**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. E165 OF 2021**

**ADRIAN KAMOTHO NJENGA.....PETITIONER/APPLICANT**

**VERSUS**

**SELECTION PANEL FOR THE APPOINTMENT OF COMMISSIONERS OF THE INDEPENDENT**

**ELECTORAL AND BOUNDARIES COMMISSION (2021).....1ST RESPONDENT/1ST RESPONDENT**

**PARLIAMENT OF KENYA.....2ND RESPONDENT/2ND RESPONDENT**

**HON. ATTORNEY GENERAL.....3RD RESPONDENT/3RD RESPONDENT**

**AND**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....INTERESTED PARTY/4TH RESPONDENT**

**RULING**

1. The Petitioner/Applicant, Adrian Kamotho Njenga, introduces himself as a lawyer, a public spirited individual and an ardent defender of the Constitution. The 1st Respondent, the Selection Panel for the Appointment of Commissioners of the Independent Electoral and Boundaries Commission ("Selection Panel") is a statutory body appointed by the President of the Republic of Kenya under Section 1 of the First Schedule of the Independent Electoral and Boundaries Commission Act, 2011 to fill four vacancies that have occurred in the membership of the Interested Party, the Independent Electoral and Boundaries Commission ("IEBC"). Parliament of Kenya, which consist of the National Assembly and the Senate, is the 2nd Respondent. The Attorney General is the 3rd Respondent.

2. The Petitioner filed his petition dated 6th May, 2021 together with a notice of motion application supported by his affidavit. The application is brought under Articles 1, 2, 3, 10, 22, 23, 25, 27, 47, 50(1), 165, 250, 258 & 259 of the Constitution; Rules 3, 4, 13, 19 and 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules; sections 5, 6, 7, 7A and the First Schedule to the Independent Electoral and Boundaries Commission Act, 2011; and all enabling provisions of the law.

3. Through the application the Applicant seek orders as follows:

> **a. THAT this application be certified urgent and heard forthwith *ex-parte* in the first instance.**
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> **b. THAT pending the hearing and determination of the Petition herein, the vacancy notice (VACANCY NO. SP/IEBC/2021) published by the 1st Respondent on 1st May 2021, pursuant to the declaration of vacancies by His Excellency the President, vide Gazette Notice No. 3522 of 2021, in the position of members of the Independent Electoral and Boundaries Commission, be and is hereby stayed/suspended.**
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> **c. THAT the costs and incidentals of this application be provided for.**
>
> **d. THAT this Honourable Court be at liberty to grant any further orders/relief that may be just and expedient.**

4. The Applicant grounds his application on the averment that the irregular requirement that prospective applicants will serve as members of the IEBC on a full-time basis violates Article 27 of the Constitution as it discriminates and illegitimately locks out competent and patriotic citizens who are desirous of serving their country on a part-time basis as per the requirements of Article 250(5) of the Constitution.

5. The Applicant asserts that there exists no national legislation enacted in the manner prescribed under Article 250(2) of the Constitution, to guide the manner of identification, recommendation and appointment of members to fill vacancies in the IEBC that emerge intermittently from time to time. Moreover, he contends that there is no known legal provision that mandates the 1st Respondent to select or recommend the appointment of four members of the Interested Party as purported in the impugned vacancy notice.

6. The Applicant opines that the Selection Panel will be acting irregularly and in vain in the absence of a legal framework to guide the selection and recommendation process applicable to four vacancies in the position of member of the IEBC.

7. In response, the Selection Panel through a replying affidavit sworn by Jeremiah Nyegenye on 17th May, 2021 contends that whatever the number of vacancies in the membership of the IEBC, there is no lacuna in the law relating to the number of persons it will select and forward to the President. According to the 1st Respondent, the procedure for determining the number of persons to be presented to the President is provided under Section 5(4) of the Independent Electoral and boundaries Act, 2011 ("IEBC Act") and the First Schedule of the said Act.

8. The Court is urged not to issue any orders as it has not been demonstrated that the Independent Electoral and Boundaries Commission (Amendment) Act No. 18 of 2020 is unconstitutional. It is further averred that the Applicant has not demonstrated the unconstitutionality of the requirement that members of the IEBC shall serve on a full-time basis. It is deposed that the application does not disclose any violation of the Constitution to warrant the intervention of this Court and that there is therefore no justiciable cause of action.

9. Both the National Assembly and the Senate filed separate grounds and submissions in opposition to the application. Since the 2nd Respondent (the Parliament of Kenya) consist of the National Assembly and the Senate, I will merge the pleadings and submissions and treat them as if they were made jointly.

10. In summary, the 2nd Respondent opposes the application on the grounds that the application violate the doctrines of presumption of constitutionality of statutes, constitutional avoidance and separation of powers; that the Applicant has not demonstrated the unconstitutionality of the impugned provisions of the IEBC Act; that the application seeks to restrict the legislative authority of Parliament; that the Applicant will not be prejudiced if conservatory orders are not granted as the appointments, if eventually found to be unconstitutional, can still be invalidated; and that issuance of any stay orders will be an affront to the strict timelines within which the Selection Panel must discharge its mandate.

11. Through grounds of opposition dated 14th May, 2021, the 3rd Respondent contends that the Applicant has wrongly and narrowly invoked the provisions of Article 250(5) of the Constitution to mean that commissioners should only work on a part-time basis whereas the said constitutional provision is not couched in mandatory terms as the discretion is left to the legislature to determine its application through specific statutes.

12. The 3rd Respondent avers that the constitutional petition is premised on the wrong assumption that there is no legal framework to guide the selection and recommendation of persons to be appointed as commissioners of the IEBC. The Attorney General asserts that the petition fails to appreciate the principal object of the amendment to the First Schedule to the IEBC Act, whose purpose was further explained in the memorandum of objects, establishing a selection panel to oversee the filling of vacant slots in the membership of the IEBC.

13. It is deposed that the petition should be dismissed in its entirety as it is premised on the wrong constitutional principles specifically on the prayer that this Court directs Parliament to enact national legislation on identification and recommendation for appointment of each member of IEBC in conformity with Article 250(2)(a) of the Constitution within a period of 60 days from the date of delivery of judgement. It is stated that this is contrary to the provisions of Article 2, as read together with Articles 94, 95 and 96 of the Constitution. The 3rd Respondent consequently prays for the dismissal of the petition and application with costs.

14. The Interested Party filed a replying affidavit sworn by Douglas Kipruto Bargorett on 25th May, 2021 averring that Article 250(5) generally provides for the terms of office of members of commissions established under Article 248, while Section 7(2) of the IEBC Act provides for the terms of office specific to the members of the Interested Party. It is his averment that it is mandatory for members of the Interested Party to serve on a full-time basis as specifically provided in Section 7(2) of the IEBC Act.

15. It is further asserted that the procedures set out in the First Schedule of the IEBC Act shall be modified as necessary to suit the filling of any number of vacancies of members of the Interested Party. Further, that Section 1(5) of the First Schedule of the IEBC Act enables a selection panel to determine its own procedure.

16. The Interested Party deposes that it is therefore apparent that in the circumstances there is sufficient legal framework to guide in the filling of vacancies in its membership.

17. The Applicant through written submissions dated 20th May, 2021 asserts that the principal issue for the determination of this Court is whether the interlocutory relief sought should be granted to him. The Applicant submits that he brings to the fore an avalanche of justiciable issues yearning for the determination of this Court. It is pointed out that the 3rd Respondent at paragraph 16 of his submissions readily concedes that the Applicant has a strong *prima facie* case with a great likelihood of success.

18. On the issue of irreparability of the damage to be suffered should the orders sought not be granted to him, the Applicant submits that should the respondents proceed with the selection process with the current legal blind spots, there is a grave risk that public funds shall be

irrecoverably expended towards a futile cause. He urges that it would therefore be pointless for the 1st Respondent to continue expending public funds on an exercise that may eventually be quashed on account of constitutional defects.

19. According to the Applicant, the 1st Respondent will not suffer any prejudice if it awaits judicial clarification on the propriety of the current selection process. This argument is supported by reference to the Supreme Court decision in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR.**

20. On the matter of public interest, the Applicant submits that there is a real likelihood that the decisions of the IEBC would lack legitimacy and fail to inspire confidence in the electoral system where its members are appointed through a contested process. It is submitted that the consequences of such a state of affairs would be far-reaching. It is urged that it is imperative that the appointment of members of the Interested Party be undertaken without a whisker of controversy, and if there be any grey areas in the applicable law, a meticulous determination be rendered timeously. It is consequently urged that a grant of stay is extremely critical as it will shield the Applicant and the public from irreparable injury, as well as the risk of the petition being rendered moot by the calculated acceleration of critical processes by the 1st Respondent.

21. The 1st Respondent vide its submissions dated 22nd May, 2021 contends that the Applicant has not demonstrated how the petition will be rendered nugatory and how he will be prejudiced if conservatory orders are not issued. This argument is supported by reference to the decisions in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR; Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another [2015] eKLR;** and **Susan Wambui Kaguru & 4 others v Attorney General & another [2012] eKLR.**

22. It is further submitted that the Applicant has not demonstrated to this Court the unconstitutionality of the requirement that members of the IEBC shall serve on a full-time basis. The Selection Panel contends that at the interlocutory stage, the court is not furnished with all the facts to enable a determination of the constitutionality of legislation. This Court is therefore urged to exercise judicial restraint and decline to grant the conservatory orders sought in the application. The argument is buttressed by reference to the decision in **Okiya Omtatah Okoiti v Attorney General & 5 others [2020] eKLR**.

23. On the matter of public interest, the Selection Panel submits that the First Schedule of the IEBC Act provides for strict timelines within which it must discharge its mandate. It is asserted that the Selection Panel is mid-way through its mandate and suspending its operations shall not be in the public interest. Further, that it is a matter of public notoriety that the IEBC is operating with only three commissioners and issuance of conservatory orders will be against the public interest since the 2022 General Election is fast approaching.

24. In conclusion, the 1st Respondent contends that the Applicant will not suffer any prejudice as the petition will not be rendered nugatory if the application for conservatory orders is declined and the Court proceeds to hear the substantive petition on its merits.

25. The 2nd Respondent through the two sets of submissions dated 24th May, 2021 asserts that the application fails to meet the test for grant of conservatory orders as set by the Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR**. It is submitted that the petition does not disclose how the Constitution has been violated by the Selection Panel performing the role conferred upon it by the legislation enacted pursuant to Article 250 of the Constitution.

26. It is urged that the 2nd Respondent has decided to establish the Selection Panel for the recruitment of the members of IEBC and the only question for the Court to determine is whether there has been a violation of the Constitution and not the wisdom of the decision that the lawmaker has taken. It is Parliament's position that the Applicant has not established a *prima facie* case with a chance of success to warrant the grant of conservatory orders.

27. On the matter of public interest, the 2nd Respondent submits that granting conservatory orders would be to the detriment and hardship of the IEBC and would jeopardize the ability of its commissioners to plan for the next General Election scheduled for August 2022. According to Parliament, the public interest lies in allowing the recruitment of commissioners of the IEBC to proceed.

28. It is further the 2nd Respondent's submission that the public interest lies in upholding the presumption that all laws enacted by Parliament are constitutional and this Court ought to decline to suspend provisions of legislation properly enacted by Parliament at the interlocutory stage.

29. It is submitted that the Applicant will not suffer prejudice or harm if this Court declines to grant conservatory orders. Further, that the substantive petition will not be rendered nugatory as this Court has the power to grant the orders sought and to quash any decisions made in the event that a violation of the Constitution is subsequently established.

30. In submissions dated 16th May, 2021, the 3rd Respondent contends that the issues in controversy will still remain alive even if no orders are granted and the Court will be able to pronounce itself on the constitutionality or otherwise of the impugned Section 7(2) of the IEBC Act. The 2nd Respondent submits that the Court has to take into account the impact of the suspension of the recruitment of IEBC commissioners on the public interest.

31. It is submitted that in determining this application, the Court has to bear in mind that every Act of Parliament enjoys a presumption of constitutionality. The Court is therefore urged to refrain from suspending legislation in the interim and instead determine the constitutionality of the impugned provision after hearing all the parties on merit.

32. It is contended that it is a very serious legal and constitutional step to suspend the operation of statutes at the interlocutory stage and for such an order to issue it should be demonstrated that the operation of the law is a danger to life and limb. In the 3rd Respondent's view the

Applicant has not met this threshold to warrant the suspension of the impugned Section 7(2) of the IEBC Act nor has he established any ground to warrant the halting of the operations of the Selection Panel.

33. Although the 3rd Respondent concedes that there is a *prima facie* case with a likelihood of success, he contends that the Applicant has not demonstrated the prejudice he will suffer if the conservatory orders sought are not granted. Reliance is placed on the decision in **Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General [2011] eKLR.** It is the Attorney General's case therefore that the Applicant herein has failed to demonstrate and satisfy the principles essential for grant of conservatory orders.

34. Through submissions dated 25th May, 2021 the Interested Party's position is that there is sufficient legal framework to guide the filling of vacancies in its membership.

35. Upon perusal of the pleadings and submissions filed in respect of the instant application, I find that the sole issue for my determination is whether the Applicant has met the threshold for grant of conservatory orders. This threshold was established by the Supreme Court in the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** as follows:

> **"[86] *"Conservatory orders"* bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the *public interest.* Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the *inherent merit of a case,* bearing in mind the *public interest, the constitutional values,* and *the proportionate magnitudes, and priority levels attributable to the relevant causes.***
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> **[87] The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. 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.***
>
> **[88] 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.***
>
> **[89] This third condition is dictated by the *expanded scope of the Bill of Rights, and the public spiritedness that run through the Constitution."***

36. The starting point is to determine whether the Applicant has established a *prima facie* case with a likelihood of success. In the case of **Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General [2011] eKLR** it was held that:

> **"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 not therefore 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. When a court is called upon to determine whether a *prima facie* case has been established, it should not delve into a detailed analysis of the facts and law but should focus on determining whether the Applicant has put forward a case that is arguable and not frivolous. In the case of **Board of Management of Uhuru Secondary School v City County Director of Education & 2 others [2015] eKLR** the Court posited that:

> **"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…"**

38. The definition of a "frivolous case" was provided by Ringera, J in the case of **Trust Bank Limited v Amin Company Ltd & another [2000] KLR 164**, as cited in **Mary Wangari Mwangi v Peter Ngugi Mwangi T/A Mangu Builders Ltd & 3 others [2013] eKLR,** as follows:

> ***"A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action."***

39. The questions raised in the petition surround the interpretation of constitutional provisions on the establishment of IEBC as against the provisions of the IEBC Act, 2011 and amendments thereto. These questions are raised following the vacancy notice (VACANCY NO. SP/IEBC/2021) published by the Selection Panel on 1st May, 2021, pursuant to the declaration of vacancies in the membership of the IEBC by the President of the Republic of Kenya vide Gazette Notice No. 3522 of 2021. It is sufficient to observe that the Applicant has raised valid questions on the interpretation of the Constitution and the IEBC Act which should be answered so as to provide better clarity on the legal mandate of the Selection Panel. The petition cannot therefore be said to be groundless or without substance. Without saying more, I find that the Applicant has a *prima facie* case with a likelihood of success.

40. The second hurdle to be cleared by an applicant seeking conservatory orders is the need to prove that the substratum of the petition will be rendered nugatory if orders are not granted. The Applicant argues that the risk to be suffered is that public funds shall have been irrecoverably expended towards a futile cause. The Applicant additionally contends that if the Selection Panel proceeds to make recommendations unrestrained, and the Court eventually finds the appointment process to have been conducted contrary to the law, reversal of the appointments will be a tall order.

41. In my view, the Applicant has not put forward a satisfactory argument that the petition will be rendered nugatory if a conservatory order is not granted. Moreover, even if the appointment process is completed and the Court eventually finds in favour of the Applicant, this Court retains the jurisdiction to quash and reverse the appointments. This statement finds support in the decision of the Court of Appeal in Nelson **Andayi Havi v Law Society of Kenya & 3 others [2018] eKLR; Civil Application 28 of 2018 (UR 26/2018)** where it was stated 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. The applicant will then have an opportunity to contest if it is determined with finality that indeed he is eligible to run for the office of president of LSK. The determination of this Court after hearing the intended appeal will have two possible consequences. If the appeal is dismissed and we have in the meantime stopped the elections, it will mean losses that are not petty cash for a professional society that is financed primarily by members' subscriptions. It will also throw into confusion the prescribed statutory calendar and disrupt or undermine the discharge of critical statutory and national functions vested in LSK such as regulation of the legal profession, resolution of complaints against practitioners, and assisting in the administration of justice and the practice of law in the country. If on the other hand the appeal succeeds, the applicant will have an opportunity to contest in the ensuing bye-election. The primary prejudice that he will suffer is a delay in the realization of his ambition to lead the LSK, which we think can be mitigated or reduced substantially by fast-tracking the hearing and determination of his appeal. In our view that scenario is not synonymous with rendering the appeal nugatory. If he really wished, the applicant could be adequately compensated for any delay that is entailed, by award of damages."**
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> [The underlining is mine]

I am thus not convinced that the Applicant herein shall suffer any harm if the orders are not granted.

42. The final issue to be determined is whether the public interest lies in granting the orders sought by the Applicant. According to Black's Law Dictionary, "public interest" is defined as:

> **"The general welfare of the public that warrants recognition and protection; or something in which the public as a whole has a stake especially an interest that justifies governmental regulation."**

43. The Applicant argues that if the appointment process is allowed to proceed it would lack legitimacy and fail to inspire confidence in the electoral system. The 1st Respondent contends that the public interest lies in the observance of the set strict timelines and suspending the selection process is therefore not in the public interest.

44. It is additionally pointed out by those opposed to the application that it is a matter of public notoriety that the IEBC is operating with only three commissioners and it will be against the public interest to let the state of affairs continue since the next General Election is fast approaching. The 2nd Respondent submits that suspending the recruitment of the commissioners would jeopardize the ability of the IEBC to plan for the next General Election scheduled for August 2022.

45. The Court is therefore tasked with balancing between the competing interests of the public as highlighted by the opposing sides. If orders are not granted, the appointments shall be finalised but the process will lack legitimacy if it is subsequently established that the Constitution and the law has not been complied with. This may result in the public's confidence in the electoral system wavering. However, the decision of the Selection Panel is reversible.

46. On the other hand, if the Court were to grant conservatory orders and halt the process, and upon hearing the substantive petition find that the process was, in fact, legitimate it would mean that the whole process is delayed and timelines breached at the risk of not having a fully constituted IEBC in place to prepare for the 2022 General Election. This can have detrimental effects on the upcoming General Election which would damage the public's confidence in the electoral process even more. In my view, the risk to the public's interest in having a General Election supervised by an electoral body that is not fully constituted according to the statutory requirements far outweighs the risk of starting the appointment process afresh.

47. I also concur with the respondents in their arguments against suspending the operation of legislation. In the case of **Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another [2015] eKLR** the Court cited the holding in **Mombasa High Court Petition No. 669 of 2009 Bishop Joseph Kimani & others v Attorney General & others** that:

**"It is a very serious legal and Constitutional step to suspend the operation of statutes and statutory provisions. The courts must wade with care, prudence and judicious wisdom. For the High Court to grant interim orders in this regard, I think one must at the interlocutory stage actually show that the operation of the legislative provision are a danger to life and limb at that very moment…It is my view the principle of presumption of Constitutionality of Legislation in (sic) imperative for any state that believes in democracy, the separation of powers and the Rule of Law in general. Further the courts to be able to suspend legislation during peace times where there is no national disaster or war, would in my view be interfering with the independence and supremacy of Parliament in its Constitutional duty of legislating law. I think that I shall hold the said views and that legislation should only be impugned in any manner only where it has been proven to be unconstitutional, null and void. Conservancy orders to suspend operation of statutes, statutory provisions or even Regulations should be wholly avoided except where the national interest demand and the situation is certain…I am still of the view that "there is no place for conservatory or interim order in petitions, which seek to nullify or declare legislation/statutes unconstitutional, null and void." It is even more premature at this stage where the application has not been heard or is not being heard to seek such conservatory orders. The applications must be heard first."**

48. The same position was held in **Susan Wambui Kaguru & 4 others v Attorney General & another [2012] eKLR** where it was determined that:

**"7. The question for the court is to consider whether these laws are within the four corners of the Constitution. No doubt serious and weighty arguments have been advanced and I think any answer to them must await full argument and consideration by the court. I cannot at this stage make an interim declaration which would effectively undo the legislative will unless there are strong and cogent reasons to do so."**

49. From the foregoing, it is clear that to suspend the operation of the law at the interlocutory stage of a matter would overlook the presumption of constitutionality, which all legislation benefits from. The Court also runs the risk of infringing upon the legislative supremacy and independence of Parliament were it to suspend legislation at the interlocutory stage without having had the full benefit of the substantive arguments of the parties. It is trite that the public interest lies in the uninhibited operation of the law and if this Court needlessly suspends the operation of the law the consequences will be far-reaching and detrimental to the upcoming 2022 General Election.

50. Notwithstanding what I have stated above, I remain alive to the fact that laws that are detrimental to the rights and fundamental freedoms in the Bill of Rights can indeed be suspended at the interlocutory stage. However, such suspension can only occur where it is demonstrated that the suspension will not hamper the State in the delivery of its mandate. In **Attorney General & another v Coalition for Reform and Democracy & 7 others [2015] eKLR; Civil Application Nai 2 of 2015 (UR 2/2015),** the Court of Appeal, in declining to set aside conservatory orders issued by the High Court suspending operation of some laws, held that:

**"It must always be borne in mind that the rights and fundamental freedoms in the Bill of Rights are not granted by the State and therefore the State and/or any of its organs cannot purport to make any law or policy that deliberately or otherwise takes away any of them or limits their enjoyment, except as permitted by the Constitution. They are not low-value optional extras to be easily trumped or shunted aside at the altar of interests perceived to be of greater moment in moments such as this…**

**While the Court appreciates the contextual backdrop leading to the enactment of the SLAA, it must also be appreciated that it is not in the interest of justice to enact or implement a law that may violate the Constitution and in particular the Bill of Rights. Constitutional supremacy as articulated by Article 2 of the Constitution has a higher place than public interest. When weighty challenges against a statute have been raised and placed before the High Court, if, upon exercise of its discretion, the Court is of the view that implementation of various sections of the impugned statute ought to be suspended pending final determination as to their constitutionality, a very strong case has to be made out before this Court can lift the conservatory order. The State would have to demonstrate, for example, that suspension of the statute or any part thereof has occasioned a lacuna in its operations or governance structure which, if left unfilled, even for a short while, is likely to cause very grave consequences to the general populace.**

**We do not think that the applicant has made out such a case. The Court was not told that the grant of the conservatory orders has brought about a vacuum in our laws which makes it impossible or difficult to investigate and prosecute terror suspects or such other persons who may be targeted by the SLAA. Apart from the eight (8) sections of the SLAA whose operationalisation has been temporary suspended, all other laws of Kenya are still in full operation. We entertain no doubt that as we await either the hearing of the appeal before this Court, or, the finalization of the petitions before the High Court, the country's security agents and law enforcement organs can still make full use of the existing laws to keep the country and its people safe."**

51. The law that the Applicant claims to be unconstitutional has been in place from the time the amendments were carried out to the IEBC Act in 2020. The law may indeed be detrimental to democracy as alleged by the Applicant. However, it has not been demonstrated that the law is a danger to life and limb to warrant its suspension at the interlocutory stage. Nobody wants a situation where the next General Election will be conducted by only three commissioners of the IEBC. Such a situation is likely to dent the public confidence in the integrity of the elections compared to a situation where commissioners are recruited using a law whose constitutionality is doubted considering that the alleged unconstitutionality is not yet verified through *inter partes* hearing.

52. In conclusion, I determine that although the Applicant has established a *prima facie* case he has not met the other requirements for the grant of conservatory orders. Most importantly, the public interest lies in the statutory timelines being observed so as to ensure that the upcoming General Election is not negatively affected.

53. Having arrived at the above conclusion, it follows that the Applicant's notice of motion application dated 6th May, 2021 is for dismissal and it is hereby dismissed.

54. Since this is a matter of public interest the parties are directed to bear their own costs in regard to the application.

**Dated, signed and delivered virtually at Nairobi this 3rd day of June, 2021.**

**W. Korir,**

**Judge of the High Court**