Kutoto & another v Musalia Mudavadi, Prime Cabinet Secretary and Acting Cabinet Secretary for Interior and National Administration & another; Ilmoitanik Ilkitoip Age Set Elders & 3 others (Interested Parties) (Constitutional Petition E009 of 2024) [2025] KEHC 5045 (KLR) (29 April 2025) (Ruling)

Neutral citation: [2025] KEHC 5045 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAROK

CONSTITUTIONAL PETITION E009 OF 2024

CM KARIUKI, J

APRIL 29, 2025

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 10, 12(1) (A), 19,20,21(3),22,23,27,28,47,48,232(1),258 & 259 OF THE CONSTITUTION OF KENYA, 2010AND

IN THE MATTER OF SECTION 4 AND 5 OF THE FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF THE BREACH OF THE RIGHT TO FAIR ADMINISTRATIVE ACTION

AND

IN THE MATTER OF SECTION 14(1) OF THE NATIONAL GOVERNMENT AND COORDINATION ACT, 2013

AND

IN THE MATTER OF SECTION 48 OF THE COUNTY GOVERNMENTS ACT, 2012

BETWEEN

ORAMAT KUTOTO ..... 1ST PETITIONER

GABRIEL OLBABUI MPURKOI KIMONG'O ..... 2ND PETITIONER

AND

MUSALIA MUDAVADI, PRIME CABINET SECRETARY AND ACTING CABINET SECRETARY FOR INTERIOR AND NATIONAL ADMINISTRATION ..... 1ST RESPONDENT

THE HON. ATTORNEY GENERAL ..... 2ND RESPONDENT

AND

ILMOITANIK ILKITOIP AGE SET ELDERS ..... INTERESTED PARTY

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ..... INTERESTED PARTY

SIAMO OLESAIYIORI ..... INTERESTED PARTY

SARISAR NICHOLAS NKADARU ..... INTERESTED PARTY

RULING

Background

1. The 1st Respondent, in the exercise of powers conferred on him by section 14[1] of the National Government Coordination Act, 2013, established a location and sub-location, namely Entargeeti and Ngoso, respectively, within Trans-Mara West Sub- County vide Gazette Notice No. 15341 dated 22nd November 2024.

2. The people from the Ilmoitanik sub-tribe of the Maasai have occupied the vast areas of Olalui Location and Ilmeshuki Sub-location since the pre-colonial era to present-day Kenya.

3. The Petitioners contend that the people from the Ilmoitanik sub-tribe were never invited to participate substantively concerning the creation of the said new administrative units before their establishment.

4. The Petitioners contend that when the Transmara District was created in 1994, the Ilmeshuki sub-location and Olalui sub-location were created in the same year, subsequently forming the Olalui Location.

5. The establishment of the Ilmeshuki Sub-location in 1994 makes it one of the oldest sub-locations in the history of the Transmara District.

6. Since 2005, the people of Ilmeshuki sub-location have proposed several times that it be elevated to a location owing to its vast geographical area and fast-growing population. These proposals were meant to bring services closer to the people.

7. The Petitioners further contend that the true diversity of harmonious coexistence by the people of Transmara West Sub-county, who comprise the Siria sub-tribe, Ilmoitanik sub-tribe, Uasin Gishu sub-tribe, and the Kipsigis community, is that each community manages its affairs and aspirations autonomously within the small and devolved administrative units. Contestations are solely manifested in the common and shared administrative units like the constituency and sub-county.

8. The Petitioners maintain that before the alleged establishment of the Entargeeti Location and Ngoso Sub-location, the Ilmeshuki sub-location within the Olalui Location, which is mainly comprised of the Ilmoitanik sub-tribe, existed and still exists.

9. Establishing the Entargeeti Location within the Ilmeshuki Sublocation directly disenfranchises the Ilmoitanik sub-tribe, which comprises most of the Ilmeshuki Sublocation's inhabitants, from access to services and service delivery.

10. The Petitioners further contend that the establishment of the said Entargeeti Location is only aimed at widening the long-term rift and re-igniting animosity that existed between the people of the Ilmoitanik sub-tribe and those of the Uasin Gishu sub-tribe, popularly known as Ilkirasha, by introducing new discriminatory administrative units.

11. The petitioners contend that the 1st Respondent did not consider any of the proposals tendered by the people of the Ilmoitanik sub-tribe for the proposed establishment of the Ilmeshuki, Nakuyiana, Olosentu, Enkosipa, and Medungi Locations.

12. The petitioners further contend that none of the proposals tendered by the people of Ilmoitanik sub-tribe proposing for the establishment of Olosheti sub-location, Naserian sub-location, Sholoolo sublocation, Nakuyiana sub-location, Olesentu sub-location, Oloshaiki sublocation, Oltanki sub-location, Oldonyo Rasha sub-location, Nganyio Sublocation, Munke sub-location, Kilutori sublocation, Inkorienito sub-location, Kilena sub-location, Oltumaroi sub-location, Mopel sub-location and Tororek sub-location were considered by the 1st Respondent.

The application

13. The petitioners/applicants herein filed a notice of motion dated 25/11/2024, which is before this Court for determination. The application is premised on Article 23 of *the Constitution* and Rule 23 of *the Constitution* of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules, 2013.

14. The petitioners/applicants seek the following orders.

    i. Spent.

    ii. Spent.

    iii. That pending the hearing and determination of this Petition inter partes, this Honorable Court be pleased to issue Conservatory Orders restraining and/or barring the Respondents and the 2nd Interested Party, whether acting jointly or severally by themselves, their servants, agents, representatives, or howsoever otherwise from the implementation, further implementation, administration and/or in any manner acting on or enforcing Gazette Notice No. 15341 dated 22nd November 2024 generated under section 14[1] of the National Government Coordination Act,2013 from in any manner acting on or enforcing Gazette Notice No. 15341 dated 22nd November 2024.

    iv. That pending the hearing and determination of this Petition, this Honorable Court be pleased to issue Conservatory Orders restraining and/or barring the Respondents and the 2nd Interested Party whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from the implementation, further implementation, administration and/or in any manner acting on or enforcing Gazette Notice No. 15341 dated 22nd November 2024 generated under section 14[1] of the National Government Coordination Act,2013 from in any manner acting on or enforcing Gazette Notice No. 15341 dated 22nd November 2024.

    v. That this Honorable Court be pleased to issue such other orders as it may deem fit to grant.

    vi. Costs are in the cause.

15. The application is based on the grounds set out on the face of the application and the supporting affidavit sworn by ORAMAT KUTOTO on 25/11/2024.

16. The response, the 2nd Respondent opposed the application herein and filed grounds of opposition dated 11/12/2024.

17. The second Respondent contends that the application has not been pleaded with precision as it does not provide adequate particulars of the claim relating to any alleged violation of *the Constitution*.

18. The second Respondent contends that the application has not met the threshold for granting Conservatory Orders, as held in Wilson Kaberia Nkuja v The Magistrate and Judges Vetting Board and Others, Nairobi High Court Constitutional Petition No. 154 of 2016[2016] eKLR.

19. The second Respondent contends that the evidence against the first Respondent is baseless and unfounded, based only on speculation, hearsay, unfounded fear, and unverified sources, hence having no basis and no probative value.

20. The second Respondent contends that the application is an abuse of the court process, as it seeks to stop respondents from executing their constitutional and legal mandate pursuant to section 14 of the National Government Coordination Act.

21. The first interested Party opposed the application.

22. The first interested Party's Replying affidavit was sworn by Olesopia Masibayi on 13/12/2024.

23. The 1st Interested Party is aggrieved by the said reorganization, which is creating unnecessary tension, distress, and risk of conflict with the people of Trans Mara West. In the recent past, the people of Trans Mara West have been engaged in feuds over administrative boundaries, land, and the scarcity of government services, and the reorganization clearly advances insecurity rather than eradicating it.

24. The 1st interested Party contends that the establishment of the said new administrative units is not in the public interest as it was done without considering the said community of interest, the demographic pattern of the areas occupied by the sub-tribes, the internal harmony of the population, security demands, and the historical and cultural ties of the said communities. As such, interim orders are warranted.

25. The third and fourth interested Party's Replying affidavit.

26. The third and fourth interested parties filed a replying affidavit sworn by Sarisar Nicholas Nkadaru on 03/02/2025.

27. They contested that all members of Olalui and adjacent locations within the entire Transmara West participated in public participation and that the interests of all the persons within that area were considered during the exercise.

28. They contest that Gazette notice no. 15341 dated 22/11/2024 affects the entire county and not Transmara West alone, and therefore, Conservatory Orders issued will not affect the said area but the entire country, from which other Kenyans have benefited.

29. They contend that the application has not made reference to a specific decentralized unit or devolved unit under which preservatory orders are being sought. Therefore, in the absence of specific and particularized pleadings, this Court cannot grant orders against the whole world.

30. Irene Kyatu swore the second interested Party's updated replying affidavit.

31. The second interested Party contends that it has absolutely no role whatsoever in establishing and/ or delimitating administrative boundaries and is willing to comply with this Court's order.

32. The third interested Party's replying affidavit.

33. The 3rd interested Party filed a replying affidavit sworn by Francis Partois on 20/02/2025.

34. The third interested Party averred that all members from the surrounding disputed locations and Sub-locations within Transmara West Sub-County participated in the said public participation, and

the interests of all the persons within that area were taken into account during such exercise. All unanimously agreed to have the said locations, namely Mapashi, Elang'ata, and Kiikat, while sub-locations are Enooretet, Empurkel, Ndonyo, and Oimisigiyo.

35. The third interested Party averred that the MOITANIK sub-tribe within the Uasin Gishu community is not affected by the newly formed Locations and sub-locations, as alleged; they live far away.

36. The third interested Party contends that the current boundaries, as established through the minister and Gazette under Gazette Notice No. 15341, service delivery to all members were aligned correctly as required by law and respected the tenor of section 48 of the County Government Act 2012, as amended.

37. The third- Party contends that it is wrongly enjoined in this suit since the affected sublocations do not affect the petitioners.

38. Directions of the Court

39. The application was canvassed by way of written submissions. The petitioner/applicant, 4th interested Party, 1st and second respondents have filed. The petitioners/applicants have filed. The respondents have not filed.

40. The Petitioners/applicants' Submissions

41. The petitioners/applicants submitted that all the 13 new administrative units were created in favor of the Uasin Gishu sub-tribe, and in the newly created Entargeeti Location and Ngoso sub-location, the people of Moitanik sub-tribe have been scattered contrary to the proposals they tendered to the government. Therefore, the Petitioners' case is not only an arguable prima facie case. The petitioners relied on Muhumed Hassan Deisow & 2 Others v County Governor of Mandera & 3 Others [2020] e KLR, Article 10[1] & Article 10[2] [a] of *the Constitution*, Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR.

42. The petitioners/applicants submitted that the grant of conservatory reliefs sought by the Applicants would enhance the constitutional values and principles of public service enshrined in the provisions of Article 232 and serve the public interest. The petitioners relied on Bundid & Another v Ministry of East African Community [EAC], the Asals and Regional Development & 3 Others [Petition E002 of 2024] KEHC3479[KLR] [26th March 2024], Law Society of Kenya v Officer of the Attorney General & Another; Judicial Service Commission [Interested Party] [2020] e KLR.

43. The first and second respondents' submissions.

44. The first and second respondents submitted that the prayers sought do not establish a prima facie case with a probability of success and do not support interlocutory orders prayed for. Given the interlocutory nature of Conservatory Orders, there is a need for a court to exercise caution when dealing with any such request for such prayers. Therefore, matters which are the preserve of the main Petition ought not to be dealt with finality at the interlocutory stage. The first and second responses relied on Muslim for Human Rights [Milimani] & 2 others v Attorney General & 2 Others [2011] eKLR, Centre for Rights Education and Awareness [CREAW] & 7 Others v Attorney General [2011] eKLR, Platinum Distillers Limited v Kenya Revenue Authority [2019] eKLR and Kenya Association of Manufacturers & 2 Others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 Others [2017] eKLR, the Supreme Court in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others, Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others [2015] eKLR, Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board and Others Nairobi High Court Constitutional Petition No. 154 of 2016 [2016] eKLR.

45. The first and 2nd respondents submitted that the petitioners have not demonstrated before this Honorable Court how the 1st and 2nd Respondents have violated their constitutional rights as it is well-settled law that the petitioners ought to demonstrate how the respondents' conduct constitutes a violation and/or contravention of their fundamental rights and freedoms. The 1st and 2nd respondents relied on Anarita Karimi Njeri v R [1976-1980] KLR 1272, Kulraj Singh Bhangra v Director General, Kenya Citizens and Foreign National Management Service [2014] eKLR, Kamal Jadval Vekeria v Director General, Kenya Citizens and Foreign National Management Service [2016] eKLR, Daniel Chacha Muriri v Attorney General [2012] eKLR, and Mrao v First American Bank of Kenya Limited & 2 Others [2003] KLR 125.

46. The 1st and 2nd respondents submitted that the Petitioner has not produced before this Court any tangible evidence that can assist the Court in granting the orders sought. The 1st and second respondents relied on sections 107 and 108 of the *Evidence Act*, Evans Nyakwana v Cleophas Bwana Ongaro [2015] eKLR, Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014 eKLR, and Hassan Ahmed Ibrahim v Kenya National Bureau of Statistics & 2 others [2019] eKLR.

47. The 3rd interested Party's submission.

48. The third interested Party submitted that the Petitioners have not specifically pleaded what prejudice loss, and damage they will likely suffer if the Conservatory Orders sought are not granted. The third interested Party relied on Giella v Cassman Brown & Company Limited [19731 EA, American Cyanamid Company v Ethicom Limited [19751 A AER 5O4, Kenleb Cons Ltdv New Gaiitu Service Station Ltd Another.[1990] EKLR, Pius Kipchirchir Kogo versus Fraqk Ktmeli Tenai [20l8] EKL,

49. The third interested Party submitted that the Petitioners have not demonstrated that the balance of convenience tilts towards him. The third interested party relied on Orissa State 9ommefcial Transport Corporation Ltd v SatErnaravan Singh [19741 4O Cut LT 336 case].

50. The 4th interested Party's submissions.

51. The fourth interested Party submitted that the Applicant had not demonstrated a prima facie case with a probability of success. The 4th interested Party relied on Mrao Ltd v First American Bank of Kenya and two others [2003] KLR 125. Wilson Liberia ninja v the Magistrate and Judges vetting board & others Nairobi high Court constitutional petition no. 154 of 2016[2016] eKLR, the fourth interested Party submitted that the Applicant had not demonstrated actual and substantial irreparable injury that is likely to occur if the orders sought herein are not granted. The 4th interested Party relied on Halsbury's Laws of England, 3rd Edition, vol 21, page 366, Nguruman Ltd v Jan Bonde Nielsen & others [2014]

52. On whether the balance of convenience tilts in favor of the Applicant, the 4th Interested Party relied on Chebii Kipkoech v Barnabas Tuitoek Bargoria & another [2019] Keller, Paul Gitonga Wanjau v Gathuthis Tea Factor Company Ltd & 2 others [2016] poker

Analysis And Determination.

53. This Court has considered the application, the supporting affidavit, the grounds of opposition, and the petitioners' submissions.

54. Issues

55. The main issue for determination is whether this application has met the legal threshold for the grant of Conservatory Orders.

56. The threshold for the grant of Conservatory Orders was established by the Supreme Court in the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR as follows:-

> " [86] "Conservatory Orders" bear a more decided public-law connotation, for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court in the public interest. Conservatory Orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case, or "high probability of success" in the supplicant's case for orders of stay. 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 causes.
>
> [87] The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the Applicant should be granted. The principles to be considered before a Court of law may grant a stay of execution have been crystallized through a long line of judicial authorities at the High Court and the Court of Appeal. Before a Court grants an order for a stay of execution, the appellant, or intending appellant, must satisfy the Court that:
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> i. the appeal or intended appeal is arguable and not frivolous, and that
>
> ii. unless the order of stay sought is granted, the appeal or intended appeal would be rendered nugatory if it were to succeed eventually.
>
> [88] These principles continue to hold sway not only at the lower Courts but in this Court as well. However, in the context of *the Constitution* of Kenya, 2010, a third condition may be added, namely:
>
> [iii] that it is in the public interest that the order of stay be granted.
>
> [89] This third condition is dictated by the expanded scope of the Bill of Rights and the public spiritedness that runs through *the Constitution*."

57. Various Courts have also discussed the principles applicable to granting Conservatory Orders. In Petition E408 of 2020 Okiya Omtatah Okoiti V Judicial Service Commission; Philomena Mbete Mwilu & Another [Interested Parties] [2021] eKLR, this collated the principles were collated as established by various decisions in the following fashion -

58. The locus classicus is the Supreme Court in Civil Application No. 5 of 2014 Gatirau Peter Munya vDickson Mwenda Kithinji & 2 Others [2014] eKLR where at paragraph *86* stated the Court stated as follows: -

> [86] ..... 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.
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> 24. In Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board and Others, Nairobi High Court Constitutional Petition No.154 of 2016 [2016] eKLR, after going through several

decisions, the Court rightly so, summarized three primary 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 due to 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 granting a conservatory order.

25. There is also a need to ascertain whether the conservatory order sought will delay the early determination of the dispute. [See Nairobi High Court Constitutional Petition No. E243 of 2020 Kenya Tea Development Agency Holdings Limited & 55 Others v The Cabinet Secretary Ministry of Agriculture, Livestock, Fisheries & Co-operatives & 2 Others and Kenya Small Tea Holders Growers Association [Kestega] [Interested Party] [unreported].

In Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others [2015] eKLR, the Court summarized the principles for the grant of Conservatory Orders as: -

There is a need for the Applicant to demonstrate an arguable prima facie case with a likelihood of success and to show that he is likely to suffer prejudice in the absence of Conservatory Orders.

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

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

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

60. A Court, therefore, dealing with an application for Conservatory Orders must maintain the delicate balance of ensuring that it does not delve into issues in the realm of the main Petition. Therefore, this Court will restrain itself from dealing with such issues in this discourse.

61. The above principles are, however, not exhaustive. Depending on the nature of the matter under consideration, there may be other parameters that a Court ought to look into. 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.

62. Prima facie case.

63. A prima facie case was defined in Mrao v. First American Bank of Kenya Limited & 2 Others [2003] KLR 125 to mean: -

.... 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 latter.

64. The Court of Appeal in Nairobi Civil Appeal No. 44 of 2014 Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another [2015] eKLR, while dealing with what a prima facie case is, referred Lord Diplock in American Cyanamid v Ethicon Limited [1975] AC 396, when the Judge stated thus: -

> " Suppose there is no prima facie case on the point essential to entitle the plaintiff to complain about the defendant's proposed activities. In that case, that is the end of any claim to interlocutory relief.
>
> What constitutes a prima facie case was further dealt with by the Court of Appeal in Mirugi Kariuki v Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156, [1992] KLR 8. The Court, in an appeal against the 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 public duty has failed, this Court would be in error if it granted leave. The curb is represented by the need for the Applicant to show, when he seeks to leave to apply, that he has a case, which is 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 granting those orders. 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. This appellant certainly disclosed a prima facie case without a rebuttal to these allegations. 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, waving a magic hand, or raising a green flag. 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. 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. The Petitioners' contention rested on the lack of public participation.

68. The process towards the establishment of a location and sub-location, namely Entargeeti and Ngoso, respectively, within Trans-Mara West Sub- County vide Gazette Notice No. 15341 dated 22nd November 2024 was questioned. These included whether there was adequate public participation and the legal validity of the Gazettement.

69. The Petitioners vehemently argued that establishing a location and sub-location, namely Entargeeti and Ngoso, would infringe on their constitutional rights.

70. The second Respondent's position is that the Petitioners have not demonstrated how they were not involved in establishing the improved service delivery coordination units and that it would be against

the public interest to suspend the gazette notice in its entirety simply because the petitioners have an issue with just one part of it.

71. This Court has carefully weighed the rival positions.

72. Therefore, the issues raised in the Petition cannot be wished away. They are serious constitutional issues worth consideration. This Court finds that the Petition raises a prima facie case in the circumstances of this case.

73. Irreparable damage/suffering prejudice

74. The second hurdle an applicant seeking Conservatory Orders must clear is the need to prove that the Petition's substratum will be rendered nugatory if orders are not granted.

75. Put differently; an Applicant must show, albeit on the face of it, that if not granted Conservatory Orders, the objective of the Petition to forestall the continued or threatened violation of the rights and fundamental freedoms of *the Constitution* will irredeemably be lost, and there would be no need to pursue the main Petition.

76. The 2nd Respondent argued that granting the Conservatory Orders would impact the constitutional mandate of the 1st Respondent.

77. This Court has carefully considered this aspect of the dispute. Admittedly, one of the parties stands to suffer prejudice. Either way, this Court decides on this issue.

78. Given the impact of the matter on the petitioners and the people from the Ilmoitanik sub-tribe, there is every justification for an expeditious determination of this matter.

79. Given the foregoing state of affairs, and for this Court to conclusively deal with the matter, the Court will have to interrogate the issues on the Constitutionality and legality of the impugned gazette notice and whether there was public participation. Such issues cannot be subject to an interlocutory application but to the main hearing of the Petition. [See the Court of Appeal in Civil Application Nai 31 of 2016 Alfred N. Mutua v Ethics & Anti-Corruption Commission [EACC] & 4 others [2016] eKLR].

80. This Court is, therefore, not persuaded that unless the application is allowed, the Petitioners stand to suffer real prejudice.

81. This Court takes the contrary position as to whether the Petition will be rendered otiose/hollow in the absence of the orders sought. The issues raised in the Petition go beyond the interlocutory application. In the main, the Petition seeks to declare several actions of the Respondents unconstitutional, among other prayers.

82. This Court thus, finds that the Petition survives even in the absence of the orders sought in the application.

83. Public Interest:

84. 'Public interest' is defined by Black's Law Dictionary 10th Edition at page 1425 as: -

> The general welfare of a populace is considered to warrant recognition and protection. The public as a whole has a stake in this, especially in something that justifies government regulation.

85. *The Constitution* and the laws govern the people. As such, *the Constitution* remains supreme, and the laws are always presumed to be constitutional until the contrary is proved. In a matter, therefore,

where the Constitutionality of a statute is impugned, or an issue arises as to whether *the Constitution* is contravened, Courts must weigh, with care and at a preliminary stage, the alleged breach against the provisions of *the Constitution* and the doctrine of presumption of Constitutionality and legality of statutes.

86. It is in the public interest that the people have a say in choosing their sub-location and location.

87. In Kizito Mark Ngaywa v. Minister of State for Internal Security and Provincial Administration & Another [2011] eKLR, the High Court [Mohamed, J [as he then was] had the following to say on the issue: -

> "I have considered the application for adjournment and temporary suspension of the regulations and the submissions by Counsel. When considering the matter, I recalled my decision in Petition No. 669 Of 2009, Mombasa Bishop Joseph Kimani & Others v Attorney General, Committee Of Experts And Another,which I delivered on 6-10-2010. In the said case, I was guided by the decisions of the Constitutional Court in Tanzania in Ndyanabo v Attorney General[2001] 2 EA 485, in which the said Court presided over by the Hon. Chief Justice Samatta stated as follows: -
>
> Thirdly, until the contrary is proved, legislation is presumed to be Constitutional. It is a sound privilege of Constitutional construction that legislation should receive such a construction as will make it operative.
>
> Fourthly, since, as stated a short while ago, there is a presumption of Constitutionality of legislation, the onus is upon those who challenge the Constitutionality of the legislation, and they have to rebut the presumption. Fifthly, where those supporting a restriction on a fundamental right rely on a clawback or exclusion clause in doing so, the onus is on them; they have to justify the restriction."

88. The above-mentioned principles of Constitutional interpretation still persuade me. In the Bishop Joseph Kimanicase, the Court observed as follows: -

> "It is a grave legal and Constitutional step to suspend the operation of statutes and statutory provisions. The courts must wade with care, prudence, and judicious wisdom. For the High Court to grant interim orders in this regard, one must, at the interlocutory stay, show that the legislative provision's operation is a danger to life and limb at that very moment."

89. It is my view that the principle of the presumption of Constitutionality of Legislation is imperative for any state that believes in democracy, the separation of powers, and the Rule of Law in general. Further, the courts' ability to suspend legislation during peacetimes when there is no national disaster or war would, in my view, interfere with Parliament's independence and supremacy in its Constitutional duty of legislating law.

90. The Court of Appeal further dealt with the applicability of the doctrine of the Constitutionality of a statute alongside the aspect of public interest in Attorney General & another v Coalition for Reform and Democracy & 7 others [2015] eKLR.

91. Based on the foregoing, this Court finds that public interest tilts in favour of the respondents. It is in the public interest that the impugned notice should not be suspended pending the outcome of the Petition.

92. Conclusion and orders

93. The above analysis indicates that the Petitioners have not successfully laid a basis for granting the orders sought in the application.

94. That being the case, the application is not successful. However, given the nature of the Petition, appropriate directions and expeditious disposal of this matter are needed. In the end, the following orders are hereby issued: -

    i. The Notice of Motion dated 25/11/2024 is hereby disallowed.

    ii. The Petition will be heard based on the pleadings, affidavit evidence, and written submissions.

    iii. If not yet, the Respondents shall file and serve responses to the Petition within 14 days of this date.

    iv. The Petitioner shall, thereafter, and within 14 days of service, file any supplementary responses, if need be, together with written submissions on the Petition.

    v. The Respondents shall file and serve their respective written submissions within 14 days of service.

    vi. Further directions be issued on a date suitable to the Court and the parties.

    vii. Orders accordingly.

DATED AND DELIVERED IN NAROK THIS 29TH APRIL 2025.

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CHARLES KARIUKI

JUDGE