REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

HCCHRPET NO. E011 OF 2025

(CORAM: CHARLES KARIUKI – J)

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 22, 23, 73, 80, 81, 82, 94, 95, 96, 103, 131, 132, 210 & 232 OF THE CONSTITUTION OF KENYA AND IN THE MATTER OF THE APPOINTMENT OF SITTING MEMBERS OF THE PARLIAMENT AS CABINET SECRETARIES

BETWEEN

LEMPAA SUYIANKA……..……..……1ST PETITIONER

NYAKUNDI NYAMBOGA……..……..…2ND PETITIONER

-VERSUS-

THE PRESIDENT OF THE REPUBLIC OF KENYA…...…….1ST RESPONDENT

UNITED DEMOCRATIC ALLIANCE (UDA)…….….2ND RESPONDENT

PUBLIC SERVICE COMMISSION……..…..…3RD RESPONDENT

RULING

1. By Motion dated 21/8/2025, the application sought orders.

    i. **That this application be certified as urgent and service be dispensed with in the first instance and be heard at the earliest possible moment before the Honourable Judge.**
    ii. **That pending the hearing and determination of this Application, a conservatory order injunction does issue to the 1st Respondent, THE**

PRESIDENT OF THE REPUBLIC OF KENYA, restraining him from appointing any other member of parliament to the cabinet.

iii. **That pending the hearing and determination of this Petition, a conservatory order does issue to the 1st Respondent, THE PRESIDENT OF THE REPUBLIC OF KENYA, restraining him from appointing any other member of parliament to the cabinet.**

iv. **Those costs are the cause.**

2. The same is supported by an affidavit sworn by Suyianka Lempaa on 21/8/2025. Contemporaneously, the applicants lodged a Petition dated 21/8/2025, supported by the same affidavit stated above, which sought reliefs vide paragraph F. Reliefs Sought.

I. **A declaration that the appointment of members of Parliament to serve as cabinet secretaries is unconstitutional.**

II. **A declaration that appointing members of parliament to the cabinet, occasioned by elections in the respective constituencies, violates Article 201 of the Constitution.**

III. **A declaration that the appointments made without public participation violate Article 10 of the Constitution.**

IV. **A declaration that the ruling party (UDA) acted unconstitutionally by sponsoring an elected member of parliament as the speaker to the National Assembly for Cabinet appointments.**

V. **A permanent order of injunction restraining the 1st Respondents from further appointing sitting members of parliament to the cabinet.**

VI. **A declaration that the 1st Respondent's power and discretion to appoint the cabinet secretary is not absolute and is subject to the constitution.**

VII. **Costs of Petition.**

VIII. **Any other relief this Honourable court may deem just.**

3. The matter is found in the factual matters in paragraphs 2 to 16 of the Petition:

4. **C. Factual Background:**

5. The President has appointed members of parliament as cabinet Secretaries.
6. These appointees have neither resigned nor vacated their elected seats.
7. The National Assembly, comprising peers of the appointees, has proceeded to vet and approve these nominations.
8. The public was not involved in these appointments, and no bye-elections were called for vacant seats.
9. The power bestowed on the 1st Respondent to make Cabinet appointments under the constitution is not absolute and is not intended to disrupt other institutions under the constitution.
10. The 1st Respondent falls short of respecting and upholding the constitution by making appointments that result in the country spending money that would otherwise be avoided had he read the constitution holistically.
11. The 1st Respondent violates the political rights of the affected constituencies, which are fundamental in nature and whose limitation is well circumscribed in the Constitution.
12. The people plucked from the constituencies are not the only qualified people from their respective constituencies, and therefore, the 1st Respondent fails in his authority of safeguarding the sovereignty of the people.
13. On the 26th of September 2022, the 1st Respondent appointed the Member of Parliament for Kandara, Alice Muthoni Wahome, as the Cabinet Secretary for Water, Sanitation, & irrigation.
14. On or about the 26th of September 2022, the 1st Respondent appointed the Member of Parliament for Garissa Town, Aden Duale, as the Cabinet Secretary for Defence.
15. On or about the 26th of September 2022, the 1st Respondent appointed the Senator for Elgeyo Marakwet Onesmus Kipchumba Murkomen as the Cabinet Secretary for Roads.
16. On or about the 8th of September 2022, the 2nd Respondent sponsored and campaigned for Bungoma County Senator Moses Masika Wetangula as National Assembly Speaker.

17. On or about the 8th day of December 2022, the Independent Electoral and Boundaries Commission conducted by-elections that cost Kenya taxpayers over Kshs. 471 million. (Wekesa, 2025) Annexed hereto and marked as LS1 is the IEBC's confirmation of the cost to taxpayers of the by-elections.

18. On the 24th day of April 2025, the 1st Respondent appointed Geoffrey K. Kiringa Ruku to the cabinet, therefore disenfranchising the people of Mbeere North without subjecting his action to people's participation.

19. The National Assembly Speaker has already declared the Mbeere North Constituency as vacant, and therefore, the Independent Electoral and Boundaries Commission will conduct a by-election in the constituency that will cost us more money.

20. It is founded on the legal background that.

21. The actions above violate the following constitutional provisions, as explained below:

22. **Article 1 – Sovereignty of the People:** Sovereignty belongs to the people and must be exercised in accordance with the Constitution. Appointing MPs to Cabinet roles without public consultation or by-election usurps the people’s sovereign power to elect and be represented.

23. **Article 10 – National values and Principles of Governance:** The process lacks transparency, accountability, and public participation. These values are central to the legitimacy of all public appointments and decisions.

24. **Article 94 – 96 - Separation of Powers:** Parliament’s legislative role is distinct from the Executive’s. Appointing MPs to the Cabinet without resignation collapses this separation and compromises legislative independence.

25. **Article 103 – Vacancy in Office:** Once an MP assumes an Executive role, they effectively resign, making their seat vacant. Failing to declare and act upon such a vacancy violates the Constitution and disenfranchises the electorate.

26. **Article 210 – Use of Public Funds:** Dual compensation or retention of MP benefits while serving as Cabinet Secretary amounts to misuse of public funds and violates the requirement of prudent public financial management.

27. **Article 232 – Values and Principles of Public Service:** Public appointments must be based on merit, competitiveness, and public accountability. These principles are

subverted when political appointees are parachuted into Cabinet without transparent recruitment.

28. **Articles 81 & 82 – Electoral Integrity:** The spirit of free and fair elections is undermined where MPs transition to the Executive without resignation or fresh elections in their constituencies.

29. **Articles 131 & 132** – The President is required to respect, uphold and safeguard the Constitution. These appointments, carried out without proper public process or adherence to the constitution, violate this obligation.

30. The motion for conservatory orders is based on the face of the Notice of Motion, paragraphs 1 – 3.

31. That this application be certified as urgent and service be dispensed with in the first instance and be heard at the earliest possible moment before the Honourable Vacation Judge.

32. That pending the hearing and determination of this Application, a conservatory order injunction does issue to the 1st Respondent restraining him from appointing any other member of parliament to cabinet.

33. Pending the hearing and determination of this Petition, a conservatory order does issue to the 1st Respondent restraining him from appointing any other member of Parliament to the cabinet.

34. Those costs are in the cause.

35. Affidavit paragraph 3 – 8: That the president has appointed sitting MPs to the Cabinet without resignation or by-election. This undermines the integrity of parliament and disenfranchises the electorate.

36. The ruling party (UDA) misused the electoral process by nominating MPs for executive appointments. The vetting process lacks impartiality as it involves peers of the appointees. That there was no public participation in the impugned appointments. Thus, the Respondents are said to have offended multiple provisions of the Constitution.

37. The respondents have failed and or neglected to file responses.

38. **ISSUES ANALYSIS AND DETERMINATION**

39. Upon perusal of the application, affidavit and the submissions, the court finds that the only issue is whether the application meets the threshold for granting conservatory orders.

40. The threshold for granting conservatory orders in constitutional petitions requires the applicant to demonstrate a *prima facie* case with a likelihood of success, that they will suffer irreparable prejudice without the order, and that the order upholds constitutional values. These orders are interim, discretionary measures aimed at preserving the subject matter or the *status quo* until the petition is fully heard. **(Ochoiki v Cabinet Secretary, Ministry of Health & 3 others (Petition E350 of 2024) [2025] KEHC 12484 (KLR) (Constitutional and Human Rights) (13 August 2025) (Ruling), 2025)**

41. Key principles for granting conservatory orders in Kenya:

42. **Prima Facie Case:** The applicant must show a clear, arguable case with a high probability of success, rather than a mere possibility of winning.

43. **Irreparable Injury/Prejudice:** It must be demonstrated that, in the absence of the conservatory order, the applicant will suffer substantial, irreparable, and material damage that cannot be adequately compensated by damages.

44. **Constitutional Purpose:** The court must be satisfied that granting the order preserves the subject matter of the petition and promotes the enforcement of constitutional rights or freedoms.

45. **Balance of Convenience:** When in doubt, the court considers the balance of convenience to determine which party suffers more from granting or refusing the order.

46. **Public Interest and Separation of Powers:** Courts often weigh the public interest and the potential impact on the separation of powers when deciding whether to grant orders that restrain government action.

47. Conservatory orders are not intended to resolve the final merits of the petition but to act as a temporary safeguard. They are often denied if the petitioner fails to establish a direct threat to a constitutional right or if the order would unfairly paralyse government operations, particularly if the matter is largely political.

48. I have carefully considered the application, the response thereto and the parties' submissions. I, hereby, discern the following areas of discussion: -

    (i) The nature of conservatory orders.

    (ii) The guiding principles in conservatory applications; and

    (iii) The applicability of the principles to the applications.

49. I will deal with the above sequentially.

50. The nature of conservatory orders:

51. In **Civil Application No. 5 of 2014 Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others (2014) eKLR**, the Supreme Court discussed, at paragraph 86, the nature of conservatory orders as follows: -***"Conservatory orders" bear a more decided public-law connotation: they are orders intended to facilitate ordered functioning within public agencies and to uphold the Court's adjudicatory authority 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.***

52. **The Court in Nairobi Civil Appeal 151 of 2011 Invesco Assurance Co. Ltd vs. MW (Minor suing through next friend and mother (HW) [2016] eKLR defined a conservatory order as follows: -*A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of the status quo to preserve the subject matter.***

53. In Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR, the Court had the following to say about the nature of conservatory orders: -***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 individuals but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are in rem rather than 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.28. Conservatory orders are, therefore, aimed at preserving the substratum of the matter pending the determination of the main issues in***

dispute.29. Given the interlocutory nature of conservatory orders, it is argued that there is need for a Court to exercise caution when dealing with any request for such prayers. I agree with that proposition for the reason that matters which are the preserve of the main Petition ought not to be dealt with finality at the interlocutory stage.

54. 30. The foregoing was fittingly captured **by Ibrahim, J (as he then was) in Muslim for Human Rights (Milimani) & 2 Others vs Attorney General & 2 Others (2011) eKLR.** The Learned Judge, correctly so, stated as follows: -***The court must be careful not to reach a conclusion and to make final findings. By the time the application is decided, all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusive or finality arising that will or may operate vis-à-vis the case of both parties in the case. The principle is similar to that in temporary or interlocutory injunctive relief in civil matters. This is a cardinal principle, and happily makes my functions and work here much easier, despite walking a tight legal rope that I could easily lose balance on with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side.***
55. . The decisions *in* ***Centre for Rights Education and Awareness (CREAW) & 7 Others v. Attorney General (2011) eKLR, Platinum Distillers Limited vs. Kenya Revenue Authority (2019) eKLR and Kenya Association of Manufacturers & 2 Others vs. Cabinet Secretary*** **–Ministry of Environment and Natural Resources & 3 Others (2017) eKLR** also variously vouch for the cautionary approach.32. A Court, therefore, dealing with an application for conservatory orders must maintain the delicate balance of ensuring that it does not delve into issues which are in the realm of the main Petition. In this discourse, I will, therefore, restrain myself from dealing with such issues.
56. **The guiding principles in conservatory applications:**
57. The principles for a Court's consideration in exercising its discretion on whether to grant conservatory orders have been developed over time. They are now well settled.34. The locus classicus is the Supreme Court in **Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others case (supra**), where at paragraph 86, the Court stated as follows: -

…… Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant courses.

58. . In **Board of Management of Uhuru Secondary School vs. City County Director of Education & 2 Others [2015] eKLR**, the Court summarised the principles for the grant of conservatory orders as: -

I. **The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of conservatory orders, he is likely to suffer prejudice.**

II. **The second principle is whether the grant or denial of conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.**

III. **Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.**

IV. **Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.**

59. In **Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board and Others, Nairobi High Court Constitutional Petition No.154 of 2016 (2016) eKLR,** the Court summarised three main principles for consideration on whether to grant conservatory orders as follows: -***An applicant must demonstrate that he has a prima facie case with a likelihood of success and that, unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.***

Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of, rights will be rendered nugatory; and

The public interest must be considered before the grant of a conservatory order.

60. The above principles, however, are not exhaustive. Depending on the nature of the matter under consideration, there may be other parameters that a Court ought to consider. Such may include the effect of the orders on the determination of the case, whether there is imminent danger to infringement of the human rights and

fundamental freedoms under the Bill of Rights, the applicability of the doctrine of presumption of constitutionality of statutes, whether the Applicant is guilty of laches, the doctrine of proportionality, among many others.

61. **The applicability of the principles to the application:**

62. A prima facie case: A prima facie case was defined in Mrao vs. First American Bank of Kenya Limited & 2 Others (2003) KLR 125 to mean: -…. In a civil application, it 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 latter.

63. In a ruling rendered on 8th February 2021 in **David Ndii & others v Attorney General & others [2021] eKLR**, the Court had the following to say about a prima-facie case: ***-. The first issue for determination in matters of this nature is whether a prima facie case has been established, and 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 the case which isfrivolous. In other words, it has to be shown that a case which discloses arguable issues has been raised and in this case, arguable constitutional issues.***

64. What constitutes a prima facie case was further dealt with by the Court of Appeal in **Mirugi Kariuki -vs- Attorney General Civil Appeal No. 70 of 1991 (1990-1994) EA 156, (1992) KLR 8.** The Court, in an appeal against refusal to grant leave to institute judicial review proceedings by the High Court, stated as follows: -

> ***"It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant's interests without regard to the nature of his complaint. If he fails to show……. that there has been a failure of public duty, this court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables this court to prevent abuse by busy-bodies, cranks and other mischief-makers... In this appeal, the issue is whether the applicant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders. Clearly, once a breach of the rules of natural justice was alleged, the exercise of discretion***

by the Attorney General under section 11(1) of this Act was brought into question. Without a rebuttal to these allegations, this appellant certainly disclosed a prima facie case. For that, he should have been granted leave to apply for the orders sought. (emphasis added)."

65. In **Re Bivac International SA (Bureau Veritas) (2005) 2 EA 43**, the Court while expounding on what a prima-facie case or arguable case; is, stated that such a decision is not arrived at by tossing a coin or waving a magic hand or raising a green flag, but instead a Court must undertake an intellectual exercise and consider without making any findings, the scope of the remedy sought, the grounds and the possible principles of law involved.

66. ***. The Court of Appeal in Nairobi Civil Appeal No. 44 of 2014 Naftali Ruthi Kinyua vs. Patrick Thuita Gachure & Another (2015) eKLR, while dealing with what a prima facie case is, made reference to Lord Diplock in American Cyanamid vs. Ethicon Limited (1975) AC 396,when the Judge stated thus: -If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities, that is the end of any claim to interlocutory relief. In sum, therefore, in determining whether a matter discloses a prima facie case, a Court must look at the case as a whole. It must weigh, albeit preliminarily, the pleadings, the factual basis, the respective parties' positions, the remedies sought and the law. In so doing, a Constitutional Court must be guided by Articles 22 (1) and 258(1) of the Constitution which provisions are on the right to institute Court proceedings whenever a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened or the when the Constitution has been contravened or is threatened with contravention.***

67. For the Petitioners to succeed in the instant application, they are obliged to demonstrate that he has a prima facie case against the Respondents herein, he must, , demonstrate on a prima facie basis that THE PRESIDENT OF THE REPUBLIC OF KENYA…….1ST RESPONDENT has appointed members of Parliament to serve as cabinet secretaries in violation of the constitutional provisions...

68. In Kenya, the President nominates individuals—including sitting Members of Parliament (MPs)—for Cabinet Secretary (CS) positions, but they must be vetted and approved by the National Assembly**. (Mwinzi v Cabinet Secretary, Ministry of**

Foreign Affairs & 2 others (Petition 367 of 2019) [2019] KEHC 2293 (KLR) (Judgment), n.d.)

69. . Once approved by Parliament, the nominee is appointed by the President, and if they are MP(s), they must resign from their parliamentary seat. (Constitution of Kenya, Article 152, 2010)

70. ***Key Procedures for Appointment:***

    I. **Nomination by the President: The President selects individuals for the cabinet based on qualifications, integrity, and political considerations.**

    II. **Vetting by Committee: The Committee on Appointments, a parliamentary committee, reviews the nominee's credentials, experience, and suitability.**

    III. **Public Participation: The process includes inviting public views on the suitability of the nominees.**

    IV. **Approval by the National Assembly: The full National Assembly must approve the nomination before the President formally appoints them.**

    V. **Resignation: Under Kenyan law, a Cabinet Secretary cannot be a sitting Member of Parliament. Therefore, any MP appointed to the Cabinet must resign from their seat. (Constitution of Kenya, 2010)**

71. These checks ensure the Executive does not make unilateral appointments and that nominees are vetted for competence and integrity.

72. . The ***Anarita Karimi*** Case prescribes that a party seeking a constitutional remedy is required to set out with reasonable precision that which has complained of, noting to stipulate which constitutional provisions have been infringed and how they have been infringed**.** ***Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272*** (**the *Anarita Karimi* Case) The court held,**

> ***"We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to***

be infringed." See also Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013) eKLR (the Mumo Matemu Case)."

73. As at this stage the threshold of above principle has not been demonstrated. This principle essentially calls upon litigants to plead their case with a high degree of specificity, thereby saving on the time required by the Court to determine the issues upon which the relevant evidence and the law should be considered. That in order for a constitutional petition to be sustained, a party must provide evidence which demonstrates how their rights have been violated, as merely citing the provisions of the Constitution alleged to have been violated is not enough.

74. On the basis of the foregoing, there is no prima facie evidence that the first Respondent violated the constitutional process of appointing any sitting member of parliament before they resigned from their positions as members of parliament. Once a member of parliament resigns from his position as an MP, he is no longer an MP, and, as long as he meets the prescribed qualifications for appointment to the position of the CS, he is eligible, like any other Kenyan, to be so appointed.

75. . Having found that the Petitioner has not established any prima facie case, then in line with the Court of Appeal in **Naftali Ruthi Kinyua vs.Patrick Thuita Gachure & Another case (supra),** that is the end of any claim to interlocutory relief.

76. . Even with the foregoing holding, suffice it to say that the Petitioners reserve the right to adduce further evidence on the substance of the petition in support of their case. In any event, this Court shall take steps for an expedited hearing of the Petition without much ado, this Court finds that the application is not merited and issues the following orders: -

a) **The Notice of Motion dated 21st February 2022 is hereby dismissed.**
b) **The Petition shall be heard by way of reliance on the pleadings, Affidavit evidence and written submissions.**
c) **The Respondents shall have 21 days within which to file and serve any response to the Petition.**
d) **The Petitioner shall file and serve any supplementary response, if need be, together with written submissions within 14 days of (c) above.**
e) **The Respondents shall file and serve their respective written submissions within 14 days of service.**

f) **Highlighting of submissions on a date suitable to the Court and the parties.**

(g) No orders as to costs.

DATED AND DELIVERED AT NAROK VIA MICROSOFT TEAMS THIS 13TH FEBRUARY 2026.

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CHARLES KARIUKI

JUDGE