Chamao & 2 others v Cabinet Secretary, Information, Communications and the Digital Economy & 2 others; Selection Panel for the Appointment of the Chairperson and Members of the Media Council of Kenya & 4 others (Interested Parties) (Constitutional Petition E486 of 2025) [2025] KEHC 14220 (KLR) (8 October 2025) (Ruling)

Neutral citation: [2025] KEHC 14220 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL PETITION E486 OF 2025

B MWAMUYE, J

OCTOBER 8, 2025

IN THE MATTER OF: ARTICLES 1(1), 2(1), 2(2), 3(1), 10, 19, 20(1), 20(2), 22(1), 23, 27, 34, 73, 201, 258 & 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: SECTIONS 6, 7(2)(B), 7(9), 7(10), AND 7(14), SECTION 8, AND SECTION 46 OF THE MEDIA COUNCIL ACT, 2013

AND

IN THE MATTER OF THE ALLEGED UNCONSTITUTIONAL AND UNLAWFUL RE-APPOINTMENT OF MEMBERS OF THE MEDIA COUNCIL OF KENYA BY THE CABINET SECRETARY FOR INFORMATION, COMMUNICATIONS AND THE DIGITAL ECONOMY

BETWEEN

ISSA ELANYI CHAMAO ..... 1ST PETITIONER

PATRICK KARANI EKIRAPA ..... 2ND PETITIONER

PAUL NGWEYWO KIRUI ..... 3RD PETITIONER

AND

THE CABINET SECRETARY, INFORMATION, COMMUNICATIONS AND THE DIGITAL ECONOMY ..... 1ST RESPONDENT

CHIEF EXECUTIVE OFFICER, MEDIA COUNCIL OF KENYA ..... 2ND RESPONDENT

THE ATTORNEY GENERAL ..... 3RD RESPONDENT

AND

SELECTION PANEL FOR THE APPOINTMENT OF THE CHAIRPERSON AND MEMBERS OF THE MEDIA COUNCIL OF KENYA INTERESTED PARTY

JOSEPH MAINA MURURI ..... INTERESTED PARTY

SUSAN KARAGO ..... INTERESTED PARTY

TIMOTHY WANYONYI CHETAMBE ..... INTERESTED PARTY

TABITHA MUTEMI ..... INTERESTED PARTY

RULING

Introduction And Background

1. The matters for determination are two competing Notices of Motion. The first is the Petitioners' Notice of Motion dated 4th August 2025, which seeks conservatory orders to suspend the implementation of two Gazette Notices and to restrain the appointed individuals from assuming office and the second is the 1st and 3rd Respondents' Notice of Motion dated 7th August 2025 which seeks to set aside the ex parte conservatory orders that were granted on 5th August 2025.

2. The background of this matter is rooted in the governance of the Media Council of Kenya (the Council), a critical statutory body established under the *Media Council Act*, 2013, whose independence is constitutionally safeguarded under Article 34(5) of *the Constitution*.

3. The factual matrix giving rise to this litigation is largely uncontested. Sometime in 2023, the Cabinet Secretary for Information, Communications and the Digital Economy (the 1st Respondent) declared vacancies in the Council's Board and constituted a Selection Panel as mandated by Section 7 of the *Media Council Act*. This Panel undertook a recruitment process, shortlisted candidates, conducted interviews, and was, by all accounts, in the final stages of its work.

4. This process was, however, interrupted by litigation in Constitutional Petitions No. E040 and E023 of 2023, which challenged the constitutionality of the Selection Panel's composition. The High Court consolidated these petitions and granted conservatory orders halting the recruitment. On 20th June 2025, the consolidated petitions were dismissed on their merits, and the conservatory orders were consequently lifted.

5. The central controversy arose on 25th July 2025. On that date, the 1st Respondent issued two Gazette Notices. The first, Gazette Notice No. 10091 of 2025, purported to appoint the 2nd to 5th Interested Parties—Joseph Maina Mururi, Susan Karago, Timothy Wanyonyi Chetambe, and Tabitha Mutemi —as the Chairperson and Members of the Council. The second, Gazette Notice No. 10092 of 2025, concurrently declared vacancies in four positions on the same Board and invited fresh Applications.

6. The Petitioners, who were applicants in the stalled 2023 recruitment process, filed the instant Petition and an Application for conservatory orders on 4th August 2025. They argued that the 1st Respondent's actions were a unilateral and illegal usurpation of the Selection Panel's statutory mandate. On 5th August 2025, this Court granted ex parte conservatory orders, staying the implementation of the impugned Gazette Notices and restraining the appointees from assuming office.

7. Aggrieved by these orders, the 1st and 3rd Respondents filed an Application on 7th August 2025 seeking to have them set aside, leading to the two competing Applications now before the Court for determination.

The Petitioners' Case

8. The Petitioners' case, as deponed in the Supporting Affidavit of Issa Elanyi Chamao and articulated in their submissions, is anchored on the principles of constitutionalism, legality, and due process. Their case can be distilled into several key propositions.

9. First, the Petitioners contend that the 1st Respondent's decision to appoint the 2nd to 5th Interested Parties via Gazette Notice No. 10091 of 2025 was a blatant violation of the statutory process prescribed by the *Media Council Act*. They assert that the 2023 Selection Panel, having expended public funds, was still legally constituted and on the verge of concluding its mandate by submitting a list of recommended candidates to the 1st Respondent as required by Section 7(9) of the Act. The 1st Respondent's act of pre-empting this process by unilaterally appointing individuals whose candidatures were still under consideration is characterized as an illegal short-circuiting of the law.

10. Second, the Petitioners argue that this action violated their legitimate expectation, and that of other applicants, that the recruitment process would be concluded lawfully and that appointments would be made from the list generated by the independent Selection Panel. They claim that the 1st Respondent's conduct was arbitrary and offended the right to fair administrative action under Article 47 of *the Constitution*.

11. The Petitioners averred that the 1st Respondent's actions were discriminatory and in violation of Article 27 of *the Constitution*. By "cherry-picking" four individuals from the pool of applicants being considered by the Selection Panel, the 1st Respondent unfairly advantaged them and disadvantaged all other qualified candidates, thereby breaching the principle of equal treatment and equal opportunity.

12. Further, the Petitioners pointed to the inherent contradiction in the 1st Respondent's actions. They argue that it is legally incoherent and administratively chaotic for the 1st Respondent to, on one hand, appoint individuals to a three-year term and, on the other hand, declare vacancies for the very same Board and initiate a fresh recruitment process. This, they contend, is a gross violation of the constitutional values of transparency, accountability, and good governance under Article 10 and a manifestly imprudent use of public resources contrary to Article 201(d).

13. Furthermore, the Petitioners asserted that the 1st Respondent's actions constitute a grave threat to the independence of the Media Council. They argue that by unilaterally appointing board members outside the statutory framework designed to ensure broad stakeholder participation, the 1st Respondent risks converting the Council into a politically beholden entity, thereby undermining the constitutional imperative of media independence under Article 34 of *the Constitution*.

The Respondents' And Interested Parties' Case

14. The Respondents and the 2nd and 5th Interested Parties have mounted a robust defense, challenging both the merits of the Petition and the propriety of the conservatory orders. Their case, as presented in the Replying Affidavits of Stephen M. Isaboke (Principal Secretary), David Omwoyo Omwoyo (CEO of the Council), and Joseph Maina Mururi, is founded on statutory interpretation, necessity, and public interest.

15. The cornerstone of their defense is the distinction between a "new appointment" and a "reappointment." They contend that the impugned action was not a new appointment but a lawful reappointment of individuals who had previously been competitively recruited and had successfully completed their first term. They rely on Section 12(1) of the *Media Council Act*, which explicitly states

that a chairperson and members "shall be eligible for reappointment for a further and final term of three years."

16. They further aver that this reappointment was not arbitrary but was based on a favourable performance evaluation conducted by the State Corporations Advisory Committee (SCAC), as required by Clause 1.12(6) of the Mwongozo Code of Governance for State Corporations. They argue that subjecting individuals eligible for reappointment to a fresh competitive process is not required by law and would be a wasteful duplication of effort and resources.

17. Concerning the stalled 2023 Selection Panel process, the Respondents argue that it had effectively collapsed and become defunct. They depone that the Panel's Chairperson had resigned, the Vice-Chair had left the country, the Secretary had retired, and other members had moved to different roles. With no report submitted and the panel's composition irreparably altered, they argue that the process was legally and practically untenable. The 1st Respondent's decision to revoke this process via Gazette Notice No. 10092 of 2025 is presented as a lawful exercise of power under Section 23 of the *Interpretation and General Provisions Act*, which allows an authority to amend or revoke a statutory instrument.

18. The Respondents place significant emphasis on the public interest and the need to avert an institutional crisis. They depone that the Council had been operating without a functional Board since October 2022, a period of over two years, which had paralysed its core regulatory functions. The reappointment of four members was, therefore, a necessary and strategic measure to immediately restore a quorum, ensure operational continuity, and comply with the constitutional mandate under Article 34(5) that the Council remains operational. They argue that the Petitioners' interpretation of the law would lead to an absurd and unconstitutional result, perpetual institutional paralysis.

19. They deny that the reappointments violate *the Constitution* by asserting that the process was transparent, merit-based, and consistent with the values of good governance under Article 10. They further argue that there was no discrimination under Article 27, as the reappointed members had already competed and succeeded in a prior inclusive process, and reappointment is a distinct legal concept. They also invoke the doctrine of administrative self-correction to justify the revocation of the flawed 2023 process.

20. Finally, they challenge the grant of the ex parte conservatory orders, alleging that the Petitioners obtained them through material non-disclosure of crucial facts, including the lawful basis for reappointment under Section 12(1), the SCAC evaluation, the defunct state of the Selection Panel, and the critical public interest in restoring the Board.

Petitioners' Submissions On Their Application

21. In their written submissions, the Petitioners argue that they have established a prima facie case with a likelihood of success, as the 1st Respondent's actions are, on their face, a clear violation of the *Media Council Act* and *the Constitution*. To buttress their argument, reliance was place on the cases of Centre for Rights Education and Awareness (CREAW) & 7 Others v Attorney General [2011] eKLR, Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR and Platinum Distillers Limited v Kenya Revenue Authority [2019] eKLR.

22. On the issue of prejudice, it was submitted that unless the orders are maintained, the illegality will be perfected, the appointees will entrench themselves in office, and the Council will be transformed into a politically beholden entity, causing irreparable harm to the media sector and the public. They argue that conservatory orders, being remedies in rem, are designed to preserve the subject matter of the dispute and uphold the Court's adjudicatory authority.

23. On public interest, the Petitioners contend that the balance tilts heavily in their favour. Relying on the decisions in Judicial Service Commission v Speaker of the National Assembly & Anorther [2013] eKLR and Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR, they submitted that the public has a paramount interest in the lawful, transparent, and independent constitution of a body as vital as the Media Council. Halting an unconstitutional process, they argue, serves a higher public interest than allowing a governance vacuum to be filled through an illegal shortcut.

24. Finally, they invoke the doctrine of proportionality, arguing that the lesser evil is to temporarily pause the impugned appointments, which can be regularized later if found lawful, rather than to allow an illegality to proceed and render the entire Petition nugatory and thus urged this Honourable Court to allow the Application as prayed.

The 1St And 2Nd Respondents' Submissions

25. The 1st and 2nd Respondents, in their skeletal submissions dated 4th September 2025, submitted that the Petitioners have failed to meet the threshold for conservatory orders. They argue that no prima facie case exists because the 1st Respondent acted within his lawful powers of reappointment under Section 12(1) of the Act, a distinct process from a fresh appointment under Section 7.

26. Relying on the case of Republic v Cabinet Secretary for Education, Science & Technology & 3 others [2014] KEHC 7654 (KLR), they assert that *the Constitution* does not require a competitive process for reappointment. They further submit that the Petitioners will suffer no irreparable prejudice, as they are not entitled to be appointed. In contrast, they contend that the public and the Council will suffer grave prejudice if the conservatory orders remain, as the Council will continue to be hamstrung without a functional Board, effectively suspending the operation of Article 34(5) of *the Constitution*.

27. On public interest, it was argued that it overwhelmingly favours setting aside the orders. They posit that the interest in having a functional media regulator far outweighs the Petitioners' interest in challenging the process. It was further argued that granting the orders would "foment and foster bad governance at MCK by lengthening and already extended governance vacuum" which would also lead to wastage of public funds.

28. The Court was urged to find that the reappointment of four MCK Board members, the revocation of the 2023 selection process and the declaration of partial vacancies was lawful, proportionate, and necessitated by governance exigencies, and therefore the petition should be dismissed with costs.

The 2Nd And 5Th Interested Parties' Submissions

29. The 2nd and 5th Interested Parties in their joint written submissions dated 25th August, 2025 contend that the Petition is without merit, based on a misapprehension of the law, and should be dismissed in its entirety.

30. The Interested Parties identify two key issues for the Court's determination: firstly, whether the Cabinet Secretary had the legal authority to reappoint them under Section 12(1) of the *Media Council Act*, 2013 and whether this violated specified constitutional provisions; and secondly, whether public interest and institutional functionality justified the reappointment.

31. On the first issue, it was submitted that Section 12(1) of the *Media Council Act* expressly permits reappointment for a final term. The Interested Parties, having been initially appointed through a competitive process and having received a favourable performance evaluation from the State Corporations Advisory Committee as per the Mwongozo Code, were lawfully and procedurally reappointed.

32. It was submitted that the Petitioners' reliance on Section 7(9) of the Act is misplaced, as the Selection Panel had not submitted any names and its process had stalled due to litigation. Relying on the decision in Republic v Principal Secretary, Ministry of Transport, Housing & Urban Development & another Ex-Parte Soweto Residents Forum CBO [2019] eKLR, it was argued that the Cabinet Secretary was therefore at liberty to act independently under Section 12(1) to avert a continued leadership vacuum that had paralyzed the Council's operations since October 2022.

33. On the second issue, it was submitted that the reappointment was a necessary executive action grounded in public interest to restore the Council's functionality and uphold the constitutional imperative under Article 34(5) of *the Constitution* for an independent media regulatory body. Counsel cited the decision in Muchiri & Another v Attorney General & 6 others; Selection Panel for Appointment of the Chairperson and Members of the Media Council of Kenya (Interested Party) [2025] to support the Cabinet Secretary's lawful exercise of discretion in such circumstances to prevent institutional paralysis, which would be contrary to the principles of good governance and the prudent use of public funds. Further reliance to support this argument was placed on the decision in John Harun Muau & 3 Others v Attorney General and 2 Others [2012] eKLR invoking the Court's duty to interpret the law in a manner that gives effect to constitutional objectives.

34. It was further submitted that the revocation of the inconclusive recruitment process and the partial reconstitution of the Council through Gazette Notice No. 10092 of 2025 was a lawful administrative measure grounded in Section 23 of the *Interpretation and General Provisions Act* (Cap. 2), which provides that the authority to make a statutory instrument includes the power to amend, vary or revoke it. It was thus argued that the Cabinet Secretary's action was not only legally permissible but also necessary to avert an institutional crisis, restore continuity, and safeguard the constitutional imperatives under Article 34(5). They urge the Court to dismiss the Petition to avert what they term "judicial micro-management" of lawful executive discretion.

The 3Rd And 4Th Interested Parties' Submissions

35. The 3rd and 4th Interested Parties, in their joint submissions dated 25th August 2025, vigorously defend the legality of their reappointment. The Interested Parties contend that the Petition and Application is devoid of merit, based on a fundamental misapprehension of the law, and constitutes an abuse of the court process. They urge the Court to dismiss the Petition and allow their Application to set aside the conservatory orders.

36. The Interested Parties identify four key issues for the Court's determination: firstly, whether the decision of the Cabinet Secretary to reappoint them was lawful and constitutional; secondly, whether the revocation of the 2023 recruitment process was valid in law; thirdly, whether the Petition and Application dated 4th August 2025 should be allowed; and finally, the issue of costs.

37. On the first issue, it is submitted that the Cabinet Secretary's decision was perfectly lawful. Section 12(1) of the *Media Council Act* expressly permits a member to be eligible for reappointment for a further and final term. The Interested Parties, having been originally recruited through a competitive and transparent process for their first term and having served diligently without complaint, were eligible for this reappointment. The Act does not mandate a fresh vetting process for a reappointment. The Cabinet Secretary acted within his lawful administrative discretion to cure a governance vacuum that had left the Council non-functional since October 2022. They relied on the decision in Republic v Wavinya Ndeti & 4 others; Gideon Ngewa & another (Ex parte); Wiper Democratic Movement Kenya (Interested Party) [2022] KEHC 12434 (KLR) to support the above arguments.

38. On the second issue, it is argued that the revocation of the stalled 2023 recruitment process via Gazette Notice No. 10092 of 2025 was valid. This action was anchored in the doctrine of administrative self-correction under Section 23 of the *Interpretation and General Provisions Act*. The 1st Respondent invoked this doctrine in the public interest to correct a process that had been inhibited by court orders and to restore the Council's capacity to function, a power affirmed by administrative law principles.

39. Regarding the third issue, it is submitted that the Petition should not be allowed. The Petitioners have failed to demonstrate any illegality, irrationality, or procedural impropriety in the reappointment process. The actions of the 1st Respondent were a lawful, reasonable, and necessary exercise of power in the public interest to end the institutional paralysis of the Media Council. They thus urged this Honourable Court to dismiss the Petition and Application with costs.

Issues For Determination

40. From the pleadings, affidavits, and submissions of the parties, the following issues fall for determination in these interlocutory Applications:

    i. Whether the ex parte conservatory orders issued on 5th August 2025 should be set aside on account of material non-disclosure.

    ii. Whether the Petitioners have met the legal threshold for the grant of conservatory orders pending the hearing and determination of the main Petition.

Analysis And Determination

i. Whether the ex parte conservatory orders should be set aside on account of material non-disclosure.

41. The principle governing ex parte Applications is one of utmost good faith. In the case of The King Vs The General Commissioners for the purposes of Income Tax Acts for the District of Kensington [1917] 1 K.B. 486, the court famously held that an applicant seeking an ex parte order must make a full and frank disclosure of all material facts. A material fact is any fact which could reasonably be taken into account by the judge in deciding whether to grant the Application and on what terms. This principle has been consistently applied in Kenyan jurisprudence. In setting the above principle, Warrington LJ had the following to the say at page 509;

> "It is perfectly well settled that a person who makes an ex parte Application to the Court that is to say, in the absence of the person who will be affected by that which the Court is asked to do is under an obligation to the Court to make the fullest disclosure possible of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the said proceedings, and he will be deprived of any advantage he may have already obtained by means of an order which has thus wrongly been obtained."

42. The Respondents allege that the Petitioners failed to disclose the true legal nature of the action as a "reappointment" under Section 12(1) of the *Media Council Act*, the favourable SCAC evaluation, the defunct state of the 2023 Selection Panel, and the critical governance vacuum at the Council. The Court of Appeal in Uhuru Highway development Limited –V- Central Bank of Kenya & others [1995] eKLR emphasized the consequences of such non-disclosure, noting that an ex parte order obtained by an applicant who has failed to make the fullest possible disclosure is ipso facto liable to be discharged.

43. Upon evaluation, the Petitioners' narrative presented a partial picture. While they correctly highlighted the existence of the Selection Panel, they framed the 1st Respondent's actions solely as an illegal "new appointment," without engaging with the statutory defense of "reappointment" and its associated legal framework. The failure to bring this central, competing legal argument to the Court's attention is a material omission. As was stated in Giela vs. Cassman Brown & Co. Ltd [1973] EA 358, a party must disclose all facts which reasonably could be taken into account by the Judge, not merely those which he believes to be material. The omission of what could have been a ground of severe institutional paralysis that could have potentially resulted in non-issuance of the ex parte orders is a grave matter; and that mischaracterized fact is also a key factor in the public interest calculus, which further compounds this failure.

44. Consequently, based on the long-standing principles in the above cited authorities, the Court finds that the ex parte conservatory orders issued on 5th August 2025 were procured through material non-disclosure and must be set aside. The Court will, however, proceed to consider the Application for conservatory orders afresh on an inter partes basis.

ii. Whether the Petitioners have established a prima facie case with a likelihood of success.

45. The threshold for a prima facie case was elaborately discussed in Mrao Ltd v First American Bank of Kenya Ltd & 2 others (supra), where the Court defined it as follows;

> " So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

46. In the constitutional context, the Court in Centre For Rights Education and Awareness (CREAW) & 7 others v Attorney General [2011] KEHC 4297 (KLR) held that an applicant must demonstrate a prima facie case of a violation of rights.

47. The Petitioners' case raises several arguable violations. First, the statutory process under Section 7 of the *Media Council Act* was abruptly circumvented. The Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] KESC 53 (KLR) emphasized that where a statute provides a specific methodology for doing a thing, that methodology must be strictly followed. The 1st Respondent's act of bypassing a duly constituted Selection Panel that was actively concluding its work presents a strong, arguable case of a departure from the prescribed statutory process.

48. Second, the Petitioners have raised a legitimate expectation. As has been observed time and again, legitimate expectation is a doctrine that is well recognized and established in administrative law. In Communication Commission of Kenya & 5 Others v. Royal Media Services & 5 Others, SC Petition Nos. 14, 14A, 14B & 14C of 2014, the Supreme Court stated that legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfill. For an expectation to be legitimate, therefore it must be founded upon a promise or practice by a public authority that is expected to fulfill the expectation.

49. The decision of the Supreme Court that I have just cited stresses that legitimate expectation involves a representation that must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate. Other important aspects of the doctrine is that the law does not protect every expectation save only those which are legitimate (South African Veterinary Council v. Szymanski2003 ZASCA 11); clear statutory words override any contrary expectation

however founded (R. v. DPP ex parte Kebilene [199] 4 All ER 801 and Republic v. Nairobi City County & Another, ex parte Wainaina Kigathi Mungai, HC. JR. Misc. C. No 356 of 2013; the representation must be one which the decision-maker can competently and lawfully make without which the reliance cannot be legitimate (Hauptfleisch v. Caledon Divisional Council [1963] (4) SA 53); legitimate expectation does not arise when it is made ultra vires the decision-maker's powers (Rowland v. Environment Agency(2003) EWCA Civ. 1885; and a public authority which has made a representation which it has no power to make is not precluded from asserting the correct position which is within its power to make (Republic v. Kenya Revenue Authority, ex parte Aberdare Freight Services Ltd [2004] 2 KLR 530).

50. The Petitioners, as participants in a publicly funded recruitment process that was nearing completion, had a legitimate expectation, procedurally, that the process would be concluded lawfully and that appointments would be made based on its outcome. The 1st Respondent's unilateral action appears to frustrate this expectation without any apparent justification, raising a serious arguable issue.

51. The Respondents' defense, while relying on Section 12(1), does not extinguish these arguable points. The legal question of whether the power of reappointment can be exercised independently of an ongoing, near-complete selection process initiated under Section 7 is a complex one that requires a full hearing. Similarly, the contradictory act of declaring vacancies for the same Board creates an arguable case of administrative unreasonableness, a concept central to the principles of fair administrative action under Article 47.

52. Therefore, the Court finds that the Petitioners have successfully demonstrated a prima facie case with a likelihood of success, as they have raised serious and arguable issues regarding the legality, procedural fairness, and reasonableness of the 1st Respondent's action.

Whether the Petitioners would suffer irreparable harm.

53. The concept of irreparable harm in public law is not confined to personal, quantifiable loss. The Supreme Court in Munya v Kithinji & 2 others [2014] KESC 30 (KLR) redefined the concept in the context of conservatory orders, noting that they bear a "decided public-law connotation" and are meant to facilitate the orderly functioning of public agencies and uphold the Court's adjudicatory authority.

54. If the conservatory orders are not granted and the appointees assume office, they will commence making binding decisions and expending public funds. Should this Court later find their appointment unconstitutional, unravelling their actions would be practically impossible. This would render the main Petition nugatory. The High Court in Board of Management of Uhuru Secondary School vs. City County Director of Education & 2 others [2015] eKLR, citing with approval the decision in Martin Nyaga Wambora v Speaker of the County Assembly of Embu & 3 Others CP No. 7 of 2014, underscored that a key consideration is whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.

55. The harm to be suffered is thus not merely personal to the Petitioners but is a public harm: the erosion of a lawful and transparent appointment process for a critical constitutional body. This constitutes irreparable harm that cannot be adequately remedied by damages or a subsequent court declaration. The preservation of the integrity of the appointment process is a public good that warrants protection through conservatory measures.

Balance of Convenience and Public Interest

56. This factor requires the Court to weigh the competing interests and potential injury to the parties and the public. The Respondents argue that the public interest lies in ending the Council's institutional

paralysis. This is a legitimate concern. However, the Supreme Court in the Munya case(supra) unequivocally stated that conservatory orders should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes.

57. There are two competing public interests at play. The first is the interest in having a functional Media Council. The second, and in the Court's view, the weightier one, is the public interest in ensuring that such a cornerstone institution of democracy is constituted in strict adherence to the law, thereby safeguarding its independence and integrity. The Court in Judicial Service Commission v Speaker of the National Assembly & Another [2013] KEHC 911 (KLR) affirmed that conservatory orders are "remedies in rem" meant to preserve a particular state of affairs in the public interest. In affirming, the court thus stated;

> "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."

58. Allowing an allegedly unlawful board to be entrenched poses a far greater risk to the public interest than maintaining a temporary vacuum. A vacuum can be filled through a lawful process; the loss of institutional legitimacy and the precedent of executive overreach are much harder to repair. The balance of convenience, therefore, tilts in favour of preserving the status quo to allow for a definitive determination on the constitutionality of the appointment process.

The Doctrine of Proportionality

59. The doctrine of proportionality is a key tool in constitutional adjudication. It requires that a measure adopted should be proportionate to its intended objective. In Jacqueline Okuta & another v Attorney General & 2 others [2017] KEHC 8382 (KLR), the High Court while quoting Leading Authors G. Huscroft, B Miller and G Webber (eds) on the doctrine, elaborated that the court must assess as follows;

> "According to the above authors, four sub-components of proportionality, a limitation of a constitutional right will be constitutionally permissible if (i) it is designated for a proper purpose; (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose; (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally (iv) there needs to be a proper relation ("proportionality stricto sensu" or "balancing") between the importance of achieving the proper purpose and the special importance of preventing the limitation on the constitutional right.'"

60. Weighing these factors, the grant of conservatory orders is a proportionate response. It is suitable and necessary to prevent the Petition from being rendered nugatory. The benefit of upholding constitutional processes and ensuring a meaningful hearing far outweighs the temporary inconvenience of a continued, albeit regrettable, governance vacuum. To deny the orders would be to allow a potential illegality to be perfected, which is a disproportionate outcome. This aligns with the reasoning in Total Kenya Limited v Emmanuel Ndithya [2021] KEHC 2391 (KLR), where the court invoked the principle of opting for the lower risk of injustice.

61. The two competing interests of the parties can be balanced by the deserved grant of conservatory orders pending the hearing and determination of the Petition on one hand, and the expedited hearing and determination of that Petition on the other. This Court shall issue Directions separately geared towards a judgment date within the month of January 2026.

62. In summary, the Court finds that while the ex parte orders were improperly obtained due to material non-disclosure, the Petitioners have, upon a full inter partes hearing, met the requisite threshold for the grant of conservatory orders.

63. Under Rule 26 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013; costs are awarded at the discretion of the Court. While this Court ordinarily leaves the question of interlocutory cost to the determination of the cause, in the present case there has been a clear material non-disclosure that necessitated the 1st and 3rd Respondents' Notice of Motion Application dated 7th August 2025. In the circumstances, the 1st and 3rd Respondents are deserving of costs for that Application, which shall be borne by the Petitioners.

64. Conversely, having obtained ex-parte conservatory orders on the basis of material non-disclosure, the Petitioners cannot then justly be awarded any costs with respect to their Notice of Motion Application dated 4th August 2025 at any stage in these proceedings.

65. Consequently, the following orders are hereby issued:

    a. The 1st and 3rd Respondents' Notice of Motion Application dated 7th August 2025 is hereby allowed to the extent that the ex parte conservatory orders issued on 5th August 2025 are hereby set aside; with costs to the 1st and 3rd Respondents, which shall be borne by the Petitioners, and which are assessed at Kenya Shillings One Hundred and Fifty Thousand, payable in full within the next forty-five days from the date hereof;

    b. The Petitioners' Notice of Motion Application dated 4th August 2025 is hereby allowed in the following terms:

        i. A conservatory order be and is hereby issued staying the implementation or further implementation of Kenya Gazette Notice No. 10091 of 2025 and Kenya Gazette Notice No. 10092 of 2025, both dated 25th July 2025;

        ii. A conservatory order be and is hereby issued restraining Joseph Maina Muiruri, Susan Karago, Timothy Wanyonyi Chetambe, and Tabitha Mutemi (the 2nd to 5th Interested Parties) from being sworn-in, taking an oath or affirmation, or performing any functions of the Offices of Chairperson and/or Board Members of the Media Council of Kenya; and

        iii. The conservatory orders issued in b(i) and b(ii) above shall lapse at end of day 22nd January 2026 unless otherwise extended; AND

    c. There shall be no costs attributable to the Petitioners' Notice of Motion Application dated 4th August 2025.

    Orders accordingly.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 8TH DAY OF OCTOBER 2025.

BAHATI MWAMUYE

JUDGE

In the presence of: -

Counsel for the Petitioners – Mr. Zaachary Kibiti h/b Mr. Peter Wanyama

Counsel for the Respondents –Mr. Marwa

Counsel for the 2nd and 5th Interested Parties- Mr. Mutua h/b Mr. Miller

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