Matindi v Attorney General & 4 others (Petition E199 of 2023) [2024] KEHC 12703 (KLR) (Constitutional and Human Rights) (24 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12703 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E199 OF 2023

LN MUGAMBI, J

OCTOBER 24, 2024

BETWEEN

ELIUD KARANJA MATINDI ..... PETITIONER

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

DEPARTMENTAL COMMITTEE ON DEFENCE, INTELLIGENCE AND FOREIGN RELATIONS, NATIONAL ASSEMBLY OF KENYA ..... 2ND RESPONDENT

NATIONAL ASSEMBLY OF KENYA ..... 3RD RESPONDENT

PUBLIC SERVICE COMMISSION ..... 4TH RESPONDENT

NOORDIN HAJI, CBS ..... 5TH RESPONDENT

RULING

Introduction

1. By a Notice of Motion application dated 15th June 2023, the Petitioner seeks orders that:

    i. Spent.

    ii. Pending the hearing and determination of this Application, a conservatory order does issue suspending the appointment of the 5th Respondent, Noordin Haji, CBS, to the office of Director-general, NIS, as notified vide Kenya Gazette Notice No. 7688 of 13th June 2023.

iii. Pending the hearing and determination of the substantive Petition, a conservatory order does issue suspending the appointment of the 5th Respondent, Noordin Haji, CBS, to the office of Director-general, NIS, as notified vide Kenya Gazette Notice No. 7688 of 13th June 2023.

iv. This Court be pleased to certify that the Petition filed alongside this Application raises substantial questions of law and forthwith refer the Petition to Her Ladyship, the Chief Justice, for assignment of an uneven number of judges, being not less than three, to hear and determine it pursuant to Article 165(4) of *the Constitution*.

v. Consequent to the grant of the prayers above, this Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.

vi. Costs be provided for.

Petitioner's Case

2. The application is supported by the Petitioner's affidavit of even date and the grounds on the face of the application. The instant application primary focus is Prayers (iii) and (iv) in the application.

3. The gist of this application and Petition is a challenge against the 5th Respondent's appointment to the office of the Director General at the National Intelligence Service (NIS) by the Petitioner. The said appointment was notified by Kenya Gazette Notice No.7688 dated 13th June 2023.

4. The Petitioner contends that prior to the 5th Respondent's appointment; there were pending Petitions for the removal of the 5th Respondents as the Director of Public Prosecutions on grounds of integrity, competence and suitability that were before the 4th Respondent. These Petitions were founded on Article 158 of *the Constitution* as read with Section 9 of the Office of Director of Public Prosecutions (ODPP) Act and Section 76 of the *Public Service Commission Act*.

5. The Petitioner contends that the appointment of the 5th Respondent is a gross violation of *the Constitution*. Furthermore, that it is contrary to Section 4(4) of the National Intelligence Service (NIS) Act which requires the President of Kenya and the 3rd Respondent to uphold the dictates of Article 73(2)(a) of *the Constitution* before appointing the Director General.

6. It is averred that Section 9 of the NIS Act makes it clear that the person appointed as the Director General must have integrity as envisaged under Chapter six of *the Constitution*. Also, be competent and suitable for the role. Accordingly, the Petitioner asserts that one who is appointed to this post must be vetted and affirmed to hold integrity standards and qualities. He contends that this was not adhered to before the appointment of the 5th Respondent.

7. He is also aggrieved that the despite the pending petitions against the 5th Respondent and the glaring integrity issues, the Respondents proceeded to acquiesce to his appointment. Similarly, that the 5th Respondent actively participated in the process that saw him assume the Director General's office well aware of the pending Petitions for his removal on integrity, competence and suitability grounds against him as the Director of Public Prosecutions.

8. Considering this, the Petitioner contends that it is crucial for the conservatory orders to be issued so as to protect *the Constitution* from gross violation and to safeguard national security.

9. In the same breath, the Petitioner claims that the issues raised herein are substantial questions of law regarding the interpretation and application of *the Constitution* in view of Articles 1, 2, 3, 10, 73, 74, 75, 94, 95, 118, 129, 131, 132, 157, 158, 232, 238, 242, 249 and 259. He avers that these issues go to

the core of governance as envisaged under *the Constitution* and the standard that must be upheld by State and public officers.

1st Respondent's Case

10. Opposing the Petition and application, the 1st Respondent filed its grounds of opposition dated 8th January 2024 on the premise that:

    i. The Petitioner has not adduced any evidence in support of the allegation made against the 1st Respondent.

    ii. No tribunal constituted in accordance with the provisions of Article 158(4) of *the Constitution* made any finding that warranted the removal of the 5th Respondent from the Office of Director of Public Prosecutions.

    iii. The Public Service Commission did not send any petition to the President disclosing the existence of any ground under Article 158 (1) of *the Constitution*.

    iv. The allegations on what either the Public Service Commission or the Tribunal constituted under Article 158(4) of *the Constitution* would have found and recommended is at best speculative and cannot legally form the basis of impeaching the 5th Respondent's nomination, approval and appointment into the office of Director-General, National Intelligence Service.

    v. Neither this Court nor the National Assembly can substitute the role of the Public Service Commission and the Tribunal under Article 158 of *the Constitution*.

    vi. The Petition is antithetic to the doctrine of separation of powers as it seeks to replace the National Assembly's role with this Court in the approval process on the appointment of the Director-General National Intelligence Service.

    vii. This Court should not reconstitute itself as the vetting/approving body as propagated by the Petitioner in the case.

    viii. It would be grossly unjust for alleged acts of commission or omission attributed upon an independent constitutional commission like the Public Service Commission to be visited upon the 5th Respondent as sought in the Petition.

    ix. Pendency of legal proceedings neither vitiates the presumption of innocence nor dispenses with the legal and evidential burden of proof required to arrive at an adverse finding that would have disqualified the 5th Respondent under obtaining law.

    x. The Petition is speculative on what National Assembly may or may not have found.

    xi. It would be a travesty of justice for this Court to draw a negative inference on the 5th Respondent's exercise of his constitutional and lawful right to seek and obtain legal relief from the judiciary as propagated by the Petitioner.

    xii. Article 79 of *the Constitution* provides for the establishment of an independent ethics and anti-corruption commission with the status and powers of a commission under chapter fifteen for purposes of ensuring compliance with and enforcement of the provisions of chapter six of *the constitution*, this Court cannot therefore assume primary responsibility in lieu of the constitutional repository of the function as proposed by the Petitioner.

    xiii. The Petitioner has failed to plead and prove any specific infraction of *the constitution* by the 5th Respondent that would serve to bar the 5th Respondent from being appointed as Director

General of the National Intelligence Service, the Petitioner is improperly seeking to take over and canvass unresolved complaints by parties who despite full knowledge of the appointment process of the 5th Respondent into office deliberately elected not to urge the same.

xiv. The petition is premised on inadmissible evidence as the same is sought to be adduced contrary to the provisions of sections 106A and 106B of the *Evidence Act*.

xv. The Petition is based on evidence that is not original to the Petitioner, therefore hearsay and inadmissible.

2nd and 3rd Respondents' Case

11. The 2nd and 3rd Respondents filed their Replying Affidavit through the Clerk of the 3rd Respondent, Samuel Njoroge sworn on 18th July 2023. He states that following the nomination of the 5th Respondent through the Notification of Presidential Action dated 18th May 2023, the matter was transmitted to the House pursuant to Section 7(2) of the NIS Act and Section 5 (1) of the *Public Appointments (Parliamentary Approval) Act*.

12. On 20th May 2023, the National Assembly pursuant to Article 118 of *the Constitution* and Section 6(4) of the *Public Appointments (Parliamentary Approval) Act* invited the public to give their views, comments and memoranda on the 5th Respondent's nomination by 29th May 2023. In this regard, the 2nd Respondent received 26 memoranda including one by the Petitioner. 22 of these were in favour of the 5th Respondent's nomination while the rest were against it.

13. He further depones that, the 3rd Respondent wrote to the Kenya Revenue Authority (KRA), the Ethics and Anti -Corruption Commission (EACC), the Directorate of Criminal Investigations (DCI), the Higher Education Loans Board (HELB) and the Office of the Registrar of political Parties (ORPP), seeking reference and background checks for the 5th Respondent. It is noted that these organs in their responses cleared the 5th Respondent for appointment. He clarified that the 3rd Respondent's is not legally bound to seek clearance by the 4th Respondent.

14. He depones that the 5th Respondent was invited on 23rd May 2023 to appear before the 2nd Respondent for a hearing. The hearing was conducted on 30th May 2023 and at the request of the 5th Respondent, the hearing was not conducted in public. He stated that the 5th Respondent's suitability was based on the criteria set out under Section 7 of the *Public Appointments (Parliamentary Approval) Act* and the constitutional requirements.

15. The 2nd Respondent found that the 5th Respondent had met the requisite requirements for appointment as the Director General and made the recommendation to the 3rd Respondent. This Report was tabled before the House on 6th June 2023. The National Assembly subsequently approved his nomination on 13th June 2023 and issued gazette Notice No.7688.He was on the next day sworn in as the Director General of the NIS.

16. In light of this, the 2nd and 3rd Respondents insisted that they adhered to the constitutional and statutory requirements in approving the appointment of the 5th Respondent.

4th Respondent's Case

17. In reply, the 4th Respondent through its Chief Executive Officer, Simon K. Rotich filed a Replying Affidavit sworn on 22nd June 2023.

18. He deponed that the 4th Respondent's authority with regard to removal from office of a person holding the office of the Director of Public Prosecutions is provided under Article 158(2) and (3) of *the Constitution*. That the 4th Respondent in 2021 received two petitions seeking the removal of the 5th Respondent as the Director of Public Prosecutions (DPP).

19. The 5th Respondent countered the move by filing Nairobi HCCHR Misc. Petition No. E037 of 2021 and obtained orders halting the 4th Respondent from considering of the petitions for his removal. That suit is still pending determination.

20. He depones that within the same time, the 4th Respondent received further 8 petitions seeking the removal of the 5th Respondent from office. He notes however that 6 of the said petitions had been withdrawn prior to the nomination of the 5th Respondent for appointment as the Director General of the NIS.

21. He further makes known that soon after the 5th Respondent's nomination, the 4th Respondent received 2 additional petitions seeking his removal as the DPP. The 4th Respondent was however not able to consider these petitions owing to the existing court order.

22. He states that since the 4th Respondent never finalized consideration of the petitions, it was not possible to give a Report to the 3rd Respondent through the 2nd Respondent during the 5th Respondent's vetting. He deposes that giving a Report without according the 5th Respondent a hearing would have been a violation of Article 47 of *the Constitution*.

23. He adds that the same would have also been in violation of Article 158 (3) of *the Constitution* which only permits forwarding of a Report to the President after the 4th Respondent has been satisfied the grounds under clause (1) have been established. For this reason, he asserts that the 4th Respondent was under no obligation to inform the 3rd Respondent of the pending petitions against the 5th Respondent hence the Petition lacks merit and ought to be dismissed with costs.

5th Respondent's Case

24. In response, the 5th Respondent filed his Replying affidavit sworn on 8th July 2023. On preliminary note, the 5th Respondent asserts that the Petition fails to meet the constitutional threshold of Petitions as set out in Anarita Karimi Njeru v Republic (1979) eKLR and affirmed in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR. This is because it does not provide the particulars of the alleged complaints against him and the manner in which he violated the specified provisions.

25. The 5th Respondent further asserts that the Petitioner has failed to discharge the burden of proof as required under Section 107(1), 109 and 112 of the *Evidence Act* for grant of the interlocutory orders. He also cited inter alia the case of *Commission for Human Rights and Justice v Torrut & 5 others (Petition E024 of 2021*) [2022] KEHC 11931 (KLR) that addressed the question of standard of proof.

26. Likewise, he asserts that the Petitioner has failed to adduce evidence to support the claim of his non - compliance with Chapter six of *the Constitution*. Similarly, that the Petitioner's case is primarily based on general allegations that are unsupported and hearsay. He adds that the Petitioner in making his case, relied upon false information. Considering this, he argues that the Petitioner filed this matter with an ulterior motive to tarnish his reputation. As such, he argues that the Petitioner's case is frivolous and vexatious.

27. On the substantive issues, the 5th Respondent takes issue with the Petitioner's allusion that the petitions before the 4th Respondent revolved around his mandate while holding the office of the DPP. He contends that his action of withdrawing cases in the year 2021/2022 was in line with his mandate and discretion as empowered under Article 157(8) of *the Constitution*. Additionally, that his actions as the DPP were in line with the law throughout and his conduct as dictated by *the Constitution*

28. He argues thus that withdrawal of cases cannot constitute a ground for removal of the DPP from office nor support the claim for incompetence or lack of integrity. He adds that the Petitioner's complaint against him ought to have been lodged in the right forum however this was not done. He in the same way prior to filing of this Petition did not lodge any complaint with the 5th Respondent during his tenure as the DPP.

29. He with reference to the application avers that the Petitioner has not demonstrated a prima facie case and the real danger and prejudice he is likely to suffer if the conservatory orders are not issued. He for this reason urges the Court to dismiss the Petition and application with costs.

Petitioner's Submissions

30. The Petitioner in support of his application filed submissions dated 13th October 2023, which dealt mainly on issuance of the conservatory orders and the empanelment of an uneven judge bench to determine the Petition.

31. On the issue of conservatory orders, the Petitioner submitted that application meets the threshold for grant of conservatory orders. He argued that his Petition is arguable, further that if the orders are not issued the Petition would be rendered nugatory and equally that the issuance is in public interest. This argument was anchored on the fact that the Petition challenges the constitutional and legal validity of the 5th Respondent's appointment as the Director General of the NIS.The Petitioner added that the 2nd and 3rd Respondents had failed to engage the 4th Respondent in the process despite its role in ascertaining the 5th Respondent's suitability in line with Chapter six of *the Constitution*.

32. Reliance was placed in Okiya Omtatah *Okoiti & Others v The Cabinet Secretary for National Treasury & Planning & Others - Petition No. E181 of 2023* -[unreported] where it was held that:

> " The purpose of conservatory orders is to preserve the substratum of the petition before Court pending the hearing and determination of the same."

33. Like dependence was placed in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR and Stanley Kangethe Kinyanjui V Tony Ketter & 5 others [2013] eKLR.

34. Moreover, the Petitioner stressed should the case against the 5th Respondent be determined against him, the same will have dire consequences since he will have held the post of the Director General while unqualified. He argued that the public interest favours grant of the conservatory orders.

35. Turning to the second issue, Counsel stated that this Petition raises substantial questions of law considering that the Petition questions the failure to adhere with the leadership and integrity requirements under Chapter six of *the Constitution*. This is against the backdrop that the 2nd to 5th Respondent asserted that the 5th Respondent's appointment was constitutional despite the pending unresolved petitions.

36. He further argued that the 1st Respondent had neglected to respond to the instant application and Petition as the representative of the President of Kenya. In his view, this means that there is a great uncertainty in upholding the applicable provisions of *the Constitution*. He equally contended that if

the Respondents' stance in this matter is unchallenged the same would amount to an unconstitutional repeal of *the Constitution* in light of Chapter six and the Respondents' collective obligation to uphold *the Constitution*. He is certain that the issues in this Petition will transcend the parties herein as concerns the question of appointment of persons to state offices while facing unresolved cases against them.

37. Reliance was placed in Sonko - v - County Assembly of Nairobi City and 10 Others [Petition 11 (E008) of 2022 [2022] KESC 76 (KLR) where the Supreme Court held that:

> "Chapter Six, in our view, is the soul of *the Constitution* of Kenya. Without integrity in leadership, *the Constitution* itself will be in utmost peril. The people, through *the Constitution*, have ordained integrity as a value and principle of governance, dedicating to it a whole chapter in *the Constitution* and, at the same time, they have determined what level of integrity is needed in leadership."

Respondents' Submissions

38. The 1st and 4th Respondents' submissions are not in the Court file and Court online portal (CTS).

2nd and 3rd Respondents' Submissions

39. The 2nd and 3rd Respondents through their counsel, Emacar Andrew filed submissions dated 11th October 2023. They argued that the Petition is not pleaded with precision as it only mentions the provisions alleged to have been violated but fails to demonstrate how the cited provisions were violated as held in the Anarita Karimi Case (supra).

40. It was stressed that the scope of this Court's jurisdiction is limited to an interrogating whether *the Constitution* and the law was complied with. Reliance was placed in Pevans East Africa Limited & another v. Chairman, Betting Control and Licensing Board and 7 Others (2013) eKLR where the Court of Appeal held that:

> "Courts must decline to intervene at will in the Constitutionals spheres of other organs, particularly when they are invited to substitute their judgment over that of other of the organs in which constitutional power reposes, because those organs have expertise in their area of mandate, which the court do not normally have."

41. The 2nd and 3rd Respondent submitted that the only issue for determination is whether the nomination, recommendation, approval and appointment of the 5th Respondent violated *the Constitution* and the law. In answer, it was argued that this process was carried out lawfully as detailed in the 2nd and 3rd Respondents' affidavit.

42. In a nutshell, the 5th Respondent's nomination by the President was stated to be in line with Section 7(1) & (2) of the NIS Act and the notification in compliance with Section 5(1) of the *Public Appointments (Parliamentary Approval) Act*,2011. Once the notification was received the Speaker of the 3rd Respondent in compliance with Standing Order 45 of the National Assembly Standing Orders committed the matter to the 2nd Respondent.

43. This was then followed by a call to the public to participate in the process by the 3rd Respondent as required under Article 118 (1) of *the Constitution* and Section 6(4) and (9) of the *Public Appointments (Parliamentary Approval) Act*.

44. Correspondingly the 2nd Respondent received a green light from KRA, EACC, DCI, HELB and ORPP on the suitability of the 5th Respondent. In like manner, Counsel stressed that there is no legal

requirement for the 2nd and 3rd Respondent to seek clearance from the 4th Respondent concerning the 5th Respondent's nomination for the Director General of NIS post.

45. It is further noted that the exclusion of the 5th Respondent's interview from the public was done in line with Articles 24 and 35 of *the Constitution* as read with Section 6(1) of the *Public Appointments (Parliamentary Approval) Act*. At the conclusion of the process and satisfied that the 5th Respondent had met the requirements, the 2nd Respondent recommended his appointment which the 3rd Respondent effected on 13th June 2023.

46. Considering these factors, it is asserted that it is clear that due process was followed in the nomination and appointment of the 5th Respondent. For this reason, it is argued that the application and Petition lack merit and hence should be dismissed with costs.

5th Respondent's Submissions

47. Taib and Taib Advocates LLP on behalf of the 5th Respondent filed submissions dated 23rd November 2023 where Counsel discussed the issues for determination as:whether the Petitioner is entitled to conservatory orders and whether the Petition raises substantial questions of law to justify empanelment of a bench under Article 165(4) of *the Constitution*.

48. To commence with, the 5th Respondent submitted on the guiding principles for issuance of conservatory orders. The case of Okiya Omtatah Okoiti v Judicial Service Commission; Philomena Mbete Mwilu & another (Interested Parties) [2021] eKLR was cited where the Court after citing numerous authorities observed that:

> " Given the nature of conservatory orders, it is argued, that there is need for a Court to exercise caution when dealing with any request for such prayers. I agree with that proposition for the reason that matters which are the preserve of the main Petition ought not to be dealt with finality at the interlocutory stage."

49. On whether the Petitioner has made a prima facie case, it was contended that the whole premise of the Petitioner's case is the argument that the 5th Respondent had unresolved petitions against him when he was nominated for the post of Director General. This notion is impugned since the cause of action in the said petitions has never been proved against the 5th Respondent and thus there has been no determination made concerning his culpability.

50. It is further submitted that the Petitioner's claims in sum have not been substantiated in the instant matter. Fundamentally, that the Petitioner has not established a prima facie and additionally, the prejudice to be suffered and real danger has not been demonstrated. To buttress this point reliance was placed in Centre for Rights Education & Awareness (CREAW) & another v Speaker of the National Assembly & 2 others [2017] eKLR where it was held that:

> " A party who moves the Court seeking conservatory orders must show to the satisfaction of the Court that his or her rights are under threat of violation, are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending cause or petition.
>
> In other words, an applicant should demonstrate to the Court that she/he has a prima facie case with a probability of success and that should the court not grant the conservatory order

sought, she/he will continue to suffer prejudice while awaiting determination of her/his cause."

51. On the second element, Counsel similarly submitted that the Petitioner had failed to demonstrate how the hearing of the Petition would be rendered nugatory if the conservatory orders are not issued or the irreparable damage as held in Stanley Kangethe Kinyanjui (supra).

52. Likewise, it was pointed out that in the event the Court held in favour of the Petitioner, the Court has the authority to invalidate the 5th Respondent's appointment. Reliance was placed in Nelson Andayi Havi v Law Society of Kenya & 3 others [2018] eKLR where the Court of appeal held that:

> " Having carefully considered the rival contentions we are not persuaded, in the circumstances of this case, that the holding of the forthcoming elections will negate the applicant's intended appeal, if it ultimately succeeds. Those elections are not immutable; this Court can nullify them if it finds that they were conducted on the basis of an illegal and unconstitutional framework that among other things discriminated against or disenfranchised the applicant and other members of LSK."

53. Similar sentiments were also recorded for the public interest element.

54. Turning to the issue of empanelment of a uneven bench to hear and determine the Petition, the 5th Respondent urged the Court to be guided by the principles set out in Esther Awuor Adero Ang'awa v Cabinet Secretary Responsible for Matters Relating to Basic Education & 7 others; Kenya Private Schools Association (KPSA) & 4 others (Interested Parties) [2021] eKLR where it was held that:

> " i. The matter to be certified must fall within the terms of Article 165(3)(b) or (d) of *the Constitution*.
>
> ii. The matter must raise substantial question(s) of law.
>
> iii. 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.
>
> iv. The applicant must show that there is a state of uncertainty in the law.
>
> v. 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.
>
> vi. The matter is of immense public importance and has unique significance in our constitutional democracy.
>
> vii. Whether the matter is complex.
>
> viii. Whether the matter raises novel points of law.
>
> ix. Whether the matter by itself requires a substantial amount of time to be disposed of.
>
> x. The effect of the prayers sought in the Petition."

55. Like dependence was also placed in Okiya Omtatah Okoiti & another v Anne Waiguru – Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR and *Community Advocacy and Awareness Trust and Others vs Attorney General Nairobi Petition No. 243 of 2011* (Unreported).

56. In counsel's view, the Petitioner had not established these principles and neither was the matter novel or complex to warrant empanelment of a bench.

Analysis and Determination

57. In my opinion, the issues for determination are:

    i. Whether the Conservatory Orders sought should be granted.

    ii. Whether the Petition dated 15th June 2023 raises substantial questions of law meriting certification before the Chief Justice for the empanelment of an uneven Judge bench.

Whether Conservatory Orders should be granted

58. The law on issuance of conservatory orders in constitutional petitions is anchored on Article 23(2)(c) of *the Constitution* as read with Rule 23 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which reads as follows:

> Conservatory or interim orders.
>
> 1. 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.
>
> 2. Service of the application in sub rule (1) may be dispensed with, with leave of the Court.
>
> 3. 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.

59. Conservatory orders were defined in Invesco Assurance Co v MW (Minor suing thro' next friend and mother (HW) [2016] eKLR 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."

60. In Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board and Others Nairobi High Court Constitutional Petition (2016) eKLR the Court summarized three main principles for consideration when dealing with such applications 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.

61. Likewise, in Board of Management of Uhuru Secondary School v. City County Director of Education & 2 Others [2015] eKLR it was stated that:

> "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.
>
> 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."

62. A perusal of the pleadings and submissions for the parties reveals that the genesis of this suit stems from the 5th Respondent's nomination by the President of Kenya, his subsequent vetting and approval by the 2nd and 3rd Respondent for appointment as the Director General of the NIS and 4th Respondent's failure to intervene in the process. The question to be answered thus is whether this dispute satisfies the threshold for grant of conservatory orders, firstly, by considering whether the applicant has demonstrated the existence of a prima facie case, and if so, if there will be prejudice that would suffer during the pendency of the case to warrant the issuance of the conservatory order, and finally, whether it is in public interest to issue.

63. A prima facie case was defined by the Court in Mrao v First American Bank Ltd & 2 others (2003) KLR 125 as follows:

> "So what is prima facie case? I would say that in civil case it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a

right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter".

64. The Respondents' being State Organs are required whilst exercising their mandate to uphold and comply with the dictates of *the Constitution* and the law. *The Constitution* in Article 73 (2) (a) requires that selection of State Officers shall be on the basis of personal integrity, competence and suitability. The petitioner alleges that in that the appointment of the 5th Respondent as the Director General of NIS fell short of this Constitutional threshold primarily because the 5th Respondent had unresolved petitions that were pending before the 4th Respondent that were instituted to remove him on integrity grounds as the Director of Public Prosecutions yet the 2nd and 3rd Respondent did not seek to get a report about the same from the 4th Respondent and the 4th Respondent did not on its own motion transmit the information which resulted in the approval of the 5th Respondent despite having those integrity concerns.

65. While it is not the intention of this Court to delve deep into this matter at this stage, the Court cannot close its eyes on the allegations completely as it is required to examine them with a view to determining if it establishes a prima facie case by presenting a strong arguable case or substantial issue.

66. In my view, the integrity concerns raised in those Petitions that were pending before the 4th Respondent were/are as a matter of fact subject to proof as they had not been decided and a final conclusion made. They remained unproven allegations whose weight and credibility could not be ascertained. To confound this matter even further, the Court had even stopped the 4th Respondent from proceeding with the hearing of the said Petitions against the removal of the 5th Respondent, which itself is a strong indicator that there existed some serious legal questions about the process that the Court was very keen to interrogate. This state of affairs brings the existence of prima facie case into doubt.

67. The second principle requires a demonstration of the prejudice or real danger that the Petitioner will be exposed to should the orders not issue ultimately rendering the Petition nugatory. The phrase 'real danger' was discussed in Martin Nyaga Wambora vs. Speaker of The County of Assembly of Embu & 3 Others (2014) eKLR where the Court opined thus:

> " 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."

68. The prejudice that the Petitioner apprehends must be real and requiring immediate action to stop by the Court. In this case, the nomination and appointment of the 5th Respondent has happened. Should the Court find for the Petitioner, the Court can still quash the appointment of the 5th Respondent. The failure to issue the conservatory order sought would not render the Petition, therefore, nugatory.

69. Lastly, is the public interest principle which was aptly expounded on by the Supreme Court in Gatirau Peter Munya(supra) 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 ...."

70. In this respect, the Court has the duty to balance the interests of the Petitioner and the Respondents. In this suit, the Petitioner seeks to have the Court suspend what he terms as a constitutionally improper appointment. On the other hand, the Respondents asserts that they carried out their mandates in strict compliance with *the Constitution* and the law. The Petitioner want the Court to suspend the appointment of the 5th Respondent based on yet to be proved allegations in the petitions that were never heard or determined by the 4th Respondent. That would be extremely injudicious and this Court would be going against the canons of administration of justice if it were to accede to the Petitioner's request. I find that public interest is in favour of not granting the orders sought at this stage. Let the Petitioner prove the allegations at the hearing of the Petition on merits.

Whether the matter should be certified to the Chief Justice for empanelment of a Bench

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

(4) 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.

72. It is evident from the above cited provision that for a matter to be considered for empanelment, it must raise a substantial question of law under Article 165 (3)(d) of *the Constitution*.

73. The Supreme Court of India in Chunilal Mehta v Century Spinning and Manufacturing Co. AIR 1962 SC 1314, discussed the question of substantial question of law as follows:

" A 'substantial question of law' is one which is of general public importance or which directly and substantially affects the rights of the parties and which has not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be substantial."

74. Correspondingly in J. Harrison Kinyanjui V Attorney General & Another [2012] eKLR the Court observed that:

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

75. 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."

76. Likewise, the Court in Philomena Mbete Mwilu vs Director of Public Prosecution & 4 Others (2018) eKLR observed as follows:

> " 24. .....a question of law would be a substantial question of law if it directly or indirectly affects the rights of parties; there is some doubt or difference of opinion on the issues raised and that the issue is capable of generating different interpretations. If however the question has been well settled by the highest court or the general principles to be applied in determining the question before court have been well-settled, the mere application of those principles to a new set of facts presented in a case before the court would not on their own constitute a substantial question of law. There must be the possibility of the matter attracting different interpretations or opinion in its interpretation or application of the principles espoused in the matter to make it a substantial question of law. All this notwithstanding, it is up to the individual judge to decide whether the matter raises a substantial question of law for purposes of reference."

77. The Court of Appeal in Okiya Omtatah Okoiti (supra) set out the principles to be applied as follows:

> " 42. There are, in our view, parallels to be drawn between certification for purposes Article 163(4)(b) of *the Constitution* and certification for purposes of Article 165(4) notwithstanding that the drafters of *the Constitution*, in providing for certification of matters for purposes of appeal to the Supreme Court under Article 163(4)(b) stipulated that a matter should be of "general public importance", The word, "substantial" in its ordinary meaning, means "of considerable importance". There is therefore wisdom to be gained from the pronouncements of the Supreme Court of Kenya respecting interpretation of Article 163(4)(b). 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:
>
> "(i) 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;

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

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

(vi) 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 should be taken into account in arriving at that decision cannot be closed."

78. Going by the above authorities it is crystal clear that mere fact that a party deems a matter to fall under Article 165(4) of *the Constitution* does not mean that the Court must allow the application for empanelment. The Court must ascertain and be satisfied that the matter raises 'a substantial question of law.'

79. The Petitioner under Paragraph 64 of his written submissions summarizes the issues he considers as substantial questions of law. They are:

i. Whether the 5th Respondent was eligible for nomination, approval and appointment as the Director-General of the NIS in view of the unresolved petitions seeking his removal from the office of the DPP.

ii. Whether persons who hold a State/public office declared to be an independent office by *the Constitution* or statute, are eligible for nomination and/or appointment to another State/ public office otherwise than after a public, competitive recruitment process.

iii. Whether the President violated *the Constitution* and the law by nominating the 5th Respondent despite the pending petitions.

iv. Whether the 2nd Respondent failed to discharge its constitutional mandate in the process.

v. Whether the 3rd Respondent violated *the Constitution* and the law by approving the appointment of the 5th Respondent.

vi. Whether the 4th Respondent violated *the Constitution* and the law by refusing to submit a report to the 2nd Respondent, setting out the details and status of the petitions it had received for the removal of the 5th Respondent from office of DPP.

vii. Whether the appointment of the 5th Respondent was unconstitutional, null and void.

80. Manifestly, these issues require an interpretation and application of constitutional and legal principles but that alone does not mean they are substantial questions of law requiring that I certify this matter for empanelment of a bench. Courts in this Country have variously adjudicated upon issues concerning the constitutionality of state and public officers' appointments and the Respondents mandates in upholding *the Constitution* and thus the questions framed touch on established constitutional principles which can adequately be addressed by a single Judge. There is no uncertainty in the law with regards to the issues raised.

81. The application for certification of a bench is thus declined. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF OCTOBER, 2024.

.....

L N MUGAMBI

JUDGE