Mbadi Ng'ongo, Hassan Ali Joho And Wycliffe Ambetsa Oparanya (Interested Parties)*. This matter was last in court on 31st July, 2024 before Hon. Mr. Justice S. Githinji. The matter shall be mentioned on 15th August, 2024.
 - b. Nairobi High Court Constitution and Human Rights Petition E363 of 2024; *Erick Otieno and Another v Hon Dr. Wycliffe Oparanya EGH, Ethics and Anti-Corruption Commission & National Assembly*. This matter was last in court 26th July, 2024, before Hon. Justice Lawrence Mugambi for directions on the Notice of Motion Application. The matter shall be mentioned for further directions be issued on 25th September, 2024
 - c. Nairobi High Court Constitutional Petition No. E364 of 2024; *Julius Ogogobv Azimio La Umoja-One Kenya Alliance, Orange Democratic Party, The Speaker of The National Assembly and The Hon. Attorney General*. The matter came up before Court before Hon. Justice Bahati Mwamuye on Wednesday, 31st July 2024. The Court directed that the Petition be mentioned together with Petition E363 of 2024 before Hon. Justice Mugambi on 25th September 2024 for further directions.
6. In the brief oral submissions, the petitioner reiterated the contents of his affidavit in which he asserted the jurisdiction of this court under Article 165 of the Constitution and argued that the President violated the law for not nominating persons with disability to be included in the list of Cabinet Secretaries that was taken to Parliament for vetting. According to the Petitioner, Parliament should have rejected the list on grounds of violation of rights of persons with disability.
7. The petitioner argued that if the court does not stop the vetting process by granting a conservatory order, the process will be concluded and right of persons with disability which have been violated will continue to be impugned.
8. He relied on the case of [Gatirau Peter Munya v Dickson Mwenda Kithinji](#) in asserting the conditions that for grant of conservatory orders were met.
9. Mr. Sekwe for 2nd Respondent supported the preliminary objection by the 2nd Respondent that the court lack jurisdiction to entertain the present petition.
10. Mr. Sekwe contended that Parliament in undertaking its constitutional mandate of vetting the nominees and allows the members of public, such as the petitioner herein to present any concerns they



would like Parliament to take into account in the course of vetting process and the petitioner has not demonstrated that he has done that.

11. Mr. Sekwe argued that the stop the process, the court would be usurping the mandate of Parliament. He argued that the petitioner has not met the threshold for conservatory order.
12. Further, Mr. Sekwe invited the court to look at the orders sought in the application which does not seek any conservatory order but final orders, and if granted, would determine the entire petition.
13. Mr. Atingo for 2nd respondent associated with the submissions of Mr. Sekwe. He, however, insisted that the preliminary objection he had filed raises issues of jurisdiction which goes to the root of the petition itself hence should be determined in priority to the petition and the application.

Analysis and Determination

14. There two issues for determination:
 - i. Whether the court should consider hearing the preliminary objection in priority to the petition and application?
 - ii. Whether the court should grant a conservatory order in this petition.
15. On whether or not the preliminary objection should take precedent before considering the question of conservatory order, ordinarily, this should be the normal course of events, particularly where the issue touches on jurisdiction of the court but this is a rule based on precedents and depending on circumstances of a given case, the court can, decide to deal on the issues raised together.
16. It is all a matter of discretion to be decided by the court upon assessment of the matter before it.
17. In the present case, isolating the issue of jurisdiction and dealing with it singularly would mean that the urgency of this matter would be lost.
18. It was thus the consideration of this court that a hearing of the application be done, albeit briefly and all other issues raised could be dealt with at a later stage.
19. Turning now to the application, the court has to consider its merits.
20. Firstly, as ably pointed out by Mr. Sekwe, although the petitioner/Applicant submitted that his application seeks conservatory orders, none of the prayers enumerated in the application is for conservatory order. All the prayers are in the nature of final orders that can only be granted after the hearing of the main petition. That in itself makes the application incompetent.
21. As was held in the case of *East African Portland Cement Company Ltd Versus Attorney General & Another* (2013) eKLR cited with approval in *John Harun Mwau Versus Linus Gitahi & 13 Others* (2018) eKLR, where the court held:

“Interim orders are not suitable if by their grant, they finally determine the substantive dispute, the courts must be wary of prejudgment of the substantive merits”
22. The petitioner/applicant cannot at this stage ask the court for permanent injunction, declaratory orders and in the main petition seek similar prayers. These are final orders which are inappropriate at this point in time.
23. The application is dismissed. Costs shall be in the course.



DATED, SIGNED AND DELIVERED VIRTUALLY AT MILIMANI THIS 2ND DAY AUGUST, 2024.

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L N MUGAMBI

JUDGE

