REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO. 163 OF 2019

BETWEEN

OKIYA OMTATAH OKOITI.....1ST PETITIONER

NYAKINA WYCLIFE GISEBE.....2ND PETITIONER

CHARLES OMBOKO.....3RD PETITIONER

DAVID MUNYAO MWANZIA.....4TH PETITIONER

VINCENT MUILI MUINDI.....5TH PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE KENYA LAW REFORM COMMISSION.....2ND RESPONDENT

THE NATIONAL ASSEMBLY.....3RD RESPONDENT

THE HON. JUSTIN BEDAN NJOKA MUTURI.....4TH RESPONDENT

THE HON, KENNETH MAKELO LUSAKA.....5TH RESPONDENT

THE CABINET SECRETARY MINISTRY OF

INFORMATION, COMMUNUCATION AND TECHNOLOGY.....6TH RESPONDENT

AND

THE COUNCIL OF GOVERNORS.....1ST INTERESTED PARTY

KATIBA INSTITUTE.....2ND INTERESTED PARTY

THE LAW SOCIETY OF KENYA.....3RD INTERESTED PARTY

CHILD WELFARE SOCIETY.....4TH INTERESTED PARTY

COMMUNICATION AUTHORITY OF KENYA.....5TH INTERESTED PARTY

RULING

The Application

1. In their petition dated 7th March, 2019, the Petitioners ask the court to declare the amendments made vide the **Statute Law**

(Miscellaneous Amendments) Act, 2018 (hereinafter referred to as "the Amendment Act") unconstitutional and therefore invalid, null and void. They contend that the manner in which the said amendments were effected violated various provisions of the Constitution. In particular, they contend that the amendments to the Kenya Information and Communication Act, 1998 (hereinafter 'KICA') pose a threat of violation of Article 34(5)(a) of the Constitution which requires that Parliament enacts a legislation that provides for the establishment of a body to regulate the media that is independent of government, political or commercial interests.

2. The Petitioners later filed an application by way of Notice of Motion dated 29th April, 2019. The application, which is expressed to be brought under Articles 20, 22, 50(1), 23(3), 159(2)(d), 165 and 258 of the Constitution of Kenya, 2010 seeks the following orders:

> ***1. Spent.***
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> ***2. That pending the inter-partes hearing and determination of this application and/or petition, the Honourable Court be pleased to issue and hereby issues an interim order suspending the implementation of the amendments made by the Statute Law (Miscellaneous Amendments) Act 2018 to s.6(1) (a) & (e) and s. 6B of the Kenya Information and Communications Act, 1998 (No. 2 of 1998.)***
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> ***3. That the costs of this application be provided for.***

3. The application is supported by an affidavit sworn by the 1st petitioner on 29th April, 2019. The 1st petitioner avers that their application seeks to stop the impending appointment by the Cabinet Secretary for Information Communication and Technology of a new Board of Directors for the Communications Authority of Kenya (hereinafter "the Authority") pursuant to sections 6(1) (a) and (e) and section 6B of the Kenya Information and Communications Act, 1998 (No. 2 of 1998) (the 'KICA'), as amended by the Statute Law (Miscellaneous Amendments) Act, 2018. He further avers that having been appointed to be members of the said Board of the Authority for a period of three (3) years with effect from the 29th April, 2016, the tenure of the current Board expires on 29th April, 2019. It is his deposition that if the orders that the Petitioners seek are not granted, then the harm that would result would be immediate, incalculable and irreversible and the limb of the petition relating to the amendments to KICA will become an academic exercise.

4. The Petitioners argue that the impugned amendments to KICA eliminate section 6B thereof which provides the all-important full proof procedure, complete with an independent selection panel for ensuring that the process of recruiting the chair and members of the Board is fair, open, competitive, merit-based and inclusive. It is therefore their contention that it is untenable to remove the checks and balances which ensured that the Board was appointed through a process that guaranteed its autonomy based on Article 34(5)(a) of the Constitution.

5. The Petitioners therefore contend that unless the orders prayed for are granted, the Cabinet Secretary will be at liberty to handpick and appoint his cronies and hangers-on to the Board, which will strip the Board of the autonomy required of it under Article 34(5)(a). It is their argument that suspending the impugned amendments will not interfere with or disrupt the operations of the public body as a new Board will be appointed under the KICA as it was before the impugned amendments were made.

6. The petitioners further contend that the impugned amendments to the KICA were enacted through a process that violated the Constitution, legislation and case law on the use of miscellaneous amendment bills (also known as omnibus bills) to effect substantive changes to statutes. They cite in this regard the decisions in **Law Society of Kenya v Attorney General & Another [2016] eKLR; Okiya Omtata Okoiti v Communication Authority of Kenya & 21 Others [2017] eKLR; Josephat Musila Mutual & 9 Others v Attorney General & 3 Others [2018] eKLR;** and **Mercy Munee Kingoo & Another v Safaricom Limited & Another [2016] eKLR.**

7. According to the petitioners, by enacting the Amendment Act, the National Assembly acted in contempt of the court especially on Tuesday 28th August, 2018, when, during debate on the Statute Law (Miscellaneous Amendments) Bill, 2018, the Speaker of the National Assembly of Kenya deliberately and contemptuously disregarded the caution raised through a point of order by Hon. (Dr.) Otiende Amollo MP, that the High Court prohibited the use of Statute Law (Miscellaneous Amendments) Bills to effect substantive amendments to statute.

8. It is also the Petitioners' contention that in contradiction to the Memorandum of Objects and Reasons, the press adverts calling for memoranda from the public stated falsely that *"the Bill was in keeping with the practice of making various amendments which do not merit the publication of separate Bills and consolidating them into one Bill. The Bill therefore proposes amendments to various Acts of Parliament."* As a result, the Petitioners understood the expression *"amendments which do not merit the publication of separate Bills"* to mean that the amendments to the Bills dealt with minor, noncontroversial and insignificant editorial matters. The petitioners thus invited the court to consider whether the impugned amendments were "minor" and were housekeeping and did not merit the publication of separate Bills.

9. With regard to the impugned amendments to KICA, the Petitioners aver that in the Bill's Memorandum of Objects and Reasons, at page 117, it is stated that *"The Bill seeks to amend the Kenya Information and Communications Act, 1998 to provide for the mode of appointment of the chairperson of the Communications Authority."* They express the view that this statement was misleading as the impugned amendments did not provide for the mode of appointment of the chairperson of the Authroity, which was provided for in section 6A of the KICA, a provision that was not amended. Rather, it eliminated the safeguards in law for ensuring that the appointment process for the chair and members resulted in an independent Board.

10. It is the Petitioners' further contention that no reasonable and meaningful public participation and stakeholder consultation was held on the impugned amendments. In their view therefore, not only was the Constitution infringed upon but it is threatened with the impending appointments of a new Board under the KICA as amended by the impugned amendments. They therefore urge the court to move with speed to protect the rule of law and to uphold the Constitution by granting the orders sought. They argue that the court has the jurisdiction under Article 22 of the Constitution to determine whether a right has been infringed or is threratened with infringement, and to grant appropriate relief, under Article 23 (3).

11. Lastly, it is also the Petitioners' contention that the court should grant the orders that they seek in order to prevent the petition from being

rendered a nullity which would result in a loss to the people of Kenya.

12. The Respondents opposed the petition. The 1st Respondent, the Attorney General (AG) filed grounds of opposition dated 16th May, 2019. He argues in these grounds, first, that the conservatory orders sought by the Petitioners are only meant to curtail the lawful operations of the Authority (the 5th Interested Party), a statutory body whose mandate is clearly defined by statute and is to be implemented by a board. Secondly, he argues that the impugned amendments enjoy a general presumption of constitutionality, and such a presumption can only be properly rebutted, if at all, at a full hearing of the petition. In the AG's view as set out in his third ground in opposition to the application, the petitioners are essentially challenging the constitutional prerogative of Parliament in exercising its delegated sovereign function of legislation without stating with specificity how the impugned amendment has breached any provision of the Constitution.

13. The AG contends that the petition will not be rendered nugatory should the conservatory orders be denied as the issues raised will still present live controversies for the court to consider and determine on their merits, and the court still has power to remedy any unconstitutionality that it may find with the impugned amendments. In the AG's view, the public interest favours a denial of the conservatory orders sought. This is on the basis, first, that a statutory body such as the Authority cannot operate without a duly constituted board as required by law; the general public will be denied effective service delivery if there is no duly constituted Board of the Authority to execute the requisite statutory mandate; and it would be prudent to allow the constitution of the Board, as this court is capable of intervening in the event that it finds the impugned law to be in conflict with the Constitution.

14. It is also the contention of the AG that the Petitioners have failed to sufficiently demonstrate, with concrete evidence, that this court is incapable of remedying a purported constitutional violation should there be a finding to that effect.

15. The 2nd Respondent, the Kenya Law Reform Commission (KLRC), also opposed the application. It filed grounds of opposition dated 14th May, 2019 in which it argues, first, that the application has been filed after an inordinate and unexplained delay on the part of the Petitioners. This is because the impugned amendments were enacted in November 2018, and the delay disentitled the Petitioners the orders that they seek. It is its view that due to the inordinate and unexplained delay, granting the orders sought would occasion irredeemable and irreparable loss and damage to the state and the citizens of Kenya, who are in the process of implementing various provisions of the laws amended pursuant to the Statute Laws (Miscellaneous Amendments) Act No. 18 of 2018. It terms the orders sought in the application as contrary to the public interest and the constitutional values of the doctrine of separation of powers.

16. KLRC contends in its fourth ground that the orders sought by the Petitioners will create a vacuum in the membership of the Board of the Authority, which will be contrary to public policy as the term of office of the current board expired on 29th April, 2019. It is its view as expressed in its fifth ground that the effect of the magnitude of the orders sought by the Petitioners is disproportionate to the purposes and objectives of the impugned amendments, and the test of proportionality therefore militates against the grant of the orders sought.

17. It is KLRC's view further that the application does not meet the threshold for the grant of conservatory orders as the Petitioners have not demonstrated that they have a *prima facie* case with a likelihood of success, and neither have they shown that any irreparable harm will be occasioned by the initiation of the appointment of the members of the Board of the Authority. KLRC agrees with the AG that there is a general presumption of constitutionality of any law enacted by Parliament, and that the burden falls on the person who alleges otherwise to rebut this presumption, which the Petitioners have not done.

18. The National Assembly, which is the 3rd Respondent in this matter, filed grounds of opposition dated 15th March, 2019. It contends in these grounds, first, that its mandate to enact, amend and repeal laws is derived from the Constitution. Accordingly, the Petitioners' prayers in their application threatens the legislative role of Parliament, and specifically the National Assembly's mandate under Articles 1(1), 94 and 95 of the Constitution. In its view, the Petitioners seek to restrict the National Assembly from carrying out its constitutional mandate derived from Article 95(3) of the Constitution, which it exercised in enacting the impugned sections 6(1)(a) and (e) and 6B of KICA. The 3rd Respondent set out the provisons of Article 109 of the Constitution and contended that the present application contravenes the said Article, which mandates Parliament to enact, amend or repeal any law through Bills passed and assented to by the President. It asserted in its fourth ground that there was adequate public participation in the process of enactment of the impugned amendments and consequently, the amendments to KICA did not violate the principle of public participation.

19. The 3rd Respondent contended in its fifth ground that the process of enactment of legislation is not an administrative action falling within the purview of Article 47 of the Constitution or the Fair Administrative Action Act, 2015. That what is required in the context of legislation is that the legislature facilitates public participation on the Bill under consideration by the House.

20. The decision in **Mugambi Imanyara and Another v Attorney General and 5 Others[2017] eKLR** was cited by the 3rd Respondent, who argued that there is a general presumption that every Act of Parliament is constitutional, and it echoes the argument set out by the AG and KLRC that the burden of proof lies on every person who alleges otherwise. The 3rd Respondent also relied on the decisions in **Institute of Social Accountability & Another v National Assembly & 4 Others (2015) eKLR**; **Muranga Bar Operators and Another v Minister of State for Provincial and Internal Security & 2 others** and; **R v Big M Drug Mart Ltd [1985]1 S.C.R. 295,** to submit that both the purpose and effect of impugned legislation must be considered in determining the cosnstitutionality or otherwise of legislation. It argued that the Court is ill-equipped to determine matters of policy and the economy, and the proper mode of national legislation process as the Petitioners are asking the Court to do, and that the Court should therefore restrain itself from intruding into the policy and legislative field of other arms of government.

21. The 6th Respondent, the Cabinet Secretary in the Ministry of Information and Communication, opposed the application. In a replying affidavit sworn on 14th May, 2019 by Juliana Yiapan, the Secretary in charge of Administration in the Ministry, the 6th Respondent acknowledged that indeed the Statute Law (Miscellaneous Amendments) Act, 2018 made amendments to section 6(1) (a) & (e) and section 6B of the KICA, and that the term of the Board of Directors of the Authority expired on 29th April, 2019. That the Authority was therefore operating without a Board of Directors.

22. Ms. Yiapan averred that the Authority is a key, sensitive and strategic organization which is responsible for the country's broadcasting,

multimedia, telecommunications, electronic commerce, security, postal and courier services. Furtermore, that the term of its Chief Executive Officer would expire around August 2019, and therefore a suspension of the existing mode of appointment of its Board of Directors under the amendment would lead to paralysis and incapacitate a strategic government entity, thereby placing at risk many functions which the Authority undertakes. She termed as untrue the averments by the Petitioners that the suspension of the appointments will not interfere or disrupt the operations of the public body, or that appointments may be done under a repealed section of the statute.

23. Ms. Yiapan further argued that the Authority cannot, for instance, hire a replacement for the retiring Chief Executive Officer in the absence of a Board of Directors. That it would be forced to operate without both a Chief Executive Officer and a Board of Directors, which will be a perilous situation for such a key, essential and critical organization, because planning for its functions and activities is the responsibility of the Board and the top executive management group headed by the Chief Executive Officer.

24. It was her averment that the procedure and process followed in undertaking the amendments complained of were legitimate and lawful, and that the National Assembly retains the control and supremacy over its Standing Orders which provide a procedure and practice for handling of parliamentary business. She acknowledged, however, that there was a slight error in the description in the Memorandum of Objects and Reasons whereby it stated that the amendment was to "provide for the mode of appointment of the Chairperson of the Communications Authority" but in reality it provided for the appointment of the members of the Board of Directors. This minor slip, in her view, did not alter the focus of the amendment, as the body of the bill clearly showed the intention of the proposed amendment and nobody was misled by the error.

25. Ms. Yiapan further averred that the amendment to the KICA must be read within the structures of the Constitution. It was her averment that by empowering the minister to appoint members of the Board of Directors of the Authority, the statute still binds the Minister to observe the national values and principles of governance under Article 10 of the Constitution as well as Article 34(5)(a) of the Constitution. The amendment, in her view, places the appointment of the Board of Directors of the Authority in line with appointment of members of the Boards of Directors of other state agencies. The mere fact that the Minister appoints members of the Board of Directors of the Authority does not in itself mean that the government is in control of the institution.

26. The 6th Respondent therefore contended that the Petitioners had not demonstrated how or in which manner the impugned amendments impair, infringe or limit the exercise of any fundamental rights of the individual; that a suspension of the operation of a statute is an action which courts take only in exceptional and extraordinary circumstances in which it is shown that there is an extreme danger imminent to the life and limb of citizens; that until it has been clearly demonstrated in a full hearing that a statute is unconstitutional, it's operation, in line with the presumption of constitutionality, should be permitted.

27. The 6th Respondent further argued that it has not been shown that there is any imminent danger, irreversible threat or prejudice at this stage which the court cannot disengage after hearing the full petition. It was also its case that public interest requires that the amendment to KICA be permitted to operate so as to allow the Minister to appoint directors to the Authority to enable it perform its function appropriately. In its view, a suspension of the statute would cause a lacuna in the operations of the Authority, that would endanger its integrity and standing in the international communications environment where it is highly regarded. In any event, in the view of the 6th Respondent, no *prima facie* case with a likelihood of success has been made to warrant the grant of interim orders.

28. The Authority, which was the 5th Interested Party, filed grounds of opposition dated 23rd May, 2019. It contends in the said grounds that the Petitioners have not shown how the main petition shall be rendered nugatory should the conservatory orders sought be denied. It was its contention that the issuance of conservatory orders would interfere with the lawful operations of the Authority, a statutory body whose mandate is clearly defined by statute and is to be implemented by the Board.

29. In a supplementary affidavit sworn by the 1st Petitioner on 4th June, 2019, the Petitioners challenged the authority of the deponent of the affidavit filed by 6th Respondent, arguing that the deponent had not annexed any evidence to demonstrate such authority. The Petitioners termed the responses filed by the Respondents and the 5th Interested Party as intended only to justify the excesses of the National Assembly.

30. The Petitioners further averred that there is no reason why a new Board of the Authority cannot be appointed under the old law. In their view, the effect of this court suspending the impugned amendments was the simultaneous reinstatement of the old law, under which the Authority would continue to operate. The Petitioners reiterated their averments that the process and procedure followed in undertaking the amendments complained of were not legitimate and lawful, and their effect is unconstitutional to the extent that it violates Article 34 (5) (a) of the Constitution.

31. According to the Petitioners, the National Assembly is subject in its operations to its Standing Orders, statutes and the Constitution. They averred that the alleged error in the Memorandum of Objects and Reasons is not minor as it misled both the Members of the National Assembly and the public. Having been tucked away in an omnibus Bill, there was practically no way of subjecting the amendments to effective public participation, particularly with the misleading information in the Bill's Memorandum of Objects and Reasons.

32. The Petitioners further averred that Article 34 (5) (a) of the Constitution expressly requires Parliament to enact legislation that provides for the establishment of a body which shall be independent of control by government, political interests or commercial interests. Such legislation, according to the Petitioners, must have clear checks and balances to ensure that the Executive does not do as it wishes in the appointment of the Board of the Authority. In their view, by deleting section 6B of KICA, Parliament will have failed in its obligation to enact legislation that complies with the requirements of Article 34 (5) (a).

33. The Petitioners further reiterated that they have demonstrated a *prima facie* case with a high probability of success, and that the public interest is best served by upholding the Constitution. In their view, the petition would be defeated should the case succeed yet persons have been appointed under the impugned amendments and Article 34 (5) (a) of the Constitution has been breached, which would then require the filing of yet another motion to seek the removal of such persons. They also averred that there has been no inordinate delay in seeking the conservatory orders. This was because a similar application made had been abandoned on the directions of the Court.

34. On the contention that the court should not grant the orders sought as there is a presumption of constitutionality of legislation, the Petitioners argued that the presumption ceases to apply the moment the constitutionality of a statute is challenged before a court of competent jurisdiction. In that event, the burden of proof as to constitutionality lies with the State once a case has been made out that the piece of legislation is unconstitutional. In their view, they had discharged their burden by demonstrating how the impugned amendments to the KICA are unconstitutional.

The Submissions

35. The Petitioners, 5th Respondent and 2nd Interested Party filed written submissions which they highlighted at the hearing of the application. The other parties made oral submissions in support or opposition to the application. In their submissions, the Petitioners echoed their averments that the impugned amendments posed a threat to Article 34 (5) (a) of the Constitution, which expressly requires Parliament to enact legislation that provides for the establishment of a body which shall be independent of control by government, political interests or commercial interests. Further, that such legislation must have clear checks and balances to ensure that the Executive does not do as it wishes in the appointment of the Board of the Authority.

36. The Petitioners cited the provisions of the repealed section 6B of the KICA which was introduced into the Act by section 7 of the Kenya Information and Communications (Amendment) Act, 2013, and which provided elaborate procedures for the appointment of the Board. The section provided for a selection panel to recruit the members of the Board and according to the Petitioners, by eliminating the independent selection panel and the elaborate procedures for appointing both the Chair and Members of the Board, Parliament will have failed in its obligation to enact legislation that provides for the establishment of a body which shall be independent of control by government, political interests or commercial interests.

37. The Petitioners submitted that by deleting section 6B of the KICA, Parliament eliminated the checks and balances that exist in law to ensure an autonomous Board was appointed by an independent selection panel, through an objective, transparent, inclusive, merit-based, and competitive process. They also reiterated their averments that unless the court issues the conservatory orders sought in the application, the Constitution will be threatened because the door will be flung wide open and the appointing authorities will be at liberty to handpick and appoint anybody to the Board, thus violating Article 34 (5) (a). On the contrary, that granting the conservatory orders will protect the Constitution and will not prejudice the Respondents at all, since a new Board can still be appointed under the old law, with all the safeguards in place.

38. The Petitioners maintained that due process was not followed in the manner in which the impugned amendments were enacted. This is on the basis that though the amendments are substantive, they were introduced by an omnibus Bill which courts of competent jurisdiction across the globe have declared can only be used to effect minor editorial changes to statute.

39. To the question of jurisdiction of this court to grant the conservatory orders, the Petitioners submitted that the court is granted powers to issue such conservatory orders in constitutional petitions by Article 23 (3)(c) of the Constitution and Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. It is also their submission that the Constitution gives this court wide and unrestricted powers and allows the court to make appropriate orders and grant remedies as the situation demands and as the need arises under Article 165(3).

40. With regard to the question whether they have met the test for grant of conservatory orders, the Petitioners submitted that the test should be predicated on the existence of a *prima facie* case with a likelihood of success. They submitted that it is in the interests of justice that this court grants the prayers sought, since the Petitioners and the people of Kenya in general stand to suffer grave injustice and irreparable loss and damage if the orders are not granted. The Petitioners relied on the decision in **Augustine Michael Murandi & 2 others v Nolturesh Loitoktok Water and Sanitation Co. Ltd (Successor in title of National Water Conservation and Pipeline Conservation), Petition No. 8 of 2017, Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR; Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & 2 Others (2014) eKLR;** and **Michael Osundwa Sakwa vs Chief Justice and President of Supreme Court of Kenya & Anor (2016) eKLR** with respect to the duty of the court when considering an applicatioin for conservatory orders.

41. With respect to whether they had established a *prima facie* case, the Petitioners relied on the case of **County Assembly of Machakos v Governor, Machakos County & 4 others [2018] eKLR** in which the definition of a *prima facie* case in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR** was cited with approval. The Petitioners also urged the court to be guided by the principles for the grant of interlocutory injunctions set out in **Giella vs Cassman Brown [1973] E. A. 358** when considering whether to grant interim relief in the nature of conservatory orders to redress denial, violation or infringement of fundamental rights or freedoms.

42. The Petitioners also made submissions on the award of costs, the gist of which is that the costs should be borne by the Respondents, reliance in this regard being placed on the decision in **Erick Okeyo v County Government of Kisumu & 2 Others [2014] eKLR**. In the event that the Petitioners were unsuccessful, however, they urged the court not to award costs against them. They submitted that this is a suit between a private citizen and the State, and they sought reliance on the *ratio decidendi* in the South African case of **Biowatch Trust v Registrar Genetic Resources and Others (CCT 80/08) [2009] ZACC 14** in which it was held that an award of costs against an unsuccessful litigant might have a chilling effect on the litigants who might wish to vindicate their constitutional rights. The court in that case stated, however, that this is not an inflexible rule, and that there may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious, or where the conduct of the litigant deserves censure by the court which may influence the court to order an unsuccessful litigant to pay costs.

43. The 2nd Interested Party supported the application for conservatory orders. In its submissions dated 21st May, 2019, it took the position that the Petitioners have established a case for the grant of conservatory orders pending hearing and determination of the petition. It relied on the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji (supra)** on the principles to be considered in determinng whether or not to grant the orders sought. It also cited the case of **George Mike Wanjohi v Steven Kariuki [2014] eKLR** in which the court held that an arguable case is one that elicits cognizable constitutional controversies. It argued that the purpose of the amendment is to eliminate the selection panel from the appointment pocess which effect is to threaten or violate media independence under Article 34(2)(3) and (5) of the

Consitution. On whether the limitation of the Petitioners' right to freedom of the media meets the three-part test in Article 24 of the Constitution: that the limitation is (i) provided by law; (ii) serves a legitimate aim and (iii) is proportionate and strictly necessary in an open and democratice society, its submission was that the Petition elicits cognizable constitutional controversies as to be arguable.

44. The 2nd Interested Party further submitted that a conservatory order suspending the amendment is necessary to prevent loss the Petitioners would suffer in relation to the appointments of the Board of the Authority. In its view, success in the petition would not reverse the appointments or the decisions made by those appointed through the impugned amended provisions. It therefore urged the court to grant conservatory orders in order to hold the subject matter of the petition in abeyance to facilitate hearing and determination of the petition on merit.

45. The 2nd Interested Party agreed with the submissions by the petitioners that the public interest lay in granting conservatory orders. It cited in support the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji (supra),** to submit that the Supreme Court had held that public interest is an additional consideration for grant of conservatory orders particularly in constitutional claims. It further cited the case of **Jacqueline Okuta v Attorney General [2017] eKLR** in which the High Court held that the proportionality test requires courts to balance the interests of society with those of individuals and groups. In its view, the critical equation in this application is between any advantage to the Petitioners and the interest they represent, namely the freedom of the media, and any disadvantage to the respondents if the orders sought are granted or denied. In its view, freedom of the media is of the utmost importance in the kind of open and democratic society the Constitution has set as an aspirational norm. Accordingly, the public interest in this application lies in the sustenance of the previous regime of appointments as opposed to reposing broad appointments in the Executive through the Cabinet Secretary.

46. The 2nd Interested Party submitted, on the authority of the decision in **Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & Another [2015] eKLR**, that where the court is faced with a choice to suspend the amendments and require the appointments to be made under the repealed law or to allow fresh appointments to be made under the amendments, the court should find in favour of suspending the amendments. Further, that the Respondents are state organs bound by the national values and principles of governance in Article 10 of the Constitution, as well as Article 21(1) to observe, protect, respect, promote and fulfil the rights and freedoms in the Bill of Rights including media freedom under Article 34.

47. Its submission was that in case of a dilemma turning on the Bill of Rights, Article 20(3)(b) embodies the *in dubio pro libertate* (when in doubt, for liberty) doctrine, which according to the 2nd Interested Party requires the court to adopt the interpretation that most favours the enforcement of a right or fundamental freedom. It was also its submission that Article 20(4) requires that the court, in interpreting the Bill of Rights, should promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; as well as the spirit, purport and objects of the Bill of Rights. In its view, a failure to grant a conservatory order suspending the amendments would occasion great injustice as the media freedom sought to be vindicated in this petition would be irreparably injured, a result which militates against the public interest in the exercise of the 5th Interested Party and the Respondents' mandate.

48. The 1st Respondent on his part relied on the case of **Okiya Omtatah Okoiti & Another v President of Kenya & 2 others [2016] eKLR** where Onguto J. outlined certain principles that govern an application for conservatory orders. He submitted that the nature of the work of the Authority is so important that any conservatory orders that curtails its operations will not promote constitutional values which include effective delivery of service to the people. He further submitted that the Petitioners have not demonstrated the nature of specific rights violated by the impugned amendments.

49. Secondly, for a conservatory order to be granted, it should be demonstrated that the petition would be rendered nurgatory if the order is not granted. It was further his submission that the issues will still be alive and the court will be able to pronounce itself on the consitutionality or otherwise of the impugned Act. On public interest, the 1st Respondent submitted that the court has to weigh the public interest in the nature of services provided by the Authority against the interest of the Petitioners. That public interest miltates against curtailment of the powers of the Authority. Lastly, he submitted that the impugned Act as enacted by Parliament was done on delegated authority of the people and no standing order was violated. Accordingly, he submitted that the Petitioners had not established a *prima facie* case, and relied on the case of **Susan Wambui Kaguru & Others v Attorney General & Another [2012] eKLR** on the presumption of constitutionality of legislation.

50. The 2nd Respondent submitted that the application is spent, as the Petitioners acknowledge that the orders sought would interfere with the operations of a public body. It was further its submission that if a law is quashed or suspended, there is no reverting back to an amended law. It is only Parliament that can legislate and as such, to breath life into a repealed statute is through legislation. Further, a public body would be adversely affected by the orders sought as the Authority has no Board and soon will be without a Chief Executive Officer.

51. The 3rd Respondent associated itself with the submssions of the 1st and 2nd Respondents, and added that the legislative authority which it excercises is drawn from the soverign will of the people, and Parliament exercised that mandate through Bills passed and assented to by the President. It was its submission that Parliament complied with the procedure and in any event, the petitioners had not established a *prima facie* case to warrant interference with the mandate of Parliament.

52. Counsel for the 4th and 5th Respondents adopted the submissions of his colleagues in opposition to the application.

53. The 6th Respondent submitted that there is a presumption of constitutionality of every statute. Reliance was placed on the case of **Ndyanabo v Attorney General (2001) E.A 495** for the proposition that unless the contrary is proved, there is a general presumption of constitutionality of legislation and that, if possible, a legislation should receive such construction as will make it operative and not inoperative. It was its further submission that it is the duty of a person alleging constitutional invalidity of a statute or statutory provision to prove that indeed the statute or any of its provision(s) are unconstitutional. In its view, this is an issue for determination, not at the interim stage, but one which must wait for a full hearing of the petition.

54. The 6th Respondent further cited the cases of **Kizito Mark Ngaywa v Minister of State for Internal Security and Provincial Administration & Another [2011] eKLR** and **Bishop Joseph Kimani & Others v Attorney General & Others, Mombasa High Court**

Petition No. 669 of 2009 for the proposition that it is a very serious legal and constitutional step to suspend the operation of statutes, and that one must, at the interlocutory stage, actually show that the operation of legislative provision are a danger to life and limb at that very moment before the court can make an order suspending the operation of legislation.

55. The 6th Respondent also relied on the decision in **Gatirau Peter Munya v Dickson Mwenda Kithinji (supra)**. In its view, when considering an application for conservatory orders within the framework of Article 23, the court is not being called upon and is indeed not required to make any definitive finding either of fact or law as that is the province of the court that will ultimately hear the petition. Its jursidiction at this stage is limited to examining and evaluating the material placed before it to determine whether the applicant has made out a *prima facie* case to warrant grant of conservatory orders. Further, that the court should evaluate the pleadings and determine whether denial of conservatory orders will prejudice the applicant.

56. According to the 6th Respondent, the applicant is required to establish a *prima facie* case with a likelihood of success and the prejudice to be suffered if orders are not granted. Reliance was placed on **Centre for Rights Education and Awareness(CREAW) & 7 Others v Attorney General, [2011] eKLR** in this regard.

57. As for what amounts to a *prima facie* case, the 6th Respondent cited the decision in **Platinum Distillers Limited v Kenya Revenue Authority [2019] eKLR** and **Kevin K Mwiti & others v Kenya School of Law & others [2015] eKLR** for the proposition that a *prima facie* is not a case which must succeed at the hearing of the main case, but is a case which is not frivolous. In this case, according to the 6th respondent, the applicant has not demonstrated or established a *prima facie* case.

58. It was its submission further that upon finding that a prima facie case has been established, the court also has to determine whether a grant or denial of the conservatory relief will enhance the constitutional values and objects of the specific right or freedom in the Bill of Rights. It was its case that an applicant has to satisfy the provisions of Article 23(3)(e) of the Constitution. It relied on the case of **Centre for Rights Education and Awareness (CREAW) & 7 Others** (supra) where the court held that a party seeking a conservatory order is required to demonstrate 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 which must be weighed against the public interest. That the applicant must be able to demonstrate that there is imminent danger, threat or irreversible prejudice suffered by the petitioners. It was the 6th Respondent's submission that the Petitioners have failed to demonstrate and satisfy any of the two principles essential for the grant of the conservatory orders, as no evidence has been tendered to show that the impugned Act is unconstitutional. Further, that the mere fact that the Petitioners impugn the Act is not a proper basis for suspending it.

59. The 6th Respondent cited the case of **Republic v National Assembly & 6 Others Ex-parte George Wang'ang'a [2018] eKLR** in which it was held that the power to suspend legislation during peace time ought to be exercised with care and prudence, and that it should be exercised only when it is shown that the legislative provisions are a danger to life and limb at that very moment or where there is imminent danger to the Bill of Rights, and where there are strong and cogent reasons for grant of the conservatory orders. In the view of the 6th Respondent, the Petitioners had not demonstrated that they have strong and cogent reasons for the grant of conservatory orders.

60. The 4th Interested Party associated himself with the submissions of the of the Respondents in opposing the application. The 5th Interested Party on the other hand submitted that the Authority, being a public body, is a living organisation and the Board is part of its structure. In absence of the Board, the licensing and regulatory functions are hampered. Accordingly, it goes against public policy and public interest to allow the Authority to operate in a vacuum. In any event, that a *prima facie* case had not been established to warrant the orders sought.

Analysis and Determination

61. The application before us seeks conservatory orders to suspend the operation of the amendments to the KICA that were effected pursuant to the **Statute Law (Miscellaneous Amendments) Act No. 18 of 2018**. While there is some suggestion in the submissions before us by some of the Respondents and the Interested Parties that we have no jurisdiction to grant the reliefs sought by the Petitioners, we take the view that the jurisdiction of this court to grant conservatory orders can no longer be a matter of judicial disputation. Article 23(3)c) of the Constitution grants the High Court power, on an application brought under Article 22, to issue a conservatory order. Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 echoes this constitutional provision, and the issue has been the subject of judicial interpretation.

62. In its decision in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others (supra)** the Supreme Court stated as follows with respect to conservatory orders contemplated under Article 23(3):

> ***"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."***

63. In **Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others [2015] eKLR**, the court summarised the principles for grant of conservatory orders as including, first, the need for the applicant to demonstrate an arguable *prima facie* case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice. The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights. Thirdly, the court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. The final principle for consideration is whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.

64. The Petitioners in the matter before us seek orders to suspend the amendments to KICA. The impugned amendments of the Statute Law (Miscellaneous Amendments) Act No. 18 of 2018 seek to delete section 6B of KICA which was introduced into KICA by section 7 of The Kenya Information and Communications (Amendment) Act, 2013. Section 6B was in the following terms:

(1) Within fourteen days of the occurrence of a vacancy in the office of chairperson or member, the President or the Cabinet Secretary, as the case may be, shall—

(a) by notice in the Gazette and on the official website of the Ministry, declare a vacancy in the Board, and invite applications from qualified persons; and

(b) convene a selection panel for the purpose of selecting suitable candidates for appointment as the chairperson or member of the Board.

(2) The selection panel referred to under subsection (1) shall comprise of persons drawn from the following organisations—

(a) Media Council of Kenya;

(b) Kenya Private Sector Alliance;

(c) Law Society of Kenya;

(d) Institute of Engineers of Kenya;

(e) Public Relations Society of Kenya;

(f) Kenya National Union of Teachers;

(g) Consumers Federation of Kenya; and

(h) the Ministry responsible for matters relating to media.

(3) At their first meeting, the panel shall appoint a chairperson and a vice-chairperson who shall be of opposite gender.

(4) An application in respect of a vacancy declared under subsection (1) shall be forwarded to the selection panel within seven days of the publication of the notice, and may be made by—

(a) any qualified person; or

(b) any person, organisation or group of persons proposing the nomination of any qualified person.

(5) The selection panel shall, subject to this section, determine its own procedure and the Cabinet Secretary shall provide it with such facilities and other support as it may require for the discharge of its functions under this section.

(6) The selection panel shall consider the applications, shortlist and publish the names and qualifications of all the applicants and those shortlisted by the panel in the Gazette and on the official website of the Ministry, within seven days from the expiry of the deadline of receipt of applications under subsection (4).

(7) The selection panel shall interview the shortlisted applicants within fourteen days from the date of publication of the list of shortlisted applicants under subsection (6).

(8) Upon carrying out the interviews, the selection panel shall select—

(a) three persons qualified to be appointed as chairperson; and

(b) two persons, in relation to each vacancy, qualified to be appointed as members of the Board, and shall forward the names to the President or the Cabinet Secretary, as the case may be.

(9) The President or the Cabinet Secretary shall, within fourteen days of receipt of the names under subsection (8), appoint the chairperson and the members, respectively.

(10) In selecting, shortlisting and appointing the chairperson and members of the Board, the President and the Cabinet Secretary shall—

(a) ensure that the appointees to the Board reflect the interests of all sections of society;

(b) ensure equal opportunities for persons with disabilities and other marginalised groups; and

(c) ensure that not more than two-thirds of the members are of the same gender.

(11) Every appointment made under this section shall be published in the Kenya Gazette.

65. The impugned amendments seek to replace the above section with the following provision:

(2) In appointing the members of the Board under subsection (I)(e), the Cabinet Secretary shall ensure –

(a) that the appointees to the Board reflect the interests of all sections of society;

(b)equal opportunities for persons with disabilities and other marginalised groups; and

(c) that not more than two-thirds of the members are of the same gender.

66. The Petitioners raise two challenges to the amendments. The first relates to the manner in which the impugned provisions were enacted. The Petitioners contend that no reasonable and meaningful public participation and stakeholder consultation was held on the impugned amendments. While we view this as an important challenge to the amendments, we are unable to consider it at this interlocutory stage. This is in view of the principles set out hereinabove that apply in the consideration of whether or not to grant consevatory order, and particularly as there is in our view no irreparable harm or prejudice caused as a result of this ground, that cannot await the hearing and determination of the substantive petition.

67. The second challenge is that the amendments run counter to Article 34 (5) (a) of the Constitution. Article 34 of the Constitution guarantees media freedom, and at Article 34(5)(a), the Constitution imposes a duty on Parliament in the following terms:

(5) Parliament shall enact legislation that provides for the establishment of a body, which shall—

(a) be independent of control by government, political interests or commercial interests;

(b) reflect the interests of all sections of the society; and

(c) set media standards and regulate and monitor compliance with those standards.

68. The question therefore before us, is whether the amendments should be suspended for violation or threat of violation of the right guaranteed under Article 34(5)(a) of the Constitution. In considering this question, we bear in mind judicial precedents on the circumstances under which the court can suspend legislation or amendments to legislation.

69. Odunga J. had the occasion to review various decisions on this point when considering a petition and application for suspension of the Security Laws Amendment Act in **Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & Another [supra]** and held as follows at paragraphs 120 to 124 of his decision:

"Before delving into the merits of the application, an issue of jurisdiction in my view was alluded to though not specifically. The issue was to the effect that this Court has no power to grant conservatory orders where the constitutionality of legislation is under challenge….. In support of this contention, reliance was placed on Kizito Mark Ngaywa vs. Minister of State for Internal Security and Provincial Administration & Anor (supra), and Susan Wambui Kaguru & Ors vs. Attorney General Another (Supra). In the Kizito Case, Ibrahim, J (as he then was) referred to his own decision made on 6th October 2010 in Mombasa High Court Petition No. 669 of 2009 – Bishop Joseph Kimani & Others vs. Attorney General & Ors in which he pronounced himself as follows:

"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."

70. Odunga J. went on to cite various decisions as follows:

"Majanja, J on his part in Susan Wambui Kaguru & Ors vs. Attorney General Another (Supra) expressed himself inter alia as follows:

"I have given thought to the arguments made and once again I reiterate that every statute passed by the legislature enjoys a presumption of legality and it is the duty of every Kenyan to obey the very law that are passed by our representatives in accordance with their delegated sovereign authority. The question for the court is to consider whether these laws are within the four corners of the Constitution. No doubt serious legal 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."

71. The learned Judge concluded as follows:

"Emphasis seems to have been placed on the underlined sentence in Bishop Joseph Kimani's Case. However, it is my view that the learned Judge's decision ought to be read as a whole. If that is done what clearly comes out is that the power to suspend legislation during peace time ought to be exercised with care, prudence and judicious wisdom where it is shown that the operation of the legislative provision are a danger to life and limb at that very moment and where the national interest demand and the situation is certain. On my part I would modify that view by adding to the phrase "a danger to life and limb" the words "or where there is imminent danger to the Bill of Rights" since Article 19(1) of the Constitution provides that the "Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies" and Article 21(a) provides that "it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights."

Similarly Majanja, J did not rule out entirely the possibility of grant of conservatory orders. What the learned Judge held was that at the stage of the application for conservatory order he could not make an interim declaration which would effectively undo the legislative will unless there are strong and cogent reasons to do so. [Emphasis mine]. In other words where there are strong and cogent reasons conservatory orders may be granted."

72. We agree with the position set out by the various judges cited above that strong and cogent reasons and a constitutional basis must be shown, before legislation can be suspended at an interlocutory stage. However, once such cogent reasons have been established, the Court has power to suspend impugned provisions of a statute. This was the position taken by the Court of Appeal in **Attorney General & Another vs Coalition for Reform and Democracy & 7 others, Civil Application No. Nai 2 Of 2015 (Ur 2/2015); [2015] eKLR** in which the Court stated:

"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."

73. It is our considered view therefore that in order for a petitioner to convince the court that suspension of the operation of a statute is the only option, a petitioner must establish the existence of a *prima facie* case and demostrate the prejudice to be suffered if no action is taken by the court. The petitioner is also required to demostrate that unless the law is suspended, great and unmitigable loss will be suffered by the public. We are also guided by the principle that every law enacted by the legislature enjoys a general presumption of constitutionality, as has been pronounced in several decisions before this court. In our view, such a presumption can only be properly rebutted at a full hearing of the petition. Therefore, whether or not the amendments made to the KICA are constitutional is not an issue that can be decided at this stage, and will have to await the final determination of this petition.

74. In asking for the suspension of a statutory provision, the Petitioners must therefore do more than is required of them in an ordinary application for conservatory orders. We hold the view that a suspension of the operation of a statute is an action which courts take only in exceptional and extraordinary circumstances, where it is shown that there is an extreme danger imminent to the life and limb of citizens, pending demonstration in a full hearing that a statute is unconstitutional. In order to grant orders, the court should be convinced that the extent and impact of the challenged provisions are so pervasive and a risk to the life and limb of the general populace. It must be demonstrated that if the impugned law is operationalised, an immediate and real violation or threat to the Bill of Rights will ensue.

75. In this regard, this court has a duty to consider the suspension of the law *vis-a-vis* the functions of the Authority. It is not disputed by all the parties that the term of the Board of the Authority has come to an end. We were also told that the term of the Chief Executive Officer terminates in August this year. The parties were also agreed that the Authority plays a central role in the communications sector in this country and the absence of the board and the Chief Executive Officer at the same time will leave the Authority rudderless.

76. What then would be the consequences of suspending the amendments to KICA at this stage? The Petitioners proposed that appointment of the Board members could still be made under the repealed law. On the other hand the advocates for the Respondents were of the view that suspending the law would create a void as the previous law has been repealed. We reserve our opinion on this issue. This is a matter that requires deep introspection and extensive arguments by the parties, and we will leave the decision for the judgment stage. We are in this regard aware of the provisions of section 20 of the Interpretation And General Provisions Act, Cap. 2 of the Laws of Kenya, which state as follows:-

"Where a written law repealing in whole or in part a former written law is itself repealed, that last repeal shall not revive the written law or provisions before repealed unless words are added reviving the written law or provisions."

77. A reading of the cited provision raises the key question as to whether an order suspending or striking out a statute or some provisions of a statute can revive the law that was repealed by the suspended law. There is also a valid question raised as to whether an unconstitutional amendment can repeal a constitutional law. All these are matters to be reserved for the trial. At this moment in time, suspending the amendments may result in a situation where there is no clear pathway as to appointement of the members of the Board of the Authority, and therefore leave the Authority in limbo.

78. It is therefore our finding that in the circumstances of this case, there is greater risk to the general welfare of the citizens of this country if the application is allowed than if it is declined, arising from the immediate need to have the Board of the Authority constituted, and these circumstances distinguish this case from that of **Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & Another [supra]** .

79. In any case, we are of the view that Article 34(5)(a) of the Constitution still binds the 6th Respondent to observe the principles therein in making any appointments to the Board of the Authority. There is thus no immediate danger to life and limb that will be occassioned if the inpugned sections of are not suspended. The 6th Respondent, may, as a matter of necessity and for purposes of prudence, apply the requirements of the repealed provisions in order to fulfil the constitutional requirements. We do not hold legal brief for him, but the 6th Respondent may be well advised to proceed with utmost caution, as any appearance of unconstitutionality may also result in a separate challenge to those appointments.

80. In light of what we have stated, we reach the conclusion that the Petitioners have not shown any irreparable harm that will be occasioned to them and the public by the initiation of the appointment of the members of the Board of the Authority, or how the main petition shall be rendered nugatory if the orders sought are not granted. Indeed more harm is likely to occur if the impugned provisions are suspended.

81. In conclusion, we reiterate that our primary duty as a Court of law is to uphold the Constitution and the law, which we must apply impartially and without fear, favour or prejudice. If, in the process of performing this constitutional duty, the court upsets the decisions and actions of the other branches of government, it cannot be faulted for paying homage to the Constitution. The courts, are however, also required by the Constitution to strive to achieve an appropriate balance between their role as the ultimate guardians of the Constitution and the rule of law, including any obligation that Parliament is required to fulfil in respect of the passage of laws, on the one hand, and the respect which they are required to accord to other branches of government as required by the principle of separation of powers, on the other hand.

82. We are however mindful that in the context of the present application, this balance can only be achieved once all parties ventilate their issues during the full hearing.

83. In view of what we have already stated, it follows that this application fails. We therefore dismiss the Petitioners Notice of Motion dated 29th April, 2019 and order that the costs of the said Notice of Motion abide the outcome of the petition.

84. Orders accordingly.

Dated, Signed and Delivered at Nairobi this 12th day of July, 2019.

P. NYAMWEYA, MUMBI NGUGI, W. KORIR,

JUDGE JUDGE JUDGE