

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
MILIMANI LAW COURTS
PETITION NO. E 577 OF 2025

IN THE MATTER OF THE ALLGED CONTRAVENTION OF: ARTICLES 1(1), 1(20, 1(3), 291), 2(2), 391), 6, 10, 154 AND 227 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT & DISPOSALS ACT, CHAPTER 312 C OF THE LAWS OF KENYA

AND

IN THE MATTER OF PUBLIC PROCUREMENT AND DISPOSALS REGULATIONS 2020

AND

IN THE MATTER OF THE MANDATORY USE OF THE ELECTRONIC GOVERNMENT PROCUREMENT SYSTEM (e- GPS SYSTEM) BY ALL PUBLIC PROCUREMENT ENTITIES PUBLISHED AS CIRCULAR NO. 04/2025

BETWEEN

ISSA ELANYI CHEMAO 1ST PETITIONER
PATRICK KARANI EIRAPA 2ND PETITIONER
PAUL NGWEYWO KIRUI 3RD PETITIONER
INTERNATIONAL LEGAL CONSULTANCY GROUP LTD 4TH PETITIONER
COUNCIL OF COUNTY GOVERNORS 5TH PETITIONER

VERSUS

CABINET SECRETARY,

NATIONAL TREASURY AND ECONOMIC PLANNING 1ST RESPONDENT

NATIONAL TREASURY AND ECONOMIC PLANNING 2ND RESPONDENT

PUBLIC PROCUREMENT REGULATORY AUTHORITY 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

AND

THE NATIONAL ASSEMBLY INTERESTED PARTY

RULING

(On the Petitioners/Applicants' Notice of Motion Application dated 5th September, 2025)

1. The guiding principles for the grant of conservatory orders are long-established and firmly settled. For an application seeking the grant of conservatory orders to succeed, the applicant must satisfy the court that on the balance of probabilities that:
 - a. The petition discloses and establishes a *prima facie* case with a likelihood of success;
 - b. Unless the conservatory orders are granted, the applicant or other persons will likely suffer prejudice;
 - c. Unless the conservatory orders are granted, the petition will be rendered nugatory;

- d. The balance of convenience tilts in favour of the grant of the Orders sought; and
 - e. The Public Interest and the duty to safeguard constitutional values and principles favours the grant of the conservatory orders sought.
2. The Petitioners/Applicants in their Notice of Motion Application dated 5th September 2025, at Prayer 3, seek that:

“Pending the hearing and determination of this Petition, a conservatory order be issued to suspend the decision of the Cabinet Secretary – National Treasury, the National Treasury, and the Public Procurement Regulatory Authority’s Circular No. E04/2025 – that directs the compulsory and mandatory use of Electronic Government Procurement System [e-GPS] by all Public Procurement entities, including county governments.”
3. The Petitioners/Applicants argue in the Petitioners/Applicants’ Written Submissions dated 1st October 2025 that all four limbs for the successful grant of conservatory orders have been met.
4. On their part, the Respondents and the Interested Party oppose the Application dated 5th September 2025. The 1st, 2nd and 4th Respondents their Written Submissions dated 5th November 2025 buttress Paragraph 1 of their Grounds of Opposition of even date by arguing that the Application has not met the legal threshold for the grant of conservatory orders as set out by the

Supreme Court in the case of ***Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others*** [SCK Petition No. 2 of 2013, [2014] eKLR].

5. Specifically, the 1st, 2nd and 4th Respondents contend that the Application fails to demonstrate a prima facie case with a likelihood of success, irreparable harm, and/or that the balance of convenience favours the grant of the Orders sought.
6. The 3rd Respondent's Written Submissions dated 9th October 2025 took a different tilt. Building on the 3rd Respondent's Replying Affidavit dated 24th September 2025, the 3rd Respondent argued that this Court should not interfere with the 3rd Respondent's decision and circular No. 04/2025 as the same would amount to the High Court crossing into an arena reserved for other bodies and institutions.
7. In support of this argument, the 3rd Respondent cited and relied on the three-judge issued judgment in the case of ***Diana Kethi Kilonzo and Anor -v- The Independent Electoral and Boundaries Commission and Others*** [***Milimani HC CHRPE No. 359 of 2013***].
8. Having carefully considered the positions of the parties, their pleadings, affidavits, and respective written submissions, I begin by observing that the Supreme Court in the case of ***Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others*** affirmed that the issuance of conservatory orders is grounded upon the intrinsic merit of a case, having due regard to public

interest, constitutional values, and the relative weight of the competing interests involved.

9. The first issue for determination is whether a prima facie case with a likelihood of success has been established. It is my finding, and I do accordingly hold, that the Petition has established a prima facie case with a likelihood of success. Whether the Petition will ultimately succeed, or whether it has a strong likelihood of success are not the correct parameters to apply in determining this limb. Rather, the test is met if a Petition, on the face of it raises an arguable case that calls for response and rebuttal from the party of parties on the opposite side. The present Petition certainly calls for substantive responses and rebuttals from the opposing parties.

10. On the second limb, whether unless the conservatory orders are granted the Applicants or other persons will likely suffer prejudice, I am satisfied that the Application has successfully demonstrated that this is more likely than not. While the 1st, 2nd and 4th Respondent's in particular argue that any harm or prejudice, which in any case they deny exists, can be reversed, it is my finding and I do hold that it is unlikely that a mechanism could be put in place to reverse the harm or compensate small scale suppliers who are unable to onboard the e-GPS in the event that the Petition were to succeed.

11. Similarly, I agree with the Applicants that were the Petition to proceed to full hearing and determination without the preservation and continuation of the

status quo ante, the Petition may more likely than not be rendered academic or moot. My finding in this regard also acknowledges the difficulty in reversing implemented programmes and systems once they have been operationalized, particularly those involving electronic systems.

12. Once persons and entities implement the same after significant time, effort, and funds have been expended towards acquisition of equipment, training of staff, reconfiguration of internal processes, and the like; change to the former position in the event of a successful petition would not be easy, if at all it could be done.
13. In essence, and once more applying the guidance of the Supreme Court that each application for the grant of conservatory orders should be considered on its intrinsic merit and with regard to the unique circumstances that prevail in each matter, I am satisfied that the Applicants have succeeded with respect to this limb.
14. In the same vein, the balance of convenience tilts in favour of the grant of the Orders sought. The Respondents and the Interested Party are better able to bear any burdens that may arise in the short period of time that it will take to hear and determine the Petition with the Orders sought in place than the Applicants would without them being in place.
15. Lastly, the Applicants have successfully shown that the Public Interest and the duty to safeguard constitutional values and principles favours the grant of the

conservatory orders sought, particularly amidst an expedited hearing and determination schedule for the Petition.

16. There can be no greater public interest than in ensuring that every action and decision is made in a constitutionally compliant manner. The parties opposed have not demonstrated how the public would be prejudiced or their interests harmed by the grant of the Orders sought, whereas the Applicants have shown that there is a likelihood that the public would be negatively affected unless the Orders sought are granted, particularly small-scale suppliers and the County Governments, and that the grant of the Orders sought resonates with the constitutional values and principles that this Court is obligated to uphold and defend as it hears and determines the Petition herein.
17. Consequently, it follows that the Petitioners/Applicants' Notice of Motion Application dated 5th September 2025 is merited and it must succeed. In that regard, and for the foregoing reasons, the same is determined in favour of the Petitioners/Applicants in terms of the confirmation and extension of the Interim Orders Numbers 1, 2, and 3 issued by this Court on 8th September 2025 from today up and until end of day on the date that judgment is delivered in this matter.
18. Costs of the Application shall be in the cause.
19. Orders accordingly.

20. The Court will now proceed to issue Directions, after hearing from Parties and/or their Counsel, geared at the expedited hearing and determination of the Petition.

**DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 3RD DAY OF DECEMBER,
2025.**

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BAHATI MWAMUYE MBS

JUDGE

In the Presence of:

Counsel for the Petitioners – Mr. Najoyo hb Mr. Peter Wanyama

Counsel for the 1st, 2nd, and 4th Respondents – No appearance

Counsel for the 3rd Respondent – Mr. Ngalatu

Counsel for the Interested Party – No appearance

Court Assistant – Ms. Amondi