Ndii & others v Attorney General & others (Petition E282, 397, E400, E401, E402, E416 & E426 of 2020 (Consolidated)) [2021] KEHC 9763 (KLR) (Constitutional and Human Rights) (8 February 2021) (Ruling)

David Ndii & others v Attorney General & others [2021]eKLR

Neutral citation: [2021] KEHC 9763 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E282, 397, E400, E401, E402, E416 & E426 OF 2020 (CONSOLIDATED)

JM NGUGI, GV ODUNGA, J NGAAH, JK MULWA & EC MWITA, JJ

FEBRUARY 8, 2021

BETWEEN

DAVID NDII & OTHERS ..... PETITIONER

AND

ATTORNEY GENERAL & OTHERS ..... RESPONDENT

Principles to consider in granting conservatory orders.

The application sought conservatory orders against, among other matters, subjecting the Constitution (Amendment) Bill, 2020 to a referendum or the taking of any further action by the Independent Electoral and Boundaries Commission to advance the Constitution (Amendment) Bill, 2020. The court highlighted the principles to consider in granting conservatory orders.

Reported by Kakai Toili

Civil Practice and Procedure *– orders – conservatory orders - nature and rationale of conservatory orders - what were the principles to consider in granting conservatory orders?*

Brief facts

The petitioners challenged the content of and the process by which the Constitution (Amendment) Bill 2020 was formulated and the steps that had been and were intended to be taken to amend the Constitution of Kenya (the Constitution). The County Assembly of Turkana (the applicant), via an application, sought an order that, pending the hearing of the petitions, a conservatory order be issued barring the 3rd to 49th interested parties, the county assemblies, from considering the Constitutional Amendment Bill submitted to them by the Independent Electoral and Boundaries Commission (the Commission).

According to the applicant, the Commission had submitted to the county assemblies the Constitutional Amendment Bill, and by so doing, the three months for consideration of the Bill by the county assemblies effectively started running. The applicant was apprehensive that the county assemblies may undertake

a legislative process that ultimately may be held to be unconstitutional for failing to meet mandatory constitutional prescripts. The applicant was equally apprehensive that the circumstances may culminate in county assemblies having to undertake a repeat legislative process, which would result in a waste of public resources.

According to the petitioners in Petition No E400 of 2020, (petitioners), two of the legal questions that they had sought a determination on were whether the respondents and the interested parties (county assemblies, National Assembly and Senate) had the legal framework to proceed with their respective roles towards the achievement of the constitutional amendment process and whether, by dint of article 257(5) and (7) of the Constitution, the terms "consideration" and "approve" provided room for county assemblies and Parliament to alter and/or improve the contents of the Constitutional Amendment Bill to incorporate divergent views raised through public participation. The petitioners were apprehensive that with the Bill heading to the county assemblies, the questions of law would remain an academic exercise, thus rendering the petition moot and nugatory.

Issues

i. What were the principles to consider in granting conservatory orders?

ii. What was the nature and rationale of conservatory orders?

Held

1. At the stage of seeking conservatory orders, the court was not required—indeed, the court was forbidden- from making definite and conclusive findings of either fact or law as to do so would prejudice the hearing of the main petitions. The court would therefore not fall into the temptation of determining the substantive issues raised in the petitions.
2. In considering whether or not to grant a conservatory order, the principle of proportionality ought also to be considered. The court, in responding to prayers, should always opt for the lower rather than the higher risk of injustice. The principles guiding the decision whether or not to grant conservatory orders were: -
    1. the applicant ought to demonstrate an arguable *prima facie* case with a likelihood of success, and that in the absence of the conservatory orders sought, he was likely to suffer prejudice as a result of the violation or threatened violation of the Constitution;
    2. once the applicant had established to the court's satisfaction a *prima facie* case with a likelihood of success, the court was then to decide whether a grant or denial of the conservatory relief would enhance the constitutional values and objects of the specific right or freedom of the Bill of Rights;
    3. flowing from the first two principles was whether, if an interim conservatory order was not granted, the petition or its substratum would be rendered nugatory. It was indeed the business of the court to ensure and secure as far as possible that any transitional motions before the court did not render nugatory the ultimate end of justice;
    4. the court must consider conservatory orders also in the face of public interest dogma; and
    5. the court was 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 would consider the applicant's credentials, the *prima facie* correctness of the availed information, whether the grievances were genuine, legitimate, and deserving, and finally, whether the grievances and allegations were grave and serious or merely vague and reckless.
3. In *Kanini v Okoa Kenya Movement & 6 others* [2014] eKLR, the court found that the petitioner had not pointed out with reasonable exactitude the rights and fundamental freedoms in the Bill of Rights which he alleged to have been denied, violated or infringed or were threatened. In the instant case, not only was it contended that there had not been any public participation in the process but that the

petitioners' right to fair administrative action under article 47 of the Constitution had been violated or was under threat of being violated or contravened.

4. A party seeking an order for a declaration that the Constitution had been contravened, or was threatened with contravention was not necessarily undeserving of the conservatory orders under article 23(3)(c) of the Constitution as long as he brought himself within the ambit of the provisions of article 23 of the Constitution which the petitioners in the petitions had done. Accordingly, the circumstances before the court were distinguishable from those in *Kanini v Okoa Kenya Movement & 6 others*. The issues therefore, placed the petitions squarely within the purview of article 23.
5. Conservatory orders were orders in *rem*. They were not a preserve of particular persons but were meant to advance the mandate of Kenyans to respect, uphold and defend the Constitution as mandated in article 3(1) of the Constitution. Therefore, the argument by the Commission that since it had followed the constitutional edict, adverse orders could not be issued against its mandate was untenable. Such orders were granted to preserve the substratum of the petition and therefore, where it was contended that there was a threat of violation of the Constitution, any stage in the chain of a constitutional process under challenge may properly be the subject of a conservatory order as long as that action was consequential to the process under challenge. Conservatory orders may be granted on an application or by the court *suo moto* as long as the court was satisfied that the constitutional threshold for doing so had been met.
6. Considering the issues raised, and without arriving at definite findings, the petitions disclosed *prima facie* arguable issues for trial. In other words, the issues could not be said to be wholly frivolous or unarguable.
7. To 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 deserved immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that was remote and unlikely would not attract the court's attention.
8. It would seem that the matter was at the stage contemplated under article 257(5) of the Constitution at which the county assemblies were required to, within three months of the submission of the Constitutional Amendment Bill by the Commission, consider the same. At that stage the court could not state with certainty that the requisite number of county assemblies would pass the Constitutional Amendment Bill. Similarly, the court could not state with certainty that they would, in arriving at their respective decisions, contravene the constitutional provisions. It would therefore be speculative to base the court's decision on how the county assemblies were likely to undertake their constitutional mandate. Based on the same grounds, the court could not state with certainty how Parliament would deal with the Constitutional Amendment Bill, assuming it would ever end up there.
9. It was not entirely true that since some of the issues for determination in the petition revolved around the process that had been adopted by the promoters of the Constitutional Amendment Bill, unless that process was halted, the substratum of the petitions would cease to exist by the time the court determined those petitions. Since one of the issues placed before the court for determination was whether the entire process was undertaken constitutionally, the court was not barred from interrogating all the events that had been undertaken in the entire process. In other words, in determining those petitions, the court would not be restricted to the end product but would be enjoined to interrogate the constitutionality of the entire process in arriving at its decision whether or not the provisions of the Constitution were or had been complied with.
10. The substratum of the petitions would not be lost simply because certain processes shall have been taken towards the amendment of the Constitution. Even if the legislative processes in Parliament and the county assemblies were to be completed the court would not be handicapped in granting appropriate relief to protect the Constitution and nothing would bar the court from carrying out its constitutional mandate when called upon to do so and where the circumstances warranted and justified

it. Therefore, notwithstanding the legislative processes by both Parliament and the county assemblies, the court still reserved the jurisdiction to determine whether or not those processes were in accordance with the letter and spirit of the Constitution and to pronounce itself accordingly.

11. There was no evidence to show that the activities of Parliament and the county assemblies in the process were likely to entail the utilisation of huge amounts of money that would be outside the routine legislative process of Parliament and county assemblies. If the Constitutional Amendment Bill was subjected to a referendum, the likely amount to be spent in the process would run into billions of shillings. In that event, and should the court find that the process was unconstitutional, Kenya's scarce financial resources would have been unnecessarily expended. If the Constitutional Amendment Bill were to be passed in a referendum the substratum of the petitions would be substantially altered and the orders that the court might make, based on the instant petitions, might well be merely academic.
12. Notwithstanding the fact that the court declined to interfere with the legislative processes in the county assemblies and Parliament a *priori*, the court had the power to intervene even at the tail end of the process. Differently put, there was no such doctrine as constitutional *fait accompli*: Parliament and the county assemblies, even as they considered the Constitutional Amendment Bill in the face of the consolidated petitions, must be aware that the court had the requisite jurisdiction and obligation to declare such actions unconstitutional and, therefore, invalid, *ex post facto* if, upon the conclusion of the petitions the court answered some or all the questions presented by the petitioners in their favour. Rushing the Constitutional Amendment Bill through county assemblies and eventually Parliament, did not inoculate the resultant proposed constitutional amendment from the possibility that it could yet, upon final disposition of the petitions, be declared invalid.
13. While the court did not agree that the processes intended to be taken by the county assemblies and Parliament would render the petitions superfluous, it was in the public interest that appropriate conservatory orders be granted.

Application allowed.

Orders

i. *A conservatory was issued restraining the Commission from facilitating and subjecting the Constitution (Amendment) Bill, 2020 to a referendum, or taking any further action to advance the Constitution (Amendment) Bill, 2020, pending the hearing and determination of the consolidated petitions.*
ii. *No order as to the costs.*

Citations

Cases

1. Board of Management of Uhuru Secondary School v City County Director of Education, Duncan Juma & Teachers Service Commission (Petition 359 of 2015; [2015] KEHC 2174 (KLR)) — Explained
2. Board of Management of Uhuru Secondary School v City County Director of Education, Duncan Juma & Teachers Service Commission (Petition 359 of 2015; [2015] KEHC 2174 (KLR)) — Mentioned
3. Centre for Human Rights and Democracy & Others v Judges and Magistrates Vetting Board & others (Constitutional Petition 11 of 2012; [2012] KEHC 2460 (KLR)) — Explained
4. Centre for Rights Education and Awareness (CREAW) & 7 others (Petition No. 16 of 2011) — Explained
5. Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others (Application 5 of 2014) — Mentioned
6. Gitirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Ors (Application 5 of 2014) — Explained
7. Hon Kanini Kega v Okoa Kenya Movement, Orange Democratic Movement, Wiper Democratic Movement - Kenya, FORD - Kenya Party, Hon Attorney-General, Constitution Implementation Commission & Independent Electoral & Boundaries Commission (IEBC) (Petition 427 of 2014; [2014] KEHC 2982 (KLR)) — Explained

8. Judicial Service Commission v Speaker of the National Assembly & Attorney General (Petition 518 of 2013; [2013] KEHC 911 (KLR)) — Explained
9. Katiba Institute & 3 others vs. Attorney General & 2 others (Constitutional Petition 548 of 2017) — Mentioned
10. Kenya Breweries Limited and Another vs. Washington Okeyo ([2002] 1 E.A. 109) — Mentioned
11. Lucy Wangui Gachara v Minudi Okemba Lore (Civil Appeal 4 of 2015; [2015] KECA 277 (KLR)) — Mentioned
12. Martin Nyaga Wambora v Speaker County Assembly of Embu, Clerk County Assembly of Embu, County Assembly of Embu, Deputy Governor Embu County, Speaker Senate Parliament of Kenya & Attorney General (Petition 3 of 2014; [2014] KEHC 6715 (KLR)) — Explained
13. Nubian Rights Forum & 2 others vs. Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) (http://kenyalaw.org/caselaw/cases/view/189189/) — Explained
14. Peter Kyalo v Alfred Mutua & 6 others (Constitutional Petition 10 of 2018) — Explained
15. Republic v County Assembly of Kirinyaga & Speaker of the County Assembly of Kirinyaga Ex-Parte Kenda Muriuki & Thirdway Alliance Kenya (Judicial Review Application 271 of 2019; [2019] KEHC 2932 (KLR)) — Mentioned
16. Republic v County Assembly of Kirinyaga & Speaker of the County Assembly of Kirinyaga Ex-Parte Kenda Muriuki & Thirdway Alliance Kenya (Judicial Review Application 271 of 2019; [2019] KEHC 2932 (KLR)) — Explained
17. Suleiman vs. Amboseli Resort Limited ([2004] 2 KLR 589) — Explained
18. Steve Furgoson & another v Attorney Genaral & another (Claim No. CV 2008 – 00639) — Explained
19. Attorney General vs. Sumair Bansraj ((1985) 38 WIR 286) — Explained

Statutes

1. Access to Information Act (No. 31 of 2016) — section 7,14 — Interpreted
2. Constitution of Kenya, 2010 (Const2010) — article 1, 2, 3, 10,23,27,35,47,201,255,256,257 — Interpreted
3. Fair Administrative Action Act (No. 4 of 2015) — section 27,47 — Interpreted

Advocates

None mentioned

RULING

1. The subject of these consolidated petitions, as we understand them, is what is popularly known as the Building Bridges Initiative (otherwise referred to by the acronym "BBI").

2. The petitioners' case is that *vide* Kenya Gazette Notice Number 5154 dated May 24, 2018 and published on May 31, 2018, the President appointed "The Task Force on Building Bridges to Unity Advisory" whose mandate was, *inter alia*, to evaluate the national challenges outlined in the Joint Communiqué of 'Building Bridges to a New Kenyan Nation, and having done so, make practical recommendations and reform proposals that build lasting unity. On November 26, 2018, the Taskforce presented its report titled, "Building Bridges to a United Kenya; from a nation of blood ties to a nation of ideals" to the President. The said report was subsequently launched on November 27, 2019.

3. *Vide* Kenya Gazette Notice Special Issue Number 264 dated January 10, 2020, the President appointed "The Steering Committee on the Implementation of the Building Bridges to a United Kenya Task Force Report" whose terms of reference included proposal of administrative policy of constitutional changes that may be necessary for the implementation of the recommendations contained in the Task Force Report. The Steering Committee was tasked to collect views from Kenyans and within six

months, submit a comprehensive advice to the Government. The Committee submitted the Report to the President on the October 21, 2020 and the same was launched on the October 26, 2020. According to the petitioners, the Report consists of a raft of proposals on constitutional and legislative amendments as well as Draft Constitution of Kenya (Amendment) Bill 2020, (hereinafter referred to as "the Constitutional Amendment Bill") Draft Legislative Bills, Administrative measures and other recommendations. It is pleaded that on the November 25, 2020, the President launched the Constitution of Kenya (Amendment) Bill, 2020 and the roll out for collection of signatures.

4. The petitions seek to challenge, the content of and the process by which the Constitutional Amendment Bill was formulated and the steps that have been and are intended to be taken in an effort to amend the *Constitution of Kenya*. They contend that the said contents and the processes violate the *Constitution*.

5. The consolidated petitions as we understand them raise, *inter alia*, the following issues:

   a. Whether the legal and judicial doctrines of the "Basic Structure" of a Constitution, the doctrines of "Constitutional entrenchment clauses" "Un-amendable Constitutional Provisions", "Unconstitutional constitutional amendments" "essential features" "supra-constitutional laws" in a Constitution, and the implied limitations of the amendment power in a constitution are applicable in the Republic of Kenya;

   b. If the legal and judicial doctrines described in (a) above are applicable in Kenya, whether they apply to limit the amendability of chapter one on Sovereignty of the People and Supremacy of the *Constitution*, chapter two on the republic, chapter four on the Bill of Rights, chapter nine on the Executive and chapter ten on the Judiciary and the provisions therein either under article 256 by Parliament or through popular initiative under article 257 of the *Constitution*;

   c. Whether in the process of formulating the Constitutional Amendment Bill, the provisions of articles 27 and 47 of the *Constitution* as read with section 4 of the *Fair Administrative Action Act* were adhered to;

   d. Whether the entire BBI process culminating with the launch of the Constitutional Amendment Bill was undertaken constitutionally having regard to articles 1, 2, 3, 10, 255 and 257 of the *Constitution*;

   e. Whether the Constitutional Amendment Bill is a Popular initiative as envisaged under article 257 of the *Constitution* and if not, whether the process chosen to enact the constitutional amendment is fundamentally flawed and constitutionally infirm;

   f. Whether at the time of launch of the Constitutional Amendment Bill and the collection of endorsement signatures, there was a legislation governing the collection, presentation, and verification signatures or a legal framework or administrative structure to govern the conduct of referenda in the Country, and whether the absence of such legal and administrative framework is fatal for the Constitutional Amendment Bill under consideration;

   g. Whether the 3rd respondent, the Independent Electoral and Boundaries Commission (the Commission), and the County Assemblies can exercise their powers under article 257 of the *Constitution* to receive, verify and approve the Constitutional Amendment Bill in the prevailing circumstances;

   h. Whether, by dint of article 257(5) and (7) of the *Constitution*, the County Assemblies and Parliament have the power to alter and or improve the contents of the Constitutional Amendment Bill so as to incorporate divergent views raised through public participation;

i. Whether article 257(10) requires all the specific proposed amendments to the *Constitution* to be submitted as separate and distinct referendum questions to the people in the referendum ballot paper;

j. Whether the constitutional edict does empower the National Executive or any State organ, as opposed to Parliament, to pursue or initiate any amendment to the *Constitution* without petitioning Parliament;

k. Whether in a popular initiative to amend the *Constitution*, the National Executive may use public resources, including deploying public and State officers to either collect signatures or popularize any intended amendments to the *Constitution*;

l. Whether the intended constitutional amendment processes are in conformity with the National Values in article 10 of the *Constitution*;

m. Whether the second schedule to the Constitutional Amendment Bill in so far as it purports to set seventy as the number of constituencies; predetermine the allocation of the said constituencies; and direct the Commission in so far as the function of constituency delimitation is concerned, is unconstitutional and/or illegal and/or irregular;

n. Whether the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report is an unlawful entity under the Laws of Kenya and whether it has *locus standi* in promoting constitutional changes pursuant to article 257 of the *Constitution*;

o. Whether the current Parliament has been declared unconstitutional by the Chief Justice and whether it can it can consider the Constitutional Amendment Bill if approved by the County Assemblies;

p. Whether the Commission is legally constituted to carry out the referendum;

q. Whether there has been public participation in the constitutional amendment process.

6. In total, seven (7) petitions were filed by various petitioners. Each petition was found to raise substantial questions of law to warrant the empanelment of a bench of no less than three judges to hear and determine it. Consequently, the Honourable Chief Justice empanelled the present bench to hear and determine all the seven petitions. On January 21, 2021, with the concurrence of all the parties to the seven petitions, we consolidated all of them with Petition No E282 of 2020 being the lead file. We, then, issued the following directions:

1) All the interlocutory applications (for conservatory orders) in the 7 petitions will be deemed compromised. The consolidated petitions will now proceed for hearing under the directions below.

2) All the petitioners in the 7 petitions to serve the petitions on all the other parties by close of business 22/1/2021. The Deputy Registrar to facilitate the process where necessary.

3) The respondents, interested parties and *amici* to file and serve their responses to the various petitions within 14 days of tomorrow.

4) The petitioners to have leave to file and serve any further affidavit if necessary, within 14 days of service together with their written submissions.

5) The respondents, interested parties and *amici* to file and serve their written submissions within 21 days of service.

6) Hearing of the consolidated petitions on 17th, 18th and March 19, 2021.

7) Hearing will be by video-conference with the following time allocations

(a) petitioners – 30 minutes each

(b) respondents – 30 minutes each

(c) interested parties & *amici* – 15 minutes each

(d) Replies by petitioners – 10 minutes each

7. In issuing the said directions, we were alive to the fact that though applications for conservatory orders ought to be made at the earliest opportunity in the proceedings, the same may be sought at any stage of the case depending on the prevailing circumstances. Accordingly, liberty was granted to the parties to move the court in the event that circumstances arose which were not in the contemplation of the court at the time it issued the said directions, to move the court for any appropriate orders. It is pursuant to the foregoing that the 25th interested party in Petition E400 of 2020, the County Assembly of Turkana (hereinafter referred to as "the applicant") filed a motion dated January 28, 2021 seeking an order that pending the hearing of these petitions, this court do issue a conservatory order barring the 3rd to 49th interested parties, the County Assemblies, from considering the Constitutional Amendment Bill submitted to them by the Commission pursuant to article 257(5) of the *Constitution*.

8. According to the applicant, on January 26, 2021, subsequent to the issuance of the directions on hearing of the consolidated petitions, the Commission submitted to the said County Assemblies the Constitutional Amendment Bill and by so doing the three-month period prescribed under article 257 of the *Constitution*, for consideration of Constitutional Amendment Bill by the said Assemblies, effectively started running. However, going by the aforesaid directions, the hearing of the consolidated petitions is set more than 50 days from the date of the submission of the Constitutional Amendment Bill to the County Assemblies.

9. It was averred that these petitions raise important and fundamental constitutional questions concerning, inter alia, the lack of clear, regular, and uniform standards by which County Assemblies should process a popular initiative Bill, and as such it is inevitable that the various County Assemblies shall resort to different procedures in their exercise of their constitutional and statutory mandate. In the absence of a referendum law or other guideline on how County Assemblies should exercise their constitutional duty of considering constitutional amendment bills initiated through popular initiative, it was contended that the County Assemblies are left with so much discretion on the choice of the procedures to use. Accordingly, the County Assemblies could opt for any of the following routes towards the passing of the Constitutional Amendment Bill. Firstly, they have the option of introducing the bill, by way of notice of motion, which when seconded, proceeds to be debated upon, and ultimately a vote taken. That option, according to the applicants, effectively circumvents the constitutional requirement and safeguard of public participation in law-making.

10. The County Assemblies also have the alternative of introducing the Bill as a Public Bill, which would entail the rigors of a First Reading, Committal to Committee, Public Participation, Second Reading, Committal of the Bill to the Committee of the Whole County Assembly, debate, Third Reading, and ultimately taking a vote as to whether a Motion passes or not.

11. Therefore, in the current circumstances, and without the intervention of the court, the applicant is apprehensive that County Assemblies may undertake a legislative process that ultimately may be held to be unconstitutional for failing to meet mandatory constitutional prescripts, therefore null and void.

The applicant is equally apprehensive that where the constitutional time limits allow, this end result may culminate in County Assemblies having to undertake a repeat legislative process, which would result in a waste of much- needed public resources, and an outcome that is antithetic to the principles of public finance under article 201. At worst, the proponents of the Bill will have acquired the necessary threshold, which is approval by a majority of the county assemblies, of which if any of the approvals is rendered constitutionally null and void would thrust the nation into a state of uncertainty, more so where modalities of a national referendum are being considered.

12. In view of the foregoing, it is the applicant's case that it is in the interest of justice that the orders and remedies sought in the present application are granted.

13. Apart from the above motion, the petitioners in Petition No E400 of 2020, Thirdway Alliance, Miruru Waweru and Dr Angela Mwikali (hereinafter referred to as "the said petitioners"), by way of a certificate of urgency dated January 26, 2021, drew this court's attention to the fact that there have been significant developments. The alleged developments, according to the said petitioners, culminated in a press statement from the Commission on the January 26, 2021, confirming that it was satisfied that the Constitutional Amendment Bill had met the requisite threshold having been supported by 1,140,845 registered voters and it was submitting the Constitutional Amendment Bill to each of the 47 County Assemblies for consideration pursuant to article 257(5) and (6) of the *Constitution*.

14. According to the said petitioners, two of the legal questions that they have sought a determination on by this court are whether the respondents and the interested parties (County Assemblies, National Assembly and Senate) have the legal framework to proceed with their respective roles towards the achievement of the constitutional amendment process; and secondly, whether by dint of article 257(5) and (7) of the *Constitution* the term "consideration" and "approve" provides room to County Assemblies and Parliament to alter and or improve the contents of the Constitutional Amendment Bill so as to incorporate divergent views raised through public participation as is always the case in a proper legislative process.

15. The said petitioners are apprehensive that with the Bill now heading to the County Assemblies for consideration and approval and later to the National Assembly and Senate, the said questions of law will remain an academic exercise since by the time the court sits to hear the petition herein in March 2021, the County Assemblies, National assembly and Senate shall have debated the said bill thus rendering the petition herein moot and nugatory. It was the said petitioners' case that the activities of the 1st and 2nd respondents are funded using tax payers money in contravention of the principles of public finance as enshrined under article 201 of the *Constitution*. The operations of the said legislative bodies are in top gear and are likely to be completed before these petitions are heard and determined, at the expense of the taxpayer which is unconstitutional.

16. The petitioners are apprehensive that the County Assemblies, National Assembly and Senate are all political organs who enjoy support from the President and the executive arm of Government. They are likely to be whipped and or marshalled to easily approve the Constitutional Amendment Bill within the shortest period of time so that the entire amendment process is likely to be completed before this court hears and determines these petitions.

17. The said petitioners therefore asserted that unless the application for conservatory orders is heard, Kenyans risk losing Billions of money in a process that is in blatant violation of their sovereign power. Accordingly, they urge, it is in the interest of justice that the operations of the respondents and the interested parties be put on hold pending the hearing and determination of these petitions. Owing to the new developments, the court was implored to issue interim conservatory orders in terms of prayers C and D of the application dated December 3, 2020.

18. Though we are cognisant of the fact that conservatory orders can be issued by the court upon application by parties or on own motion, we directed, in compliance with the rules of natural justice, that the parties herein submit on the said motion and affidavits before making our decision.

19. On behalf of the applicant and the said petitioner, reliance was placed on *Board of Management of Uhuru Secondary School v City County Director of Education & 2 others* (2015) eKLR; *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* (2014) eKLR and *Republic v County Assembly of Kirinyaga & another ex parte Kenda Muriuki & another* (2019) eKLR, and it was submitted that they have demonstrated an arguable *prima facie* case with a likelihood of success.

20. It was further submitted that if the conservatory orders are not granted, the petition or its substratum will be rendered nugatory and the Applicant is likely to suffer prejudice as a result of the threatened violation of the *Constitution*. To the applicant, in the event that the conservatory orders are not issued, it is likely that County Assemblies will adopt different mechanisms in considering Constitutional Amendment Bill an eventuality which will precipitate a constitutional crisis as to whether the Constitutional Amendment Bill is to be re-submitted to the County Assemblies; whether the County Assemblies are entitled to undertake a repeat process so as to align the procedures adopted with constitutional values; and finally whether there shall be sufficient time remaining to conduct a meaningful public participation exercise. It was further submitted in making preparations for a referendum, there will be significant costs that may go to waste, when preparations for nation- wide election are abandoned for the County Assemblies to re-consider and approve the popular initiative Bill. These outcomes, it was contended, would result in a waste of much required public resources, contrary to the provisions of article 201 of the *Constitution*.

21. The applicant's position was that the grant of the conservatory orders will enhance constitutional values and objects of the right to political participation and enable this court uphold and enhance the national values and principles of governance of public participation, democracy, good governance, integrity, transparency, and accountability under article 10(2) of the *Constitution*. To the applicant, the public interest in this matter is momentous since the process of amendment of our highly-regarded Constitution should be conducted with the utmost fidelity to the *Constitution* itself, and accommodating the general public at every turn possible.

22. In the alternative, and based on the decisions in *Kenya Breweries Limited and another v Washington Okeyo* (2002) 1 EA 109 and *Lucy Wangui Gachara v Minudi Okemba Lore* (2015) eKLR, the Applicant sought a mandatory injunction to the extent that the Constitutional Amendment Bill shall be considered and approved in a manner that ensures the observance of key constitutional and democratic principles, particularly public participation, prior to its approval.

23. In response to the above averments, it was contended that even if there is a change in circumstances, it has not been shown that they materially affect the concerns that informed the previous compromise of interlocutory applications, and to what extent. It was also contended that article 165 does not give the High Court powers beyond hearing and determining the unconstitutionality of the questions before it and that the express jurisdiction to hear the questions before it as granted by the *Constitution*, empowers the court to issue declaratory powers and no more.

24. According to the respondents, the alleged violations in the petitions and application, to a large extent concern the National Government, the BBI Secretariat and the Taskforce of Implementation of the Building Bridges Initiative. Since the 3rd to 49th interested parties have not violated the *Constitution*, the respondents argue, the said allegations have nothing to do with the County Assemblies and adverse orders cannot be sought against them. However, the Constitutional Amendment Bill or proposal for

amendments is no longer in the initiators' hands and the violation, if at all it will be proven, has already occurred and is no longer a threat.

25. According to the respondents, the consideration of the Constitutional Amendment Bill by the 3rd to 49th interested parties, which had already begun as at February 5, 2021, is not a violation, but a propagation of the product of a possible violation. County Assemblies and Parliament would only be performing their constitutional roles which involves deliberating the very issues being canvassed here. The guilt by association cannot be presumed and if presumed, cannot be the basis to grant these orders, when in fact the County Assemblies and Parliament have within their broad political discretion the power to stop the supposed legal violation by disapproving the proposals.

26. As regards the prayer for injunction, it was contended that article 23, under which the application is brought, specifically makes reference to proceedings relating to the denial of, infringement on, violation of or threat to the rights and fundamental freedoms in the Bill of Rights and that this should not, without supporting legislation, be considered a carte blanche for the court to issue the same orders on all constitutional and legal rights and interests. In this case, it was submitted that the applicants have not brought before this court a petition regarding the violation of, infringement on, denial of or threat to a specific right in the Bill of Rights to invoke the broad jurisdiction of the court to enforce these rights as envisioned in the article they rely on.

27. As regards the prayer for an order compelling the 1st and 2nd respondents to release certain information in relation to this amendment process, some of the respondents conceded that the prayer is rightly before this court and may be granted pursuant to article 23 of the *Constitution* in enforcing the Bill of Rights since article 35 as read with sections 7 and 14 of the *Access to Information Act 2016*, opens the doors of the State to anyone seeking information, their reasons notwithstanding. It was however contended that the applicants have not demonstrated even an attempt to access, let alone a denial of, the information the seek the court's help in accessing from the State departments. Neither have they demonstrated that the information they seek is exempted by the specific Act. They have also not appealed to the Commission on Administrative Justice for the orders they now seek.

28. It was however urged that in the event that the said alterative order were to be granted, the court ought to also provide some guidance to the effect that public participation should significantly utilise the 3-month period stipulated by the *Constitution* at article 257(5), and avoid a scenario, such as witnessed in the Siaya County Assembly. According to the respondents, the Siaya County Assembly purports to have granted the public a single day only for airing their views, before it proceeded to unanimously approve the Constitutional Amendment Bill without amendment the following day – thereby making a mockery of the purpose of the *Constitution* in providing 3 months for proper consideration and possible approval of any constitutional amendment bill transmitted to County Assemblies by the Commission under the said article.

29. It was contended that since article 257(5) and (6) of the *Constitution* require that the County Assemblies consider and subsequently approve a proposed amendment bill within three months after the date it is submitted by the Commission, a granting of the kind of orders the applicants seek may arguably seem to tie the hands of the CountyAssemblies, but it cannot stop the clock since statutory timelines are binding on the courts. In this case since the constitutional clock on the consideration of the Constitutional Amendment Bill started ticking when the Commission submitted the Constitutional Amendment Bill to the County Assemblies, since, in their view, conservatory orders are meant to maintain status quo, there is no status quo to be maintained. In granting the orders sought, this court will only be tying the hands of the County Assemblies, but it cannot stop the clock from ticking. The order sought, it was contended, would take away from the people's representatives

adequate time needed to think before taking a decision on the Constitutional Amendment Bill and that would defeat the intents, purposes and values of the *Constitution*.

30. As regards the financial resources to be deployed in the said process, it was submitted that the consideration of the Constitutional Amendment Bill is only one out of the many discretionary sittings that Parliament and County Assemblies are mandated and are usually paid to have. Such meetings, argue the respondents, cannot be an obvious waste of public funds as alleged. Accordingly, the applicants have not demonstrated that any public funds are likely to be spent outside of the routine legislative process of Parliament and County Assemblies.

31. It was submitted that since the court is duly seized of Petition No E426 of 2020, in which it is sought that any public officer who has directed or approved the use of public funds spent on the BBI constitutional change process, be made accountable, the issue of the wastage of funds does not justify grant of the orders sought herein.

32. It was submitted that since the *Constitution* does not provide for extending the 3-month period stipulated in article 257(5), no person or State organ has the power to extend it. Accordingly, a reduction of the said period would be fraught with significant jurisdictional issues.

33. It was further submitted, based on the decision in *Kanini v Okoa Kenya Movement & 6 others* [2014] eKLR, that for the court to grant conservatory orders under article 23 of the *Constitution*, an Applicant must demonstrate that the substantive suit and/or petition is hinged on a claim that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.

34. On behalf of the Commission, it was submitted that it has undertaken its constitutional mandate in accordance with the law. The Attorney General took the view that the orders sought herein are incapable of being granted as the petitioners have not made any fresh application or sought review of the orders granted on January 21, 2021. It was also contended that since the 25th interested party has not filed any pleadings in this matter, its application is incompetent.

Determinations

35. We have considered the issues placed before us as set out hereinabove.

36. In determining the issues before us, we must point out that at this stage we are not required, indeed we are forbidden, from making definite and conclusive findings of either fact or law as to do so would prejudice the hearing of the main petitions. As Musinga, J (as he then was), in Petition No 16 of 2011, Nairobi – *Centre for Rights Education and Awareness (CREAW) & 7 others*, stated:

> ...It is important to point out that the arguments that were advanced by counsel and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the petitioner's application and not the petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only requires to demonstrate that he has a *prima facie* case with a 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*.

37. In the Privy Council Case of *Attorney General v Sumair Bansraj* (1985) 38 WIR 286, Braithwaite JA expressed himself follows:

> Now to the formula. Both remedies of an interim injunction and an Interim declaration order are excluded by the State Liability and Proceedings Act, as applied by section 14(2) and (3) of the *Constitution* and also by high judicial authority. The only judicial remedy is that of

what has become to be known as the "conservatory order" in the strictest sense of that term. The order would direct both parties to undertake that no action of any kind to enforce their respective right will be taken until the substantive originating motion has been determined; that the status quo of the subject matter will remain intact. The order would not then be in the nature of an injunction, ... but on the other hand it would be well within the competence and jurisdiction of the High Court to "give such directions as it may consider appropriate for the purpose of securing the enforcement of ... the provisions" of the *Constitution*...In the exercise of its discretion given under section 14(2) of the *Constitution* the High Court would be required to deal expeditiously with the application, inter partes, and not *ex parte* and to set down the substantive motion for hearing within a week at most of the interim conservatory order. The substantive motion must be heard forthwith and the rights of the parties determined. In the event of an appeal priority must be given to the hearing of the appeal. I have suggested this formula because in my opinion the interpretation of the word in section 14(2) "subject to subsection (3) and the enactment of section 14(3) in the 1976 Constitution must have...the effect without a doubt of taking away from the individual the redress of injunction which was open to him under the 1962 Constitution. On the other hand, however, the state has its rights too...The critical factor in cases of this kind is the exercise of the discretion of the judge who must "hold the scales of justice evenly not only between man and man but also between man and state.

38. The aforesaid principles were adopted by the High Court of the Republic of Trinidad and Tobago in *Steve Furgoson & another v The AG & another* Claim No CV 2008 – 00639 – Trinidad & Tobago. The Honourable Justice V Kokaram in adopting the reasoning in the case of Bansraj above stated:

> I have considered the principles of *East Coast Drilling –v- Petroleum Company of Trinidad and Tobago Limited* (2000) 58 WIR 351 and I adopt the reasoning of BANSRAJ and consider it appropriate in this case to grant a conservatory order against the extradition of the claimants pending the determination of this motion. The constitutional challenge to the Act made in this case is on its face a serious one. The defendant has not submitted that the constitutional claim is unarguable. The claimants contends that the Act is in breach of our fundamental law and the international obligations undertaken were inconsistent with supreme law. It would be wrong in my view to extradite the claimants while this issue is pending in effect and which will render the matter of the constitutionality of the legislation academic.

39. In The *Centre for Human Rights and Democracy & others v The Judges and Magistrates Vetting Board & others* Eldoret Petition No 11 of 2012, it was held by a majority as follows:

> In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in the contravention of any constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission.

40. In *Judicial Service Commission v Speaker of the National Assembly & another* [2013] eKLR this court expressed itself as follows:

> Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the *Constitution*, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute *in situ*. Therefore, such remedies are remedies *in rem* as opposed to remedies *in personam*. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.

41. This position was reinforced by the Supreme Court in *Gitirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR where the highest court in the land held:

> 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...The principles to be considered before a court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the court that:
>
> (i) the appeal or intended appeal is arguable and not frivolous; and that
>
> (ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.
>
> These principles continue to hold sway not only at the lower courts, but in this court as well. However, in the context of the *Constitution of Kenya, 2010*, a third condition may be added, namely:
>
> (iii) That it is in the public interest that the order of stay be granted.
>
> This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through *Constitution*.

42. We will therefore not fall into the temptation of determining the substantive issues raised in these petitions, in the present ruling.

43. In considering whether or not to grant conservatory order, it is our view that the principle of proportionality ought also to be taken into account. As was stated by Ojwang, AJ (as he then was) in *Suleiman v Amboseli Resort Limited* [2004] 2 KLR 589 the court, in responding to prayers, should always opt for the lower rather than the higher risk of injustice.

44. The principles guiding the decision whether or not to grant conservatory orders were succinctly set out by Onguto, J in *Board of Management of Uhuru Secondary School v City County Director of Education & 2 others* (2015) eKLR, who set out the same as hereunder:

i The applicant ought to demonstrate an arguable *prima facie* case with a likelihood of success, and that in the absence of the conservatory orders sought, he is likely to suffer prejudice as a result of the violation or threatened violation of the *Constitution*;

ii Once the applicant has established to the aourt's satisfaction a *prima facie* case with a likelihood of success, the aourt is then to decide whether a grant or denial of the conservatory relief will enhance the constitutional values and objects of the specific right or freedom of the Bill of Rights;

iii 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 as far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice;

iv The court must consider conservatory orders also in the face of public interest dogma; and

v 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 applicant's 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.

45. The first issue for determination in matters of this nature, is whether a *prima facie* case has been established and 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, it has to be shown that a case which discloses arguable issues has been raised and in this case, arguable constitutional issues.

46. In this case, we have set out the issues which the petitioners intend to argue at the hearing. Just to mention a few, there is the issue whether the process being followed to enact the Constitutional Amendment Bill is constitutionally infirm due to lack of an overall legislation structuring how the process should be undertaken especially in the County Assemblies where different Assemblies may elect one of the possible routes with attendant consequences for the uniformity of the legal outcomes; the critical question of the legal competency of the Commission, based on its composition to carry out a referendum; the contents of the amendments given a claimed existence of a judicial doctrine of basic structure and "eternity clauses"; the adequacy of the public participation in the process; whether article 47 of the *Constitution* and the *Fair Administrative Action Act* were complied with; and the constitutionality of the process through which the Constitutional Amendment Bill was originated.

47. We are aware of a few decisions which, though not binding, have helped us in arriving at our decision on this point. In *Republic v County Assembly of Kirinyaga & another ex parte Kenda Muriuki & another* (2019) eKLR, the court recommended that since the passage of a constitutional amendment by popular initiative is a national exercise that affects the Commission, Parliament and County Assemblies need to develop and enact a law to ensure uniformity in the procedures of consideration and approval by Parliament and County Assemblies of bills to amend the *Constitution* by popular initiative, and to ensure the inclusion and insulation of key constitutional and democratic requirements and thresholds in the said procedures. In *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (interested parties)* [2020] eKLR the court observed that the proper remedy for the court to grant when there is no or deficient regulatory framework is to stay the action until the duty bearers – Parliament - passes the regulatory framework. The issue of the quorum of the Commission was, on the other hand, dealt with in *Katiba Institute & 3 others v Attorney General & 2 oothers* [2018] eKLR.

48. The respondents have submitted, based on *Hon Kanini vs. Okoa Kenya Movement & 6 others* [2014] eKLR, that the orders sought cannot be granted since the petition is not hinged on a claim that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. In that case, the court found that the petitioner had not pointed out with reasonable exactitude the rights and fundamental freedoms in the Bill of Rights which he alleged to have been denied, violated or infringed or is threatened. In this case, not only is it contended that there has not been any public participation in the process but that the petitioners' right to fair administrative action under article 47 of the *Constitution* have or are under threat of being violated or contravened. As was appreciated in *Peter Kyalo v Alfred Mutua & 6 others* [2018] eKLR, a party seeking an order for a declaration that *the Constitution* has been contravened, or is threatened with contravention is not necessarily undeserving of the conservatory orders under article 23(2)(c) of *Constitution* as long as he brings himself within the ambit of the provisions of article 23 of the *Constitution* which we find the petitioners in these petitions have done.

49. Accordingly, the circumstances before us are distinguishable from those in *Hon Kanini v Okoa Kenya Movement & 6 others* (*supra*). The said issues therefore place these petitions squarely within the purview of article 23 of the *Constitution*.

50. As regards the locus of the 25th interested party to make an application seeking orders in the nature of conservatory relief, as we have stated hereinabove, conservatory orders are orders in rem. They are not a preserve of particular persons but are meant to advance the mandate of Kenyans to respect, uphold and defend the *Constitution* as mandated in article 3(1) of the *Constitution*. It therefore follows that the argument by the Commission that since it has followed the constitutional edict, adverse orders cannot be issued against its mandate is untenable. Such orders are granted to preserve the substratum of the petition and therefore, where it is contended that there is a threat of violation of the *Constitution*, any stage in the chain of a constitutional process under challenge may properly be the subject of a conservatory order as long as that action is consequential to the process under challenge. As we have held hereinabove, conservatory orders may be granted on an application or by the court *suo moto* as long as the court is satisfied that the constitutional threshold for doing so has been met.

51. It is therefore our finding that considering the issues raised, and without arriving at definite findings, these petitions disclose prima facie arguable issues for trial. In other words, we cannot say that the said issues are wholly frivolous or unarguable at this stage.

52. The said petitioners and applicants having surmounted the first hurdle by proving that a prima facie case exists, the next question is whether there is real danger that prejudice will be suffered as a result of the violation or threatened violation of the *Constitution*. What amounts to real danger was dealt with in *Martin Nyaga Wambora v Speaker of The County of Assembly of Embu & 3 others* [2014] eKLR, where the court expressed itself as follows:-

> 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.

53. In the matter before us we are called upon to determine whether there is real danger that by the time we determine these petitions, some of the questions posed before us will have been rendered superfluous by the unfolding events and secondly, whether colossal public funds are likely to have been

expended in a process that the said petitioners and applicants contend may well be found to have been unconstitutional.

54. Article 257 of the *Constitution* provides as hereunder:

(1) An amendment to this Constitution may be proposed by a popular initiative signed by at least one million registered voters.

(2) A popular initiative for an amendment to this Constitution may be in the form of a general suggestion or a formulated draft Bill.

(3) If a popular initiative is in the form of a general suggestion, the promoters of that popular initiative shall formulate it into a draft Bill.

(4) The promoters of a popular initiative shall deliver the draft Bill and the supporting signatures to the Independent Electoral and Boundaries Commission, which shall verify that the initiative is supported by at least one million registered voters.

(5) If the Independent Electoral and Boundaries Commission is satisfied that the initiative meets the requirements of this article, the Commission shall submit the draft Bill to each county assembly for consideration within three months after the date it was submitted by the Commission.

(6) If a county assembly approves the draft Bill within three months after the date it was submitted by the Commission, the speaker of the county assembly shall deliver a copy of the draft Bill jointly to the Speakers of the two Houses of Parliament, with a certificate that the county assembly has approved it.

(7) If a draft Bill has been approved by a majority of the county assemblies, it shall be introduced in Parliament without delay.

(8) A Bill under this article is passed by Parliament if supported by a majority of the members of each House.

(9) If Parliament passes the Bill, it shall be submitted to the President for assent in accordance with articles 256 (4) and (5).

(10) If either House of Parliament fails to pass the Bill, or the Bill relates to a matter mentioned in 255 (1), the proposed amendment shall be submitted to the people in a referendum.

(11) Article 255 (2) applies, with any necessary modifications, to a referendum under clause (10).

55. Going by the applicant's contention, it would seem that the matter is at the stage contemplated under article 257(5) of the *Constitution* at which the County Assemblies are required to, within three months of the submission of the Constitutional Amendment Bill by the Commission, consider the same. At this stage we cannot state with certainty that the requisite number of the County Assemblies will pass the Constitutional Amendment Bill. Similarly, we cannot state with certainty that they will, in arriving at their respective decisions, contravene the constitutional provisions. It would therefore be speculative to base our decision on the manner in which the County Assemblies are likely to undertake their constitutional mandate. Based on the same grounds, this court cannot state with certainty how Parliament will deal with the Constitutional Amendment Bill, assuming it will ever end up there.

56. It is, however, contended that since some of the issues for determination in this petition revolve around the process that has been adopted by the promoters of the Constitutional Amendment Bill, unless that process is halted, the substratum of the petitions will cease to exist by the time this court determines

these petitions. This is not an entirely accurate proposition. In our view since one of the issues placed before this court for determination is whether the entire process was undertaken constitutionally, this court is not barred from interrogating all the events that have been undertaken in the entire process. In other words, in determining these petitions, this court will not be restricted to the end product but will be enjoined to interrogate the constitutionality of the entire process in arriving at its decision whether or not the provisions of the *Constitution* were or have been complied with. In other words, the substratum of these petitions will not be lost simply because certain processes shall have been taken towards the amendment of the *Constitution*. To paraphrase the court in *Hon Kanini v Okoa Kenya Movement & 6 others* (*supra*), even if the legislative processes in Parliament and the County Assemblies were to be completed the court would not be handicapped in granting appropriate relief to protect the *Constitution* of this country and nothing would bar this court from carrying out its constitutional mandate when called upon to do so and where the circumstances warrant and justify it. Therefore, notwithstanding the legislative processes by both Parliament and the County Assemblies, this court still reserves the jurisdiction to determine whether or not those processes are in accordance with the letter and spirit of the *Constitution* and to pronounce itself accordingly.

57. The other ground for seeking the conservatory orders is that since activities of the 1st and 2nd respondents are funded by tax payers' money they are likely to spend public money at the expense of the taxpayer yet their said activities are unconstitutional and a waste of public money. We have no evidence at this stage that the activities of Parliament and the County Assemblies in this process are likely to entail the utilisation of huge amounts of money that would be outside the routine legislative process of Parliament and County Assemblies.

58. We, however, agree that if the Constitutional Amendment Bill is subjected to a referendum, the likely amount to be spent in the said process will run into Billions of Shillings. In that event, and should this court find that the process was unconstitutional, the country's scarce financial resources would have been unnecessarily expended. This position is akin to the circumstances alluded to by the Supreme Court in *Munya's* case (*supra*) where it expressed itself as follows:

> Bearing in mind the nature of the competing claims, against the background of the public cause, we have focused our perception on the public interest, and the concept of good governance, that runs in tandem with the conscientious deployment of the scarce resources drawn from the public. Proper husbandry over public monetary and other resources, we take judicial notice, is a major challenge to all active institutions and processes of governance; and the courts, by their established attribute of line-drawing, must ever have an interest in contributing to the safeguarding of such resources...These principles dictate that our conscientious sense of proportions, stands not in favour of allowing the conduct of fresh elections for Meru County's gubernatorial office, during the pendency of an appeal. By our sense of responsibility, the court's contribution to good governance in that context, takes the form of an expedited hearing for the appeal. Just that.

59. Apart from that, if the Constitutional Amendment Bill were to be passed in a referendum the substratum of these petitions would be substantially altered and the orders that this court might make, based on the instant petitions, might well be merely academic.

60. Notwithstanding the fact that we decline to interfere with the legislative processes in the County Assemblies and Parliament a priori, as rightly appreciated by the 1st respondent in Petition No E416 of 2020, this court has the power to intervene even at the tail end of the process. Differently put, there is no such doctrine as constitutional fait accompli: Parliament and the County Assemblies, even as they consider the Constitutional Amendment Bill in the face of these consolidated petitions,

must be aware that this court has the requisite jurisdiction and obligation to declare such actions unconstitutional and, therefore, invalid, *ex post facto* if, upon the conclusion of these petitions the court answers some or all the questions presented by the petitioners in their favour. Rushing the Constitutional Amendment Bill through County Assemblies and eventually Parliament, does not inoculate the resultant proposed constitutional amendment from the possibility that it could yet, upon final disposition of these petitions, be declared invalid.

61. Therefore, all considered, without deciding with finality the issues raised in these petitions and while we do not agree that the processes intended to be taken by the County Assemblies and Parliament will render these petitions superfluous, we are of the view and find that, based on the Munya case (*supra*), it is in the public interest that appropriate conservatory orders be granted.

62. Consequently, we hereby order that a conservatory order be and is hereby issued restraining the Independent Electoral and Boundaries Commission from facilitating and subjecting the Constitution (Amendment) Bill, 2020 to a referendum, or taking any further action to advance the Constitution (Amendment) Bill, 2020, pending the hearing and determination of these consolidated petitions.

63. There will be no order as to the costs.

64. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF FEBRUARY, 2021

J M NGUGI

JUDGE

G V ODUNGA

JUDGE

J NGAAH

JUDGE

J MULWA

JUDGE

E C MWITA

JUDGE