REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CONSTITUTIONAL PETITION NO. 10 OF 2018

BETWEEN

PETER KYALO.....PETITIONER

~VERSUS~

DR ALFRED MUTUA,

GOVERNOR MACHAKOS COUNTY.....1ST RESPONDENT

THE CLERK,

COUNTY ASSEMBLY OF MACHAKOS.....2ND RESPONDENT

THE SPEAKER,

COUNTY ASSEMBLY OF MACHAKOS.....3RD RESPONDENT

THE COUNTY ASSEMBLY OF MACHKOS.....4TH RESPONDENT

MS. EVERLYNE KAVUU MUTIE.....1ST INTERESTED PARTY

ENG. MORRIS OMUYOMA ALUANGA.....2ND INTERESTED PARTY

MR TITUS NZEKI KAVILA.....3RD INTERESTED PARTY

MR FRANCIS KIIO MWAKA.....4TH INTERESTED PARTY

MR KIMEU MBITHI KIMEU.....5TH INTERESTED PARTY

MR URBANUS MUSYOKA WAMBUA.....6TH INTERESTED PARTY

MR LAZARUS KIVUVA.....7TH INTERESTED PARTY

RULING

Petitioners' Case

1. The subject of this ruling is the application dated 12th June, 2018 brought by way of Motion on Notice pursuant, primarily, to the provisions of Rules 19 and 23 of the ***Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules***, otherwise commonly referred to as "***the Mutunga Rules***", Articles 22 and 23(3)(b) and 258 of the Constitution of Kenya, 2010.

2. The Petitioner herein described himself as an adult individual, resident of Machakos County (hereinafter referred to as "the County"), a voter and a law abiding citizen.

3. The 1st Respondent is the Governor of the County Assembly of Machakos (hereinafter referred to as "the Governor") conferred with the

powers pursuant to Articles 179(1)(b) of the Constitution and section 30(2)(d) of the ***County Governments Act*** (hereinafter referred to as "the Act"), to nominate the County Executive Members in compliance with sections 35 and 36 of the Act.

4. The 2nd Respondent is the administrative officer of the County Assembly of Machakos (hereinafter referred to as "the Assembly") responsible for the day to day management and functioning of the Assembly.

5. The 3rd Respondent is the Speaker of the Assembly (hereinafter referred to as "the Speaker"), with the mandate to appoint an appointing committee for the purposes of vetting nominees for the position of County Executive Committee.

6. The 4th Respondent is the County Assembly of Machakos having the mandate inter alia of vetting nominees for the position of member of the County Executive Committee.

7. The interested parties were he persons nominated by the Governor for appointment by the Assembly for the position of member of the County Executive Committee Members.

8. The facts of this petition, according to the petitioner herein are that the Governor, through a letter dated 17th May, 2018 addressed to the Speaker pursuant to Articles 179(2)(b) of the Constitution and section 30(2)(d) of the Act and sections 4, 5, 6, 10 and 11 of the ***Public Appointment (County Assemblies Approval) Act*** (hereinafter referred to as "the Approval Act") forwarded the names of 7 nominees to be vetted by the Assembly for the purposes of their appointment as members of the Machakos County Executive Committee Members.

9. According to the petitioner, the aforesaid nominees were done in gross contravention of the said constitutional and statutory provisions as required under section 5(1) of the ***Approval Act***, in that he did it in an opaque manner, discriminatively, without transparency, openness and accountability thereby locking out eligible members of the public from applying to be nominated b him for the various positions in the County Executive Committee.

10. It was therefore t petitioner's case that the actions of the Governor infringe on his constitutional rights and those of other members of the public and are in violation of the rule of law, democracy and participation of the people, good governance, integrity, transparency and accountability and values and principles of public service as envisaged in the Constitution.

11. It was however disclosed that the 2nd, 3rd and 4th Respondents had, through public announcement, invited the public and the nominees for vetting despite the said procedural flaws by the Governor. The Petitioner was therefore apprehensive that owing to the limited time scheduled for the nominees' interview by the Assembly, the Court ought to step in and stop the violation of the constitutional provisions.

12. The Petitioner therefore sought the following orders:

> **1. An order and a declaration that it is against national values and principles of the County Government for the 1st Respondent to forward names of the nominees of the county executive committee members to the 2nd and 3rd Respondents to the exclusion of the public participation in a competitive process.**
>
> **2. An order and a declaration that pending the hearing and determination of the petition, the court do issue a conservatory order directing and restraining the 2nd and 3rd Respondents from vetting the list of nominees forwarded to them by the 1st Respondent.**
>
> **3. An order and declaration compelling the 1st Respondent to advertise in a public newspaper an invitation of Members of Machakos County to apply for the position of the Executive Committee Members before nomination to allow public participation in a competitive, transparent and accountable process.**
>
> **4. Costs of this petition.**
>
> **5. Further relief or orders that this honourable court may deem just and fit to grant.**

13. Pending the hearing and determination of the petition the Petitioner seeks in the instant application a conservatory order restraining the 2nd, 3rd and 4th Respondents from proceeding with the vetting interview process of the interested parties.

14. It was the Petitioner's case, though his learned counsel, **Ms Machuki**, that under Articles 22 and 258 of the Constitution 2010, every person has a right to institute a suit in person, on behalf of another person or members of a group, or in public interest, *claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or threatened. In this case, it was submitted that the* Petitioner has sworn on oath that he has a genuine interest in the appointments of members of the County Executive Committee, whose functions under Article 183 of the Constitution and section 36 of the ***County Government Act***, not only impact on him as a member of the Machakos County but also other residents of the county and further that that the orders sought are for the benefit of all members of the county. The petition, it was therefore submitted, is not for personal gain or private profit or out of political motivation or other oblique consideration but for public interest.

15. According to the Petitioner, under Article 165 of the Constitution 2010, the High court has unlimited original jurisdiction in all matters including; to determine the question whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened. The High Court is thus vested with the jurisdiction to determine the process, the constitutionality, procedure as well the legality of the nomination of the interested parties by the 1st Respondent.

16. By implementing these constitutional mandates, it was submitted that the High Court cannot be said to have interfered with the separation of power as alluded to by the 2nd, 3rd and 4th Respondents. In this respect reference was made to the case of **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR.**

17. According to the Petitioner, this petition seeks Court's interpretative powers of the 1st Respondent in Article 179(2)(b) and Section 30(2)(d) of the County Government Act as read with provisions of Article 10(1)(2), Article 73(d), Articles and 174(a)(c) of the Constitution which is well within the jurisdiction confine of the High Court.

18. It was submitted on behalf of the Petitioner that whereas the powers granted to the 1st Respondent under Article 179(2) of the Constitution and section 30(2)(d) of the ***County Government Act***, to nominate persons to be vetted by the 2nd, 3rd and 4th Respondent as members of the Executive County Committee may sound discretional, in construing the spirit of the constitution governing state organs, state officers and public officers, these powers have limitations. In this respect the Petitioner referred to Article 10(1) of the Constitution 2010, which binds all state organs, state officers, public officers and all persons to observe the national values and principles of governance, when applying or interpreting the Constitution, enacting, applying or interpreting any law; or implementing public policy decisions. Article 10(2) of the Constitution on the other hand sets out the national values and principles of governance to include good governance, integrity, transparency and accountability while Article 73(2) (d) of the Constitution provides the guiding principles of leadership and integrity to include accountability to the public for decisions and actions. The Petitioner also cited Article 174 of the Constitution which provides for the objects of the devolution government to include promoting democratic and accountable exercise of power; and to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the state and in making decisions affecting them. In this respect the Petitioner relied on **Benson Riitho Mureithi vs. J. W. Wakhungu & 2 Others [2014] eKLR** and **David Kariuki Muigua vs. Attorney General & Another Petition No. 161 of 2011.**

19. The Petitioner's position was that his petition seeks to challenge the process, constitutionality and legality of nominations of the interested parties by the 1st Respondent, for failure to conform to the above stated constitutional provisions. To him, the Governor in nominating the interested parties did not involve the people of Machakos County to allow their participation. The process was therefore neither transparent nor democratic. Further, the 1st Respondent's actions did not amount to good governance and hence, could not be said to be accountable to the people of Machakos.

20. It was submitted that Article 23(3) of the Constitution is the premise upon which the Petitioner has sought the conservatory orders herein and that the Constitution empowers this Honourable Court to grant appropriate relief in any proceedings brought under Article 22 thereof which include a conservatory order as sought in prayer 2 and 3 of the Application.

21. The Petitioner contended that he had placed relevant material facts and provisions of the law in its application, necessary to establish a *Prima facie case*, warranting grant of a conservatory order.

22. In support of his case the Petitioner relied on the decision of the Supreme Court in **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others [2014] eKLR.**

23. The Petitioner submitted that unless the conservatory orders are granted pending the hearing of the petition, the 2nd Respondent will proceed as provided in section 9 of the **Public Appointment, (county Assemblies Approval) Act** to forward a report notifying the 1st Respondent of the decision of the 4th Respondents. These may lead to the interested parties assuming office, despite the illegality of the process and constitution contravention, which is against public policy. In addition, the function of the County Executive Committee members as envisaged in the Constitution will have a direct impact on the Petitioner and the people of Machakos.

24. Based on various authorities, the Petitioner submitted that his case cannot be termed as frivolous, hopeless, offensive or lacking seriousness as pleaded by the 2nd 3rd and 4th Respondents. Further, the values and principles of public service includes involvement of the people in policy making process, accountability for administrative acts, transparency and provisions to the public of time, accurate information, and fair competition and merit as the basis of appointments and promotions which requirements under Article 10(1) and (2) have been violated.

25. It was submitted that the nominations of the interested parties were done in gross contravention of the foretasted constitutional provisions since the 1st Respondent acted in an opaque manner, discriminatively, without transparency, openness and accountability to the public, as he did not advertise the process of the nominations, thereby locking out eligible members of the public from applying to be nominated by him for the various positions in the County Executive Committee.

26. It was the Petitioner's case that it is in the public interest that the conservatory orders sought be granted since will be an affront to justice if the people of Machakos County are denied a chance to participate in the processes of nomination to the County Executive Members, considering the County Executive Members play a bring role in policy management and development of Machakos County as a whole. An imposition of the interested parties on them without adhering to the proper legal procedures, is unconstitutional and infringe on their bill of rights. In the Petitioner's view, since the roles and functions of the County Executive Members are *inter alia*, to manage and co-ordinate the functions of the county administration and its departments, it is necessary that the most qualified candidates are selected in a competitive, transparent and accountable process.

27. As regards the principles guiding the grant of conservatory orders, the Petitioner relied on **Petition No. 16 of 2011 Centre for Rights Education and Awareness CREAW.**

28. In this case it was the Petitioner's submission that the Petitioner has demonstrated a *prima facie* case with a high likelihood of success and that unless the conservatory orders are issued, he and the people of Machakos County will suffer damage in the sense that, they will be locked out of the public participation exercise and be governed by County Executive Members, whose integrity and leadership was not

decided by the people of Machakos County. The invitation by the 2nd Respondent to participate in the vetting of the nominees is like putting the cart before the horse since the people of Machakos County needed to be involved before nomination was done.

29. It was therefore submitted that it is in the interest of justice, this Honourable Court intervenes and issues a conservatory order to stop the ongoing vetting process, pending the hearing of the petition since failure to this, the entire petition will be rendered nugatory, supposing the vetting process proceeds to conclusion and appointments made. On the other hand, the conservatory orders will save the county's miniature resources in repeat exercise in the event court declares the nomination of the Executive Committee members unconstitutional.

1st Respondent's Case

30. The 1st Respondent opposed the application.

31. According to him, the application and the petition are incompetent because:

i) The pleadings do not disclose the particulars in support of the alleged cause of action;

ii) The petitioner has not stated what violations of the constitution or any other law were committed by the 1st respondent;

iii) The petitioner makes general accusations of violation of the constitution which are anticipatory, speculative and unspecified.

iv) The petitioner does not appreciate the separate functions of the 1st to 4th respondents with respect to nomination, vetting and appointment of the committee members and thus the cause of this ill-advised petition.

32. According to the 1st Respondent, the application and the petition seek to stop the functions of constitutional office holders which is in itself unconstitutional and thus should be dismissed with costs for being an abuse of the court process. It was deposed that Article 179 of the Constitution as well as the section 35 of the ***County Governments Act*** gives the governor exclusive powers to nominate county executive committee members and there is no requirement that he should consult or invite members of the public to advise him on who to nominate. According to the Governor, in nominating the county executive committee members, he is exclusively exercising delegated powers under the constitution which again is not subject to discussion by members of the public at this stage since the nominees are then subject to vetting by members of the national (sic) assembly and such vetting include invitation of the members of the public to give their views as well as contribution on the suitability of such nominees through adverts in newspapers of nationwide circulation, the local radio stations as well as through the local administration and *barazas* to ensure maximum participation.

33. It was averred that it is at the vetting stage where the Petitioner and other members of the public are given an opportunity to present their support or objections to the nominees being approved for appointment and either way the decision to approve or reject them lies with the County Assembly and on the governor. It was therefore averred that the application and the petition are thus misinformed and in the wrong forum because the petitioner should present his allegations before the County Assembly during the vetting process for consideration since it is the County Assembly which does the vetting and not this Court.

34. It was therefore the 1st Respondent's position that it is a lie when the petitioner alleges that the whole process of nomination and vetting is opaque when he already has a chance to present his grievances before the vetting panel but he chose not to follow the laid down procedures.

35. It was disclosed that in this case the Governor forwarded the names of the nominees to the County Assembly of Machakos on 21st May, 2018 together with their testimonials for purposes of vetting and that the advertisement was done in the daily nation on 25th May, 2018 inviting the members of the public to submit to the office of the clerk of the County Assembly in writing and under oath any relevant information concerning the nominees opposing their suitability to hold the relevant offices. However in spite of such a clear roadmap given and facilitated the petitioner for unknown reasons chose to abandon the procedures as laid down by the law to come to court and stop a legal and constitutional process from taking place.

36. It was contended that the Petitioner had not informed the Court whether he presented his grievances through the laid down procedure or that he was prevented by the any of the respondents from presenting them and as it is, the petitioner is out to abuse the court process and frustrate the constitutional bodies from doing their work.

37. The 1st Respondent deposed that after the vetting process is over, the County Assembly in tandem with sections 35(3) of ***County Governments Act*** no. 17 of 2012 as well as sections 7, 8,9,10 and 11 of the ***Public Appointments (County Assemblies Approval Act) 2017*** will cause to be forwarded the report made by the committee to the 1st respondents office approving or rejecting the nominees. It is therefore out of the control of the 1st respondent whether the nominees are approved or rejected. However, in view of the fact no such report has been presented, the application and the petition are merely speculative and the Court cannot exercise its jurisdiction over hypothetical creations of the petitioner and which do not have any legal underpinning.

38. According to the 1st Respondent, the vetting of the nominees were conducted in accordance with the law and members of the public were invited to present their views and consequently the Court's jurisdiction cannot be invoked to supervise or direct a constitutional body on how to discharge its mandate or conduct its business.

39. The 1st Respondent therefore averred that the petition and the application offend the obvious *doctrine of separation* of powers because he is asking the court to direct the County Assembly which is the legislative body of the county government on how it ought to conduct their

business, a power which the Court does not have.

40. On behalf of the 1st Respondent it was submitted by **Mr Muumbi**, his learned counsel that the nomination of County Executive Members is not subject to public participation and that it is only after the names are forwarded to the Assembly that public views are invited. In this case the public had already been invited to present their views to the Assembly as reagrds the said nominees.

41. It was submitted that in naming the said members, the 1st Respondent exercises delegated power under Article 1 of the Constitution. In this respect the 1st Respondent relied on the definition of the term nomination by ***Black's Law Dictionary*** as a mere suggestion which is not binding. It was further submitted that the said members being political appointees, it is the 1st Respondent to decide who to nominate. The 1st Respondent further relied on section 2 of the ***County Governments Act*** which defines who public officers are which definition excludes the said members. As for the procedure for approval the 1st Respondent relied on sections 7, 8, 9, 10 and 11 of the ***Approvals Act***.

42. It was submitted that the vetting process was already over though no report on the said nominees' suitability had been made.

2nd, 3rd and 4th Respondents' Case.

43. On their part the 2nd, 3rd and 4th Respondents filed the following objections:

> **1. That the Petitioner's pleadings are general, speculative and do not disclose a real controversy/dispute capable of resolution by this honourable court. The petition and application thereof are predicted on unspecified anticipated actions by the Respondents who are separate and distinct legal entities. This honourable court cannot grant omnibus orders based on non-existent and or alleged threats of violation of rights.**
>
> **2. The Petitioner's pleadings do not adequate in support of their alleged cause of action/claim relating to the alleged violations of the Constitution against the Respondents to enable this honourable court grant the reliefs sought herein.**
>
> **3. The Petition and the Application thereof seek to impede the functions of the constitutional office holders and as such, it is frivolous, vexatious and an abuse of the judicial process. One cannot stop a person or an organ of state or any other constitutional body from carrying out their constitutional mandate.**
>
> **4. The jurisdiction to interpret the Constitution confereed by Article 165 (3) does not exist in a vacuum and this honourable court can only invoke its mandate to interpret any provisions of the Constitution under the said Article if there is a real issue in controversy and not in hypothetical or academic situation.**
>
> **5. In the premises, this honourable court has no jurisdiction to supervise constitutional bodies carrying out their mandate within the confines of the Constitution and both the Petition and the Application herein are made in bad faith. The same has been overtaken by events.**
>
> **6. That the Petitioner's pleadings offend the *Doctrine of Separation of powers* as the same invite this honourable court to direct Parliament and County Assemblies which are Legislative branches of the government, on their procedures and how they ought to run their affairs.**
>
> **7. That the issues raised in the application and the petition are directed against parties who have not infringed any right or rights of the petitioners or any member of the public and are intended to protect speculative interest of the petitioners.**
>
> **8. The said application is bad in law and an abuse of court process.**
>
> **9. Other grounds to be argued at the hearing thereof.**

44. Apart from the said objections the said Respondents filed a replying affidavit in which they averred that this Court has no jurisdiction to supervise constitutional bodies carrying out their mandate within the confines of the Constitution. It was contended that the Petitioner's pleadings offend the doctrine of separation of powers by inviting this Court to direct Parliament and County Assemblies which are legislative branches of government on their procedures and how to run their affairs.

45. According to the said Respondents after the said nominations, the nominees are to be vetted by the Assembly in accordance with the legislation which process is already underway in accordance with the law. Further, the orders being sought are against parties who have not been accused of any wrongdoing. It was the said Respondents' case that they complied with the law. Since the public have been invited to present their views on the nominees it was contended that this Court has no power to grant the orders sought.

46. It was submitted on behalf of the said Respondent by their Learned Counsel, **Ms Kamende** that the prayer sought in the Motion cannot be granted since it concerned the vetting process which had already been undertaken hence there is no process in terms of the interview to be stopped. According to learned counsel, as at the time of filing this petition, the said vetting proceedings were about to end. It was submitted that the names of the nominees were forwarded a month before the petition came to Court.

47. It was further contended that the Petitioner had not met the threshold in so far as the order sought were concerned since the prayers though directed at the 2nd, 3rd and 4th Respondents, no wrongdoing was alleged against them.

48. It was submitted that where a process is at a preliminary stage, the Court cannot interfere with it if to do so would amount to interfering with a constitutional process. In this case as the Assembly may still reject the nominees, it was submitted that the application and the petition are speculative and premature.

The Interested Parties' Case

49. On their side, the interested parties contended that the Petitioners Notice of Motion Application and the Petition in its entirety is misconceived, misguided, bad in law and should be dismissed with costs to the Interested Parties as the said application and Petition are made in bad faith, misrepresent the true position, and do not raise constitutional issues that can be determined by this Honourable court.

50. It was the interested parties' case that the said application and the Petition raise general, vague and speculative disputes camouflaged as constitutional disputes and as such the application and petition are flawed and incompetent for want of compliance with the law and precedents on pleadings relating to Constitutional Petitions seeking redress for alleged Constitutional violations.

51. In their view, the said application and petition seek the court to issue orders against presumed and anticipated speculative actions of the Respondents herein thus rendering the same a candidate for dismissal by this honourable court as no violation has been specified and pointed out that is capable of redress by this honourable court at this stage. Furthermore, the said application and Petition are meant to impede and interfere with statutory and constitutional functions of independent arms of the County Government and as such a clear case of gross abuse of court process. According to the interested parties, the Application and the entire Petition do not with specificity point to the actual Constitutional provision that has been violated or a constitutional wrong that has been committed by either the Respondents or the Interested Parties herein and as such, ought to be dismissed forthwith with costs.

52. The interested parties averred that pursuant to the powers conferred upon the 1st Respondent herein under the provisions of section 30(2)(d) of the ***County Government Act*** as read together with Article 179(2)(b), the 1st Respondent herein is empowered to appoint the County Executive Committee in compliance with the said statutory and Constitutional provisions. Further to the foregoing, section 35 of the ***County Governments Act*** gives the Governor the powers to nominate for appointment any person who meets the criteria set down therein and on the considerations therein enumerated and then forward the said persons to the County Assembly for vetting and subsequent approval or rejection as the case may be. Pursuant to the provisions of Article 179(2)(b) of the Constitution of Kenya 2010, section 30(2)(d), (e) and section 35 of the ***County Governments Act***, the 1st Respondent did nominate the Interested Parties herein and consequently forwarded the names of the Interested Parties to the Speaker of the County Assembly, the 3rd Respondent herein vide a letter dated 17th May 2018.

53. It was deposed that in compliance with the provisions of Articles 179 and 196 of the Constitution as well as the provisions of section 5 and 7 of the ***Public Appointments (County Assemblies Approval) Act, 2017***, the Speaker of the County Assembly, the 3rd Respondent herein did issue notice to all members of the Public vide a newspaper of national circulation on 25th May 2018 that he had received the list of nominees form the 1st Respondent and as such, invited the public to submit to the office of the Clerk, the 2nd Respondent herein any relevant information concerning the Interested Parties herein opposing their suitability to hold the offices to which they had been nominated to hold by the 1st Respondent. Subsequently, all the Interested Parties herein including received the notification letters dated 31st May 2018 from the Clerk of the County Assembly notifying them of their nomination to the various positions and also inviting them for a vetting session with the Assembly on various dates as communicated in the said letters and also requiring them to collect and submit the vetting forms from the office of the Clerk and further requiring them to submit the documents enumerated therein before the 11th of June 2018.

54. The interested parties averred that pursuant to the foregoing, the interested parties did comply with the requirements therein and submitted the documents required and further attended the vetting session on various days as from 11th June 2018 to the 21st of June 2018 when the last vetting session was carried out. It was therefore averred that as things stand now, all the interested parties herein have been vetted as required under the ***Public Appointments (County Assembly Approvals) Act, 2017*** and as such, the prayer to stop the vetting of the interested parties herein is overtaken by events and as such cannot be granted. In any event, it was contended that the newspaper notice gave the Petitioner herein ample time to object to the nomination of the interested parties herein and he even had an opportunity to present a petition/grounds to the Assembly against all the Interested Parties herein and also to appear during the vetting sessions to raise his objection but instead chose to sleep on is right all the way from the 25th May 2018 to the 14th of June 2018, mid-way through the vetting session when he approached this Court.

55. It was contended that the act of failing to raise his objection to the Clerk of the Assembly as required and clearly communicated and the assembly in general even after being given notice to do so; and subsequently coming to this court to stop the process is clearly malicious, an afterthought and a confirmation that the Petitioner is actuated by ill will and motive and not the protection of the constitution as being alleged. Since no petition or report was filed or received from the petitioner, the interested parties averred that this application and the entire petition incompetent.

56. To the interested parties, the elaborate procedure provided for in law and specifically under the ***Public Appointments (County Assembly Approvals) Act, 2017*** is meant to ensure that the 1st Respondent does not abuse his powers and further to ensure that the public is able to participate in the process of vetting suitable and qualified officers to the various position in the County Government including the County Executive Committee as the case herein.

57. It was averred that the County Assembly is made up of the members of the County Assembly who are the representatives of all the people in the entire County, including the Petitioner herein and as such, the issue of public participation is seriously undertaken and observed before the nominees can be appointed to the various positions. In the circumstance, it is clear that the process of appointment is still in motion and as such, there can be no violation of the Constitution even before the act is finalised. The interested parties herein remain nominees until they are appointed to their substantive positions after the whole process of approval of nominees is finalised as provided for in law. As such no law or constitutional right of the has been broken by the Interested Parties herein by availing themselves for scrutiny and vetting by the County Assembly, which also represents the Petitioner herein.

58. It was contended that since the names of the Interested Parties have been in public domain, the Petitioner cannot allege that the processes were being conducted in secrecy. In view of the foregoing, it was contended that the Petitioner's application and the entire petition is in bad faith and ought to be dismissed forthwith. Further, it is clear that no constitutional right of the Petitioner has been infringed or is threatened to be infringed and as such, the Application and the Petition ought to be disallowed.

59. In their submissions the interested parties reiterated the foregoing and relied on the holding in **Robert N Gakuru & Another vs. Governor Kiambu County & 3 Others [2013] eKLR.**

60. It was the interested parties' that the Petitioner is guilty of undue delay and as such, cannot benefit from orders of this court having approached the court only when the process was halfway to its conclusion despite knowledge of the same in advance.

61. In any event, it was submitted that the vetting interview sought to be stopped in the Notice of Motion Application were carried out between the 11th of June 2018 and the 21st of June 2018 and are finalized. As such, there is nothing left for this court to be restrained by way of a conservatory orders as court orders cannot be issued in vain.

Determinations

62. I have considered the issues raised in this application.

63. Since the Respondents raised the issues revolving around this Court's jurisdiction to grant the orders sought herein, it is important that the said issue be resolved *in limine*. This was the position adopted by **Nyarangi JA** in **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1** where he stated that:

> **"Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".**

64. Similarly in **Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367** the same Court expressed itself as follows:

> **"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."**

65. Lastly, on the same issue, the Supreme Court in the case of **Samuel Kamau Macharia vs. Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011**, observed that:

> **"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings… Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."**

66. However as appreciated in **Bollinger vs. Costa Brava Wine Co. Ltd [1960] 1 Ch. 262 at 238**, the law is a living thing and a court would be shirking its responsibility were it to say, assuming that there be no existing recognised remedy covering the facts of a particular case, "Why then, this must be an end to it". The law may be thought to have failed if it can offer no remedy for the deliberate acts of one person which causes damage to the property of another. In that event the rule of law will give way to anarchy and impunity.

67. It has been appreciated that the law must, of necessity, adapt itself; it cannot lay still. It must adapt to the changing social conditions. The court in the modern society in which we live cannot deny a party with a genuine grievance a remedy. Our Constitution under Article 1 obliges every person to respect, uphold and defend the Constitution while Article 258 of the Constitution provides as follows:

> ***(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.***
>
> ***(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—***
>
> ***(a) a person acting on behalf of another person who cannot act in their own name;***

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

68. The courts have recognised that unlawful interference with a citizen's rights give rise to a right to claim redress and if the petitioners have a right they must of necessity have the means to vindicate it and a remedy if they are injured in the enjoyment or exercise of it: and indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. Whether or not the Petitioner will be able to prove that his rights have been contravened or infringed is another matter altogether. It is however contended by the Petitioner that he had a right, just like other members of the public, to participate in the decision by the 1st Respondent Governor to nominate the interested parties herein to the position of County Executive Member. See **Rookes vs. Barnard [1964] AC 1129** and **Ashby vs. White [1703] 2 Ld Raym.938; 92 ER 126.**

69. In **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008** it was held that just as nature abhors a vacuum, even the enforcement of the rule of law abhors a vacuum or a gap in its enforcement and proceeded to uphold the jurisprudence that helps to:

> **"illuminate the dark spots and shadows in all circumstances, so that justice as a beacon of light and democratic ideals are practiced and hailed at all times over the hills, valleys, towns and homes in this beautiful land of Kenya. The mantle of justice and the rule of law must cover all corners of Kenya in all stations. Courts have a continuing obligation to be the foremost protectors of the rule of law".**

70. I fully agree and only wish to add that to allow the preliminary objections based on jurisdiction is likely to render the Petitioner and the people of Machakos County remediless and would lead to a situation where in order to avoid transparency in the appointment processes the Chief Executive of County Government would simply undertake the process of appointments clandestinely and when challenged claim that the Court has no jurisdiction. That possibility cannot be permitted to take root in the current constitutional dispensation.

71. Taking into account the issues canvassed herein, this Court when invited to investigate the constitutionality of the decisions of the Executive whether at national level or at county level must do so and ought not to down its tools based on the doctrine of separation of powers without conducting full investigations into the allegations particularly when the same touch on the constitutionality of the decision in question.

72. As regards separation of powers, it is trite that the principle broadly incorporates the scheme of "checks and balances"; but the principle is not to be applied in theoretical purity for its ultimate object is good governance, which involves phases of co-operation and collaboration, in a proper case.

73. As regards precision in the pleadings, it is my view that where it is apparent to the Court that the Bill of Rights has been or is threatened with contravention, to avoid to enforce the Bill of Rights on the ground that the supplicant for the orders has not set out with reasonable degree of precision that of which he complains has been infringed, and the manner in which they are alleged to be infringed where the Court can glean from the pleadings the substance of what is complained of would amount to this Court shirking from its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles and the dictates of the rule of law at the altar of procedural issues. Where there is a conflict between procedural dictates and constitutional principles especially with respect to the provisions relating to the Bill of Rights it is my view and I so hold that the latter ought to prevail over the former.

74. In the foregoing premises the preliminary objections which were raised by the Respondents herein are disallowed and I will now proceed to consider the merits of the application.

75. There were a number of issues raised which I am not prepared to delve into at this stage of the proceedings. In determining this application, the Court is not required-indeed it is forbidden- from making definite and conclusive findings of either fact or law. I will therefore refrain from making any determinations whose effect would be to prejudice the hearing of the main Petition. As **Musinga, J** (as he then was) in Petition No. 16 of 2011, Nairobi – **Centre For Rights Education and Awareness (CREAW) & 7 Others** stated:

> **"...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."**

76. The first issue for determination is therefore whether the applicant has established a *prima facie* case. A *prima facie* case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the applicant has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues.

77. In this case, it is contended that the decision by the Governor flies in the face of the Constitutional provisions in particular the national values and principles of governance set out in Article 10 of the Constitution and specifically the need for public participation, transparency and accountability in decision making. **Mumbi Ngugi, J** dealing with the appointment process in **Benson Riitho Mureithi vs. J. W. Wakhungu & 2 Others [2014] eKLR** held that:

"What does the Constitution require with regard to appointments to public office" As already observed, public officers must be appointed on the basis of the criteria set out in Chapter 6. They must also, in addition, be appointed in accordance with the national values and principles set out in Article 10…It has been conceded by Counsel for the respondents, however, that no-one knew or had any inkling that the Interested Party was going to be appointed as Chairman of the Water Services Board; and consequently, there was no opportunity for the petitioner or any other person to seek information about the appointment, or raise objections to the appointment, which objections would be expected to be considered by the Minister, and if found to be valid and sufficient to bar the appointment, the intended appointment ought not to be made...It seems to me therefore that the primary responsibility lay on the 1st respondent, and indeed on any other state officer making a similar appointment, to put in place a mechanism for recruitment or appointment of members of Boards of state corporations that would allow for public participation and consideration of the suitability and integrity of potential appointees as the Constitution now demands…It may seem that the Constitution has imposed an irksome and onerous burden on those responsible for making public appointments by requiring that they make the appointments on the basis of clear constitutional criteria; that they allow for public participation; and that those they appoint meet certain integrity and competence standards. This burden, however, is justified by our history and experience, which led the people of Kenya to include an entire chapter on leadership and integrity in the Constitution…"

78. Similarly in **David Kariuki Muigua vs. Attorney General & Another Petition No. 161 of 2011**, the Court observed as follows:

"However, it would be expected that the Minister, in making the appointments to the Tribunal, would be guided by the national values and principles set out in Article 10 of the Constitution, in particular participation of the people, equity, good governance, integrity, transparency and accountability… There is no evidence that there was a competitive process that would enable public participation in the process and show the transparency and accountability required under the Constitution, thereby giving legitimacy to the appointment of the petitioner. Like his successor, the petitioner was appointed on the basis of a Gazette Notice; the basis of the appointment, the criteria followed in appointing him and the other members of the Tribunal was, from all appearances and regrettably so, more in keeping with the old order that preceded and indeed gave impetus to the clamour for the new Constitution when public officers were appointed at the whim of the Minister or President. To uphold the appointment of the petitioner would be to give a seal of approval to the old order. It is imperative that all public appointments are made in accordance with constitutional values and principles."

79. In my view, where it is alleged that in arriving at his decision a State Officer or organ did not adhere to the relevant constitutional provisions such contention if true may well justify the filing of a constitutional petition.

80. Having considered the foregoing, it is my finding that considering the issues raised, this petition discloses *prima facie* arguable issues for trial. In other words it cannot be said that the petition is wholly frivolous or unarguable at this stage.

81. Having passed the first hurdle the second issue is whether the petitioner has satisfied the provisions of Article 23(3)(c) of the Constitution.

82. Article 23(3)(c) of the Constitution provides that in any proceedings brought under Article 22, a court may grant appropriate relief, including a conservatory order.

83. Proceedings under Article 22 of the Constitution deal with the enforcement of the Bill of Rights. Therefore a strict interpretation of Article 23(3)(c) shows that the reliefs specified thereunder are only available where a party is alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. In my view, an applicant for conservatory order under Article 23(2)(c) of the Constitution ought to bring himself or herself within the provisions of Article 22 of the Constitution by pleading and establishing on a *prima facie* basis that his right or fundamental freedom in the Bill of Rights or those of other persons have been denied, violated or infringed, or is threatened. In this case the applicant's case is hinged on violation of Article 10 of the Constitution which strictly speaking does not fall within Chapter 4 of the Constitution.

84. Whereas the Petition may well succeed on the issue whether the actions being undertaken by the Respondents are Constitutional, that *per se* does not necessarily merit the grant of the conservatory orders under Article 23(3)(c) of the Constitution.

85. This is not to say that a party seeking an order for a declaration that the Constitution has been contravened, or is threatened with contravention is necessarily undeserving of the conservatory orders under Article 23(2)(c) of the Constitution. What I am saying is that the applicant must go further and show that his allegations bring him within the provisions of Article 22 as well. This Court has of course held that in general conservatory orders are orders in rem and not in personam. However the Constitution itself gives an indicator as to when conservatory orders may be granted.

86. Whereas under Article 258(1) of the Constitution, every person has the right to institute court proceedings, claiming that the Constitution has been contravened, or is threatened with contravention, the mere fact that a person is entitled to bring such proceedings does not automatically entitle such a person to grant of conservatory orders. The person is enjoined to go further and show how the refusal to grant the said orders is likely to be prejudicial to him or her.

87. In the Privy Council Case of **Attorney General vs. Sumair Bansraj (1985) 38 WIR 286 Braithwaite J.A**. expressed himself follows:

"Now to the formula. Both remedies of an interim injunction and an Interim declaration order are excluded by the State Liability and Proceedings Act, as applied by Section 14 (2) and (3) of the Constitution and also by high judicial authority. The only judicial remedy is that of what has become to be known as the "Conservatory Order" in the strictest sense of that term. The order would direct both parties to undertake that no action of any kind to enforce their respective right will be taken until the substantive originating motion has been determined; that the status quo of the subject matter will remain

intact. The order would not then be in the nature of an injunction, … but on the other hand it would be well within the competence and jurisdiction of the High Court to "give such directions as it may consider appropriate for the purpose of securing the enforcement of … the provisions" of the Constitution…In the exercise of its discretion given under Section 14(2) of the Constitution the High Court would be required to deal expeditiously with the application, inter partes, and not ex parte and to set down the substantive motion for hearing within a week at most of the interim Conservatory Order. The substantive motion must be heard forthwith and the rights of the parties determined. In the event of an appeal priority must be given to the hearing of the appeal. I have suggested this formula because in my opinion the interpretation of the word in Section 14 (2) "subject to subsection (3) and the enactment of Section 14(3) in the 1976 Constitution must have… the effect without a doubt of taking away from the individual the redress of injunction which was open to him under the 1962 Constitution. On the other hand, however, the state has its rights too…The critical factor in cases of this kind is the exercise of the discretion of the judge who must "hold the scales of justice evenly not only between man and man but also between man and state."

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

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

89. Back home, **Musinga, J** (as he then was) in Petition No. 16 of 2011, Nairobi – **Centre for Rights Education and Awareness (CREAW) & 7 Others** stated 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 therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."

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

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

91. In **Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR** this Court expressed itself as follows:

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

92. This position was reinforced by the Supreme Court in **Gitirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Ors [2014] eKLR** where the highest Court in the land held:

"'Conservatory orders' bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the *public interest*. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the "prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success' in the applicant's case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes...The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

(i) the appeal or intended appeal is arguable and not frivolous; and that

(ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:

(iii) That it is in the public interest that the order of stay be granted.

This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through the Constitution."

93. In considering whether or not to grant conservatory order, it is my view that the principle of proportionality plays a not remote role. As was stated by **Ojwang, AJ** (as he then was) in **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589** the Court, in responding to prayers should always opt for the lower rather than the higher risk of injustice. The learned Judge expressed himself as follows:

"…Although the court is unable at this stage to say that the applicant has a prima facie case with a probability of success, the Court is quite convinced that it will cause the applicant irreparable harm if his prayers for injunctive relief are not granted; and in these circumstances, the balance of convenience lies in favour of the applicant rather than the respondent. There would be a much larger risk of injustice if the court found in favour of the defendant, than if it determined this application in favour of the applicant".

94. Dealing with the circumstances under which the Court would grant conservatory orders the Supreme Court in ***Munya's Case*** (supra) expressed itself as follows:

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

95. The Petitioner having surmounted the first hurdle by proving that he has a prima facie case, the next question is whether there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution. What amounts to real danger was dealt with by **Mwongo, J** in **Martin Nyaga Wambora vs. Speaker of The County of Assembly of Embu & 3 Others [2014] eKLR**, where expressed himself as follows:-

"To those erudite words I would only highlight the importance of demonstration of "real danger". The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention."

96. It is not in doubt that the decision by the Governor to nominate a person for appointment as a County Executive Member is not final but is subject to the decision of the Assembly which Assembly may ratify the Governor's decision or reject the same. During the process of determining the suitability of the said nominees, it is a Constitutional requirement that the public must be invited to present their views thereon.

97. Therefore without deciding with finality the issue whether or not the decision by the Governor to bypass the public in his decision to nominate the interested parties was lawful, in light of the avenue presented to the public including the Petitioner herein to challenge the suitability of the interested parties before the County Assembly, I am not satisfied that there is real danger that the Petitioner will suffer prejudice as a result of the violation or threatened violation of the Constitution.

98. It is also trite that the decision whether or not to grant conservatory orders being discretionary, the party seeking them must move the Court with alacrity and ought not to be guilty of laches. Therefore a claim for conservatory orders ought to be made promptly, timeously and without delay. This was the position adopted by this Court in **Matatu Welfare Association (Suing Through Its Registered Officials Namely & 3 Others vs. Cabinet Secretary for Transport and Infrastructure & 6 Others [2015] eKLR** where it was held that:

"a party seeking the conservatory orders must also do so as soon as the threat of violation to his rights is brought home to him. Where a party waits until the last minute to bring the application, the Court may frown upon such conduct and may decline to grant such an applicant the reliefs he or she seeks."

99. Similarly in **Robert N Gakuru & Another vs. Governor Kiambu County & 3 Others [2013] eKLR** this Court held that:

"With respect to the need to move the Court expeditiously the law acknowledges the need for speedy certainty as to the legitimacy of target activities and requires petitioners to act promptly to avoid frustrating a public body whose decision is challenged, particularly because of public interest. Therefore in order to qualify for the grant of the conservatory orders sought the application must be made promptly hence undue delay in applying is a major factor and the needs of good

administration must be borne in mind as courts cannot hold decision making bodies hostage. See Kithome vs. The District Land Adjudication & Settlement Officer Mwingi District & Others Nairobi HCMA. No. 1108 of 2004 [2006] 1 EA 116 and Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728. I therefore associate myself with the decision of Musinga, J (as he then was in Republic vs. City Council of Nairobi & Another ex parte Peter Odoyo & Another Nairobi High Court Judicial Review Case No. 25 of 2011 that decisions with financial implications must be challenged promptly failing which orders seeking to stay such decisions may not be granted even where otherwise deserved."

100. In this case, whether through the Petitioners default or not, these proceedings were commenced when the process of vetting the interested parties was on course. While that may not necessarily bar the Court from granting conservatory orders, it is certainly a factor to be taken into consideration in deciding whether or not to exercise the court's discretionary jurisdiction favourably.

101. It is therefore my view that to grant the conservatory orders in the circumstances of this case would be disproportionate to the mischief that is sought to be cured by such orders.

102. Accordingly, as the Petitioner/Applicant has failed to satisfy all the conditions necessary for the grant of conservatory orders the Motion dated 12th June, 2018 fails and is dismissed with costs to the Respondents and Interested Parties.

103. It is so ordered

Dated at Nairobi this 2nd day of July, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Machuki for the Petitioner

Mr Nthiwa for the 1st Respondent and holds brief for Mr Mutua for the interested parties

Miss Kamende for the 2nd to 4th Respondents

CA Geoffrey