

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS - CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.E632 OF 2025**

IN THE MATTER OF: CONTRAVENTION AND ALLEGED CONTRAVENTION OF  
THE CONSTITUTION UNDER ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 47, 73, 232,  
238,

239, 241, 249 AND 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTION 28 OF THE KENYA DEFENSE FORCES ACT AND  
IN THE MATTER OF: THE CONSTITUTIONAL OBLIGATION OF THE MINISTRY OF  
DEFENCE AND KENYA DEFENCE FORCES TO CONDUCT RECRUITMENT IN  
ACCORDANCE WITH THE PRINCIPLES OF EQUITY, FAIRNESS, EQUALITY AND  
NON-DISCRIMINATION AS ENSHRINED IN THE CONSTITUTION

**BETWEEN**

HON. MARK MURIITHI MWENJE.....1ST PETITIONER  
SEN. EDWIN SIFUNA.....2ND PETITIONER  
HON. TIMOTHY WANYONYI WETANGULA.....3RD PETITIONER  
HON. BEATRICE KADEVERESIA ELACHI.....4TH PETITIONER  
HON. JOHN KIARIE WAWERU.....5TH PETITIONER  
HON. PHELIX ODIWUOR KHODHE.....6TH PETITIONER  
HON. PETER OCHIENG ORERO.....7TH PETITIONER

HON. AUGUSTINE KAMANDE MWAFFRIKA.....	8TH PETITIONER
HON. RONALD KAMWIKO KARARI.....	9TH PETITIONER
HON. TOM JOSEPH FRANCIS KAJWANG’.....	10TH PETITIONER
HON. JULIUS MUSILI MAWATHE.....	11TH PETITIONER
HON. JAMES MWANGI GAKUYA.....	12TH PETITIONER
HON. MEJJADONK BENJAMIN GATHIRU.....	13TH PETITIONER
HON. BABU OWINO PAUL ONGILI.....	14TH PETITIONER
HON. GEORGE ALADWA OMWERA.....	15TH PETITIONER
HON. AMOS MWAGO.....	16TH PETITIONER
HON. ABDI YUSUF HASSAN.....	17TH PETITIONER
HON. ANTHONY TOM OLUOCH.....	18TH PETITIONER
HON. ESTHER PASSARIS.....	19TH PETITIONER

**AND**

CABINET SECRETARY FOR DEFENCE.....	1ST RESPONDENT
PERMANENT SECRETARY, MINISTRY OF DEFENCE.....	2ND RESPONDENT
THE ATTORNEY GENERAL.....	3RD RESPONDENT

**RULING**

*(On the Petitioners/Applicants’ Notice of Motion Application dated 30<sup>th</sup> September, 2025)*

1. Before the Court is the Petitioners/Applicants’ Notice of Motion Application dated 30<sup>th</sup> September 2025. The Application, brought under Articles 22, 23, 165 of the Constitution, Rules 23 & 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, and

all enabling provisions of the law) seeks the following orders, verbatim:

“

- i. **THAT** the Application and Petition be certified as urgent and heard *ex parte* in the first instance.
- ii. **THAT** pending the hearing and determination of this Application *inter partes*, a conservatory order be issued restraining the Respondents, whether by themselves, their officers, servants, agents or any person acting under their authority, from proceeding with or in any way conducting the recruitment of the Kenya Defence Forces personnel/officers pursuant to the notice dated 14<sup>th</sup> September 2025.
- iii. **THAT** pending the hearing and determination of this Petition, a conservatory order be issued restraining the Respondents, whether by themselves, their officers, servants, agents or any person acting under their authority, from proceeding with or in any way conducting the recruitment of the Kenya Defence Forces personnel/officers pursuant to the notice dated 14<sup>th</sup> September 2025.
- iv. **THAT** the costs of this application be in the cause.
- v. Any other orders that this Honourable Court may deem just and fit to grant.”

2. The Petitioners/Applicants' Notice of Motion Application dated 30<sup>th</sup> September 2025 was supported by the annexed affidavit of the 1<sup>st</sup> Petitioner, which Supporting Affidavit was also dated 30<sup>th</sup> September 2025.

3. The Application and the Supporting Affidavit contend that:

- a) On 14<sup>th</sup> September 2025, the Respondents through the Ministry of Defence and ostensibly through the 2<sup>nd</sup> Respondent herein, widely advertised through print and electronic media that a Kenya Defence Forces recruitment exercise for General Service Officer (GSO) Cadets (Regular and Graduate), Specialist Officers, General Duty Recruits, Tradesmen/women and Defence Forces Constables would take place across all counties of the Republic in the month of October 2025;
- b) The Petitioners/Applicants jointly issued a complaint/demand letter to the 1<sup>st</sup> Respondent raising substantial constitutional questions as to whether the recruitment of the Kenya Defence Forces as currently proposed complies with Articles 10, 27, 73, and 232 of the Constitution on equity, fairness, equality, transparency and non-discrimination in public service recruitment;
- c) The Respondents' failure to accord the potential recruits from Nairobi with the same opportunities to access decentralized recruitment centres as the other potential recruits in the other forty-six (46) Counties amounts to discrimination/unequal treatment as:
  - i. There is a distinction, whether intentional or not, by the Respondents.
  - ii. The distinction is based on grounds relating to personal characteristics of the individual or group, the group being the potential recruits residing in the county of Nairobi.
  - iii. The distinction has the effect of imposing burdens, obligations

or disadvantages on potential recruits from Nairobi County not imposed upon the potential recruits from the other forty-six (46) counties, or which withholds or limits access to opportunities, benefits and advantages the potential recruits from the other forty- six (46) counties.

- d) The Ministry of Defence published an advertisement indicating that the KDF Recruiting Teams, comprising the Kenya Army, Kenya Air Force, and Kenya Navy, would recruit General Duty Recruits and Defence Forces Constables at the designated recruitment centres set out in the published itinerary/notice;
- e) The recruitment itinerary published in September 2025 consolidates recruitment centres for over a dozen constituencies in Nairobi County into three (3) locations; Nyayo Stadium, Moi International Sports Centre (Kasarani), and Jamhuri Grounds. Whereas in other counties, recruitment centres are decentralized and designated at the sub-county level;
- f) Nairobi City County, with a metropolitan population of more than 5.7 million persons, accounting for 9.5% of Kenya's population, has unique demographic and logistical realities. Consolidating its 17 constituencies into a handful of recruitment centres is inequitable, discriminatory, and disproportionate when compared to recruitment arrangements in other counties;
- g) The impugned notice/itinerary creates a situation where there is a failure to treat all persons/potential recruits within the 47 Counties equally, as no reasonable distinction could be found between the

recruits in the County of Nairobi and other counties with major metropolitan centres such as Nakuru, Kiambu, Eldoret, Kisumu and Mombasa Counties, whose headquarters and administrative units have significant cosmopolitan populations like the County of Nairobi;

- h) The impugned recruitment plan offends the constitutional rights to equality and non- discrimination under Article 27, the principles of equity and inclusivity under Article 10, and the requirement for equitable, fair, and transparent public service recruitment under Articles 73 and 232 of the Constitution;
- i) Unless the conservatory orders sought are granted, the recruitment exercise will proceed on the basis of a discriminatory and constitutionally flawed itinerary/notice, occasioning irreparable prejudice to thousands of eligible young persons in Nairobi County, and rendering the Petition nugatory;
- j) The conservatory orders sought are necessary to preserve the subject matter of this Petition, safeguard public confidence in the recruitment process, and ensure that the Constitution is not violated through an inequitable allocation of recruitment opportunities;
- k) It is in the interest of justice that this matter be certified urgent, heard on a priority basis, and conservatory orders issued as prayed in the accompanying Notice of Motion to prevent imminent constitutional infringement;
- l) The Respondents, and the members of the public who are potential recruits in the 47 counties, will not be prejudiced in any way if the orders in this application are granted and conservatory orders issued

to enable this court to interrogate the constitutionality of the Respondents' collective decision as the Defence Council to provide the residents of the county of Nairobi with a different and skewed recruitment formula;

m) On the contrary, the potential recruits from the County of Nairobi seeking recruitment into the Kenya Defence Forces will be prejudiced if the orders sought herein are not granted as the recruitment is slated for 13/10/2025; and

n) It is in the interests of justice and fairness that this Court do grant the orders sought in the Application.

4. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents entered appearance as did the 3<sup>rd</sup> Respondent. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed and served a Replying Affidavit dated 6<sup>th</sup> October 2025 and deponed by Colonel Daniel Kiama, the Colonel Personnel at the Ministry of Defence. That Replying Affidavit, canvassing both the Application as well as the Petition, opposes the grant of the conservatory orders sought by the Petitioners/Applicants.

5. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are in opposition to the grant of the interlocutory reliefs sought. That the impugned advertisement and recruitment process is lawful and does not violate either the Constitution or statute, the impugned advertisement and recruitment process are identical in substance within the Nairobi City County recruitment to previous recruitments, and the Petitioners/Applicants' Notice of Motion Application does not meet the legal threshold for the grant of

conservatory orders.

6. The 3<sup>rd</sup> Respondent also entered appearance and it opposed the Application vide Grounds of Opposition dated 6<sup>th</sup> October 2025. The 3<sup>rd</sup> Respondent argues that the Petitioners/Applicants' Notice of Motion Application does not meet the legal threshold for the grant of conservatory orders and it also has not rebutted the applicability of the doctrine of presumption of legality of governmental action in the present case. The Attorney-General also raised a jurisdictional challenge in its Grounds of Opposition, contending that matters concerning recruitment fall within the jurisdiction of the Employment and Labour Relations Court and not the High Court.
7. The Court directed that the Application be canvassed by way of written submissions, with hearing of the Application being by way of highlighting of written submissions.
8. In support of their Application, the Petitioners/Applicants filed and served the Petitioners/Applicants' Written Submissions dated 3<sup>rd</sup> October 2025, the Petitioners/Applicants' Further Written Submissions dated 7<sup>th</sup> October 2025, and the Petitioners/Applicants' List and Bundle of Authorities dated 7<sup>th</sup> October 2025.
9. On their part, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed and served the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Written Submissions dated 6<sup>th</sup> October 2025 and

accompanying authorities in furtherance of their position.

10. The 3<sup>rd</sup> Respondent filed and served the 3<sup>rd</sup> Respondents' Written Submissions dated 7<sup>th</sup> October 2025 in support of their Grounds of Opposition.

11. The Application was heard by way of highlighting of written submissions on 8<sup>th</sup> October 2025. The parties were in agreement on the issues for determination in this Ruling; and they have largely cited the same authorities or authorities articulating the same or similar points of law in support of their relative positions and in opposition of the positions being taken by the parties on the opposite side of the matter.

12. The 3<sup>rd</sup> Respondent's jurisdictional challenge in its Grounds of Opposition, contending that matters concerning recruitment fall within the jurisdiction of the Employment and Labour Relations Court and not the High Court was not pursued in its written submissions. However, for good order the same shall nonetheless be considered by this Court in this Ruling.

13. From the Application, the Affidavits, and the Written Submissions it emerges that the issues for determination are as follows:

- a) Whether this Court has jurisdiction to hear and determine the Application and the Petition or whether the same is a matter for the Employment and Labour Relations Court;

- b) Whether the Petitioners/Applicants have demonstrated a prima facie case with a likelihood of success;
- c) Whether the Petition would be rendered nugatory if the conservatory orders sought were denied and were not issued to cover the hearing and determination of the Petition and the Applicants and Other Persons would suffer an irreversible and irreparable prejudice if the Application did not succeed;
- d) Where does the Public Interest lie; and
- e) Costs.

**Whether this Court has jurisdiction to hear and determine the Application and the Petition or whether the same is a matter for the Employment and Labour Relations Court**

14. The 3<sup>rd</sup> Respondent's jurisdictional challenge in its Grounds of Opposition, contending that matters concerning recruitment fall within the jurisdiction of the Employment and Labour Relations Court and not the High Court was not pursued in its written submissions. At the highlighting of written submissions, Counsel for the Petitioners and Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were in agreement that the Employment and Labour Relations Court (ELRC) does not have jurisdiction over pre-employment disputes as no employer-employee relationship exists at that stage. To their mind, the High Court and not the ELRC has the requisite jurisdiction to hear and determine the matters in dispute before this Court.

15. That is undoubtedly the correct position in law. The Court of Appeal in ***Moi Teaching and Referral Hospital & 3 others v Gikenyi B & 152 others*** [2025] KECA 937 (KLR) (23 May 2025) (Judgment) observed that while the Employment and Labour Relations Court (ELRC) has exclusive jurisdiction over employer-employee disputes it does not have jurisdiction over pre-employment disputes, as no employer-employee relationship exists before a contract is formed. The Court emphasized allegations of constitutional breaches in public recruitment processes are not in the nature of an employment dispute, but rather a wider constitutional one that falls squarely within the High Court's jurisdiction and not that of the Employment and Labour Relations Court.

16. Consequently, I find that the High Court, and not the Employment and Labour Relations Court, has the requisite jurisdiction to hear and determine the Petition herein and the pending interlocutory application.

**Whether the Petitioners/Applicants have demonstrated a prima facie case with a likelihood of success**

17. In support of their contention that they have demonstrated a prima facie case with a likelihood of success, the Petitioners/Applicants cited various leading authorities on this limb, including the seminal case of ***Mrao vs. First American Bank of Kenya Limited & 2 Others*** (2003) KLR 125. The Petitioners/Applicants reproduced the key passage from that authority,

which states:

**“ ... In a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case 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 later.”**

18. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents argued that the Petitioners/Applicants have not established a prima facie case. They contended that the Petitioners/Applicants have not demonstrated that they have a strong claim with a probability of success, and the Application also falls short of the test set out in the celebrated case of **Anarita Karimi Njeru v Republic (1976-1980) KLT 1272**.

19. The 3<sup>rd</sup> Respondent concurred with the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, and added that the Petitioners/Applicants have not demonstrated a *prima facie* case as they have not shown how the 1<sup>st</sup> and 2<sup>nd</sup> Respondent wrongly exercised their discretion on how to conduct the impugned recruitment exercise.

20. It is the finding of this Court that the applicable legal standard for considering whether a prima facie case has been established in a constitutional petition is whether or not the petition in question raises arguable or triable issues of a nature that calls for response or rebuttal from the party or parties on the opposite side of the dispute; and which arguable or triable issues have a

likelihood of success. Put another way, the arguable or triable issues raised in the petition must be of a nature that, if the party or parties on the opposite side of the dispute failed to respond and rebut the position advanced in the petition, the petition in question would have a likelihood of succeeding. That likelihood cannot be remote, nor can it be far removed from the natural progression of the arguments advanced by a petitioner.

21. I must make clear from the outset that in determining the question of *prima facie* case at the interlocutory stage the Court must ensure that it does not delve into the relative merits or demerits of the contested legal and factual positions at issue in the Petition. The role of the Judge is to weigh those contested legal and factual positions to determine if on the face of it the petition raises issues that should be canvassed at full hearing of the petition rather than being dismissed at the preliminary stages, and the petition has a likelihood of success if the matter were to proceed to finality.

22. It is clear that the Petition herein raises arguable and triable issues that require hearing and determination post the interlocutory stage. This is not to say that those arguable and triable issues are bound to succeed; but they most certainly are of a nature and a weight that make them fit and proper for full hearing and determination. It is also clear that the likelihood of success, while not guaranteed, is also not remote so as to defeat the essence of the characterization of a *prima facie* case with a likelihood success.

23. Accordingly, it is the finding of this Court that the Petitioners/Applicants

have demonstrated a prima facie case with a likelihood of success.

**Whether the Petition would be rendered nugatory if the conservatory orders sought were denied and were not issued to cover the hearing and determination of the Petition and the Applicants and Other Persons would suffer an irreversible and irreparable prejudice if the Application did not succeed**

24. In determining this limb, I begin by underscoring that each Petition is unique and must be considered based on the specific facts, allegations, and circumstances at issue in that particular case. The failure to grant conservatory orders may render one petition concerning public recruitments likely nugatory but not another. A uniform, robotic, or formulaic approach to the question of a petition potentially being rendered nugatory does not take into account differential backgrounds and scenarios.

25. In the present case, the Petitioners/Applicants have not satisfied this Court that the Petition would likely be rendered nugatory and academic if the interim orders sought are not granted pending the full hearing and determination of the Petition herein.

26. This Court is satisfied that there exists adequate reliefs within our legal order that can be issued by this Court in the event that the Petition herein were to succeed. Tying this to the second aspect of whether the Applicants and Other Persons would suffer an irreversible and irreparable prejudice if the Application does not succeed, I am equally satisfied that those

adequate reliefs that exist within our legal order that can be issued by this Court in the event that the Petition herein were to succeed mean that any prejudice or harm cannot then be properly said to be irreversible or irreparable.

27. Consequently, it is the finding of this Court that the Application has not succeeded with regard to this limb.

### **Where does the Public Interest lie?**

28.\_The Petitioners/Applicants argue that the public interest overwhelming lies in maintaining the sanctity and vitality of the Constitution through the grant of conservatory orders pending the full hearing and determination of the Petition. The Petitioners/Applicants drew the gaze of this Court to the dicta of **Mrima J** in the case of ***Law Society of Kenya v Attorney General another [2020 KEHC 1702(KLR)]*** wherein the Learned Judge held that there can be no greater public interest than upholding the Constitution and the law.

29.The Petitioners/Applicants buttressed this argument by linking it to the fact that they have established a prima facie case with a likelihood of success.

30. Unsurprisingly, the Respondents took an opposite view. To their minds, the public interest does not favour what they termed a disproportionate

order, whereby an alleged and denied unconstitutionality in one of our nation's forty-seven counties results in the halting of a recruitment exercise in all the other forty-six counties as well as in the subject county.

31. The Respondents also argued that the national security imperative of Kenya Defence Forces recruitment is the overwhelming public interest concern that is before the Court.

32. I wholeheartedly concur with the dicta of **Mrima J** cited above. There undeniably can be no greater public interest than upholding the Constitution and statute law. The challenge that the Petitioners/Applicants have been unable to surmount is that national security, the rights of the persons who seek to participate in the recruitments in the other forty-six counties, and need to encourage constitutional compliance are all aspects of the same public interest.

33. The Petitioners/Applicants do not fault the recruitment exercise as it is occurring or set to occur in the other forty-six counties. It must then be taken that the same are being conducted in a constitutionally and statutorily compliant manner. With that in mind, would it encourage and foster constitutional and statutory compliance to halt those exercises in the non-contested counties? To my mind it would not.

34. The public interest would be significantly compromised if public authorities were placed in a position where alleged non-compliance with the Constitution and statute at the interlocutory stage in one of forty-

seven counties has the same effect as having non-compliance in all forty-seven counties, that is, a halting of recruitment in all counties on the basis of allegations of non-compliance in one county.

35. The public interest is also clearly in favour of a recruitment exercise that is geared towards bolstering the security and defence capabilities of our nation proceeding as scheduled and in the manner that has been designed, pending the full hearing and determination of the Petition.

36. It was incumbent on the Petitioners/Applicants to demonstrate to the required standard that the grant of the orders they are seeking and as they have framed them would not imperil Kenya's national security. They did not do so.

37. The Petitioners/Applicants only stated that Kenya is currently not at war, and thus the recruitment exercise can be halted for the short time that it would take to hear and determine the Petition.

38. The famous Latin adage, "*Si vis pacem, para bellum*" which translates in English as "*If you want peace, prepare for war*" was coined by Publius Flavius Vegetius Renatus over a millennia and half ago as a constant reminder that a strong military during peacetime deters potential aggressors and ensures that a nation is always capable of adequately responding to threats to its security and sovereignty.

39. At this interlocutory stage, and absent a legally satisfactory counter, the public interest in maintaining a state of capacity and readiness that

allows Kenya to meet the challenges of the twenty-first century security and defence environment and maintain the establishing ethos articulated in Article 239(2) of the Constitution cannot be gainsaid. This Court, while capable of halting the recruitment exercise even at this interlocutory stage, can only do so where the various aspect of the public interest have been met; which in the present Application they have not been met.

40. The Court wishes to underscore that this is not a finding on what the public interest would entail at the judgment stage. The findings above on public interest are limited purely to the question of the grant of conservatory orders pending the hearing and determination of the Petition, and not how the public interest would operate at the latter stage of judgement or within that judgment.

41. It is the finding of this Court that the Petitioners/Applicants have not met the requisite threshold under this limb and that the public interest favours the orders being sought being declined at this interlocutory stage.

### **Costs**

42. At this interlocutory stage, the Court finds no compelling reason to make a finding and an award of costs. The same shall be reserved for the judgment in this matter.

### **Disposition and Orders**

43. Consequently, and for the foregoing reasons, this Court issues the following orders:

- a. The Petitioners/Applicant's Notice of Motion Application dated 30/09/2025 is dismissed with costs in the cause; and
- b. Directions on the hearing and determination of the Petition shall be issued by this Court on 11<sup>th</sup> November 2025 at 9:00 am virtually.

**DATED, SIGNED, AND DELIVERED VIA EMAIL BY CONSENT OF PARTIES  
ON THIS 16<sup>th</sup> DAY OF OCTOBER, 2025.**

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**BAHATI MWAMUYE  
JUDGE**