Omondi & another v Attorney General & 2 others; Ethekon & 6 others (Interested Parties) (Petition E269 of 2025) [2025] KEHC 7463 (KLR) (Constitutional and Human Rights) (29 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7463 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E269 OF 2025

LN MUGAMBI, J

MAY 29, 2025

BETWEEN

KELVIN ROY OMONDI ..... 1ST PETITIONER

BONIFACE MWANGI ..... 2ND PETITIONER

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

HEAD PUBLIC SERVICE ..... 2ND RESPONDENT

NATIONAL ASSEMBLY ..... 3RD RESPONDENT

AND

ERASTUS EDUNG ETHEKON ..... INTERESTED PARTY

ANNE NJERI NDERITU ..... INTERESTED PARTY

MOSES ALUTALALA MUKWANA ..... INTERESTED PARTY

MARY KAREN SOROBIT ..... INTERESTED PARTY

HASSAN NOOR HASSAN ..... INTERESTED PARTY

FRANCIS ODHIAMBO ADUOL ..... INTERESTED PARTY

FAHIMA ARAPHAT ABDALLAH ..... INTERESTED PARTY

RULING

Introduction

1. The Petition dated 13th May 2025 assails the manner the 1st – 7th Interested Parties were selected and nominated to serve as Chairman and Commissioners of the Independent Electoral and Boundaries Commission (IEBC).

2. The Petitioners challenge the selection process of the seven interested parties on the grounds that it was carried out in violation of Articles 10, 27(1), 73(2), 88(2), 232 and 250 (3) & (4) of *the Constitution* as read with the *Independent Electoral and Boundaries Commission Act* as well as the *Public Appointments (Parliamentary Approval) Act*.

The Notice of Motion Application for Conservatory orders

3. Filed contemporaneously with the Petition was the Notice of Motion of even date, praying for orders as follows:

   i. Spent.

   ii. Pending the hearing and determination of the instant Application, the Court does issue Conservatory Orders staying and/or suspending the consideration and vetting of Erastus Edung Ethokon; Ann Njeri Nderirtu; Moses Alutalala Mukhwana; Mary Karen Sorobit; Hassan Noor Hassan; Francis Odhiambo Aduol; Fahima Araphat Abdallah for the positions of Chairperson and commissioners of the Independent Electoral and Boundaries Commission by the National Assembly.

   iii. In the alternative to (2) above, pending the hearing and determination of the instant Application, the Court does issue an order of Injunction, stopping the gazettement of Erastus Edung Ethokon; Ann Njeri Nderirtu; Moses Alutalala Mukhwana; Mary Karen Sorobit; Hassan Noor Hassan; Francis Odhiambo Aduol; Fahima Araphat Abdallah as the Chairperson and commissioners respectively of the Independent Electoral and Boundaries Commission by the National Assembly.

   iv In the alternative to (3) above, pending the hearing and determination of the instant Application, the Court does issue Conservatory Orders suspending the taking of oath by Erastus Edung Ethokon; Ann Njeri Nderirtu; Moses Alutalala Mukhwana; Mary Karen Sorobit; Hassan Noor Hassan; Francis Odhiambo Aduol; Fahima Araphat Abdallah or if they shall have taken oath of office at the time of hearing the instant Application and Petition they be barred from assuming office, taking office, drawing salaries and/or acting or being Member(s) of the Independent Electoral and Boundaries Commission.

   v Pending the hearing and determination of the instant Petition the Court does issue Conservatory Orders staying and suspending the consideration and vetting of Erastus Edung Ethokon; Ann Njeri Nderirtu; Moses Alutalala Mukhwana; Mary Karen Sorobit; Hassan Noor Hassan; Francis Odhiambo Aduol; Fahima Araphat Abdallah for the positions of Chairperson and Commissioners of the Independent Electoral and Boundaries Commission by the National Assembly.

   vi. In the alternative to (5) above, pending the hearing and determination of this Petition, the Court does issue an order of Injunction, stopping the gazettement of Erastus Edung

Ethokon; Ann Njeri Nderirtu; Moses Alutalala Mukhwana; Mary Karen Sorobit; Hassan Noor Hassan; Francis Odhiambo Aduol; Fahima Araphat Abdallah as the Chairperson and commissioners respectively of the Independent Electoral and Boundaries Commission by the National Assembly;

vii. In the alternative to (6) above, pending the hearing and determination of this Petition, the Court does issue Conservatory Orders suspending the taking of oath by Erastus Edung Ethokon; Ann Njeri Nderirtu; Moses Alutalala Mukhwana; Mary Karen Sorobit; Hassan Noor Hassan; Francis Odhiambo Aduol; Fahima Araphat Abdallah or if they shall have taken oath of office at the time of hearing the instant Application and Petition they be barred from assuming office, taking office, drawing salaries and/or acting or being Member(s) of the Independent Electoral and Boundaries Commission.

viii. The Court does direct that the instant suit be served by way of advertisement in any of the popular local dailies with nationwide circulation.

ix. Any such other and further orders that the Court may deem fit to grant in the circumstances.

Petitioners' Case

4. The Application is supported by the 1st Petitioner's affidavit, of even date sworn on behalf of both Petitioners, the grounds on the face of the Application and a further affidavit sworn on 15th May, 2025.

5. The Petitioner laid out the context of the Application by stating that prior to the commencement of the recruitment process of the new nominees to Commission, the *Independent Electoral and Boundaries Commission Act* was amended to be in accordance with the National Dialogue Committee's recommendations.

6. Thereafter, Selection Panel was constituted by the 3rd Respondent to initiate the recruitment process and what followed was the declaration of vacancies in the IEBC.

7. The Selection Panel vide Gazette Notice No. Vol. CXXVII – No.21 dated 3rd February 2025, invited applications and subsequently shortlisted a number of people for the interviews.

8. At the end of that exercise, the Selection Panel issued its Report to His Excellency the President, Dr.William Samoei Ruto forwarding the names for the position of Chairperson and nine names for the Commissioners.

9. On 8th May 2025, the Office of the President through the 2nd Respondent published the names of the seven persons (the 1st to 7th Interested Parties herein) nominated to serve Chairman and Commissioners.

10. The Petitioners contend that the selection process was not merit based for a number of reasons.

11. Firstly, it is alleged that some of the candidates such as the 3rd Interested Party did not score as high as the others in the interviews.

12. As for the 1st Interested Party's nomination, the Petitioners allege that the Chairperson has close affiliations with Mr. Josephat Nanok, the Statehouse Deputy Chief of Staff to the President hence the nomination is being challenged on grounds of partiality/bias.

13. In respect of the 5th Interested Party, the Petitioners assert that he was never shortlisted for the interviews, rather, his name was sneaked in mysteriously under unclear circumstances which is contrary to Section 3 of the *Independent Electoral and Boundaries Commission Act*. The Petitioners assert that

this preferential action was discriminated against all the other candidates who had legitimately applied and shortlisted.

14. The Petitioners protest that the 2nd Interested Party was at the time of nomination a State Officer and the 4th Interested Party was a member and officer bearer of a political party. The Petitioners fault the nomination as being in violation of Article 88(2) of *the Constitution* and also in breach of Articles 10, 73(2)(a), 232 (1)(g) of *the Constitution*.

15. Further, the 1st to 7th Interested Parties nominations is contested as to be illegal and unconstitutional as they do not meet threshold of public appointments as stipulated in *the Constitution* and the Law.

16. The Petitioners deposed that the 1st to 7th Interested Parties nominations do not meet the requirements of regional and ethnic balance contrary to Articles 10, 27(1), 232 and 250(3) and (4) of *the Constitution*. It was pointed out that both the 1st and 4th Interested Parties are from Rift Valley region. A comparable argument is made in relation to representation of persons with disabilities. It is stated that this is despite Edward Katama Ngenywa among many others having been shortlisted and interviewed as persons with disabilities, none of whom was selected.

17. Moreover, the nominees were selected without prior consultation with the minority and majority political parties as highlighted in the National Dialogue Committee Report hence were in breach of Articles 10 and 27(1) of *the Constitution*.

18. The Petitioners further contend that the Selection Panel's Report on the outcome of the interviews was not publicly shared contrary to Article 35 of *the Constitution*. Their request for information was ignored by the Selection Panel.

19. In the light of the above, the Petitioners believe that they have demonstrated a prima facie case for issuance of conservatory orders.

20. They maintained that should this this Court not issue conservatory orders, their Petition will become moot since upon taking office, *the Constitution*, under Articles 248 and 251 does not provide for removal of the Commissioners on grounds of illegal or unconstitutional appointment.

21. Furthermore, the Petitioners assert in their further affidavit that the members of the 3rd Respondent have made public utterances vowing to approve the 1st to 7th Interested Parties nomination thus confirming the Petitioners' apprehension. According to the Petitioners' the pronouncements are confirmatory of an already tainted Parliamentary Process with a predetermined conclusion. As such, the Petitioners assert that the vetting process will only be a mere cosmetic exercise hence urge this Court to grant the orders sought.

1st Respondent's Case

22. In its response to the Petition and Notice of Motion Application, the 1st Respondent filed a Notice of Preliminary Objection dated 16th May 2025 on the grounds that:

    i. The Petition is non-justiciable on account of having been instituted contrary to the principle of ripeness.

    ii. The Petitioner has not exhausted the first instance, constitutionally provided remedy before invoking the jurisdiction of this Court, thereby contravening the doctrine of exhaustion

    iii. The exercise of jurisdiction by this Court at this stage of the appointment process of Commissioner of an independent constitutional commission would be contrary to the

doctrine of separation of powers and would constitute a usurpation of the primary role of the legislature in the approval process.

iv The claim against the Attorney-General is non-justiciable and premature.

v The Petition merits dismissal under the constitutional avoidance doctrine

2nd Respondent's Case

23. In like manner, the 2nd Respondent filed its Notice of Preliminary Objection dated 17th May 2025 on the foundation that:

i. The jurisdiction of this Court has been wrongly invoked as the issues raised herein shall be subject to vetting and approval by the National Assembly pursuant to Article 250 (2) of *the Constitution* as read with Section 3 (5) of the First Schedule of the IEBC Act.

ii. The Petition is an attempt to circumvent and usurp the Constitutional and statutory mandate and authority of the National Assembly in the approval of the Chairperson and members of the IEBC.

iii. The Petition offends the findings in Bishop Donald Kisaka Mwawasi v Attorney General & 2 others [2014] KECA 561 (KLR) which confirms that the eligibility of a candidate for a public office is at the time of taking said office and not at nomination.

3rd Respondent's Case

24. The 3rd Respondent in response filed its Notice of Preliminary Objection dated 15th May 2025 on the basis that:

i. The Petitioners' Notice of Motion and Petition are not justiciable for violating the doctrine of ripeness.

ii. To the extent that Petition and the Notice of Motion challenges an ongoing constitutional process in respect of which no decision or action has been taken by the National Assembly, the Petitioners' Notice of Motion and Petition are speculative and deals with prospective anticipatory circumstances rather than current or probable events.

iii. The Petitioners, having failed to exhaust all avenues available to them under *the Constitution* and the Standing Orders, the Petition and Application violate the doctrine of exhaustion and are therefore premature.

25. In the Replying Affidavit sworn on 15th May 2025, Jeremiah Ndombi, the 3rd Respondent's Deputy Clerk depones that by a letter dated 9th May 2025, the 2nd Respondent forwarded to the 3rd Respondent's Speaker, the names of the selected persons in line with Section 4 of the *Public Appointments (Parliamentary Approval) Act*. The Speaker in line with Section 4 of the Act then notified the House of the selection on the same day.

26. Additionally, the Speaker committed the 1st to 7th Interested Parties names to the 3rd Respondent's Departmental Committee on Justice and Legal Affairs (JLAC). He informs that the Committee is required to conduct approval hearings as stipulated under Section 6(1) within 28 days and issue its Report to the House.

27. The public was also on 12th May 2025 vide the local dailies notified of the nominees and requested to issue their comments and memoranda concerning the nominees by 21st May 2025. In view of this, he stresses that the process is still ongoing.

28. He states that during the 3rd Respondent's vetting process among the issues examined is whether the correct procedure was followed in selecting the nominees and to undertake a merit review of the entire selection process against the law. Owing to this, he contends that the Petitioners should have raised these issues at that juncture. Taking these factors into consideration, he asserts that the Petitioners have failed to satisfy the threshold for grant of conservatory orders.

29. Be that as it may, he points out that if the conservatory orders are issued the public participation and vetting process will be halted thus denying the public and 3rd Respondent the opportunity to exercise their right and mandate respectively. He adds that once the 28 days lapse, the 1st to 7th Interested Parties shall be deemed to have been duly approved in light of Section 9 of the *Public Appointments (Parliamentary Approval) Act*. Consequently, he argues that grant of the conservatory orders will in the end defeat the dictates of *the Constitution*.

2nd Interested Party Case

30. In like manner, the 2nd Interested Party filed its Notice of Preliminary Objection dated 15th May 2025 on the premise that:

    i. The Petition and the Notice of Motion dated 13th May, 2025 violate the Doctrine of Exhaustion, Justiciability and this Court ought to exercise and adhere to the Doctrine of Avoidance.

    ii. Under the *Public Appointments (Parliamentary Approval) Act* it is Parliament that is mandated to consider any issues concerning the nominees and not this Court.

    iii. The matter herein is neither ripe nor justiciable as it remains pending before the National Assembly, which is yet to conclude its constitutionally mandated role in the appointment process. Litigating this matter at this stage would therefore offend the constitutional doctrine of separation of powers and the principle of institutional competence.

31. Likewise, the 2nd Interested Party filed her Replying Affidavit on even date. She depones that she submitted her application to the Selection Panel and was interviewed on 28th March 2025. She later on learnt on 8th May 2025 that she was among the selected nominees.

32. She asserts that the position of member of the Commission is open to all eligible persons not withstanding whether they are State Officers. She avers that there exists no legal bar as alleged and that the Petitioners have misinterpreted the edicts of Article 88(2)(b) of *the Constitution*.

33. She further contends that the Petitioners are prosecuting this Petition in the wrong forum. She states that this matter ought to be brought before the 3rd Respondent as stipulated under the *Public Appointments (Parliamentary Approval) Act*. For this reason, the matter is not ripe for determination.

3rd Interested Party's Case

34. The 3rd Interested Party filed his Replying Affidavit sworn on 15th May 2025.He in like fashion submitted that the application was premature in view of the ongoing constitutional process thus unmerited and an invitation to breach the doctrine of separation of powers. He argues that this Court does not have jurisdiction to entertain the matter.

35. He depones that his application to be a member of the Commission was made in accordance with the law. He submitted his application on 5th March 2025 and was thereafter shortlisted and interviewed on 15th April 2025. He notes that in line with public participation, the public was also invited to issue comments and memorandum concerning the shortlisted Candidates. He asserts that the claim that he garnered a low score is unsubstantiated as no material was placed before the Court to support the same.

36. He avers that following their nomination, he received a letter dated 12th May 2025 inviting him for the approval hearing before the 3rd Respondent's Committee (JLAC) set for 26th May 2025.

37. Furthermore, he alleges that the assertion of breach of regional balance is premised on a misinterpretation of the law as the country is now divided into counties not provinces. Equally he notes that it would be unrealistic for there to be a complete representation of all counties due to the limited number of positions.

38. According to him, the Petitioners have not set out any demonstratable grounds to warrant issuance of the sought orders.

4th Interested Party's Case

39. In reply, the 4th Interested Party filed her Replying Affidavit sworn on 15th May 2025. On the onset she avers that the Petition offends the doctrine of exhaustion, ripeness, justiciability and separation of powers.

40. She depones that she applied for the position of member of the Commission and was among the persons who were shortlisted and interviewed on 27th February 2025. She avers that the Petitioners neglected to issue their concerns regarding her eligibility to the Selection Panel. Considering this, she perceives that the Petition is disingenuous and malicious as seeks to raise the issue now.

41. Contrary to the Petitioners allegations, she claims that she has never served as the Executive Director or member of the Jubilee Party's governing body within the preceding five years. She notes that this was confirmed by the Registrar of Political Parties in its letter dated 15th May 2025.She adds that she does not have any political affiliations with any political party. That said, she points out that the Petitioner did not adduce any evidence to support this allegation.

42. Additionally, she posits that the claim for breach of requirement for regional balance lacks a legal basis as it is clear that herself and the 1st Interested Party's come from different Counties. Nonetheless, she reasons that nomination of persons from all the counties would be unrealistic as the positions are only 7 in number.

43. It is asserted further that Section 6(9) of the *Public Appointments (Parliamentary Approval) Act* allows a person to contest suitability of any candidate during the 3rd Respondent's vetting and approval process which the Petitioners have failed to exhaust. In addition, it is observed that the Petition is premature as the process is ongoing before the 3rd Respondent which in turn leads to violation of the doctrine of separation of powers. In view of the foregoing, she asserts that the application has not met the prerequisite for grant of the sought orders.

5th Interested Party's Case

44. The 5th Interested Party in response filed his Replying Affidavit sworn on 19th May 2025.

45. He depones that when the Selection Panel called for applications, he submitted his application and was shortlisted for an interview conducted on 24th April 2025.He stated that the Petitioners allegations are

false as it evident that his name was in the shortlist published in the Daily Nation Newspaper dated 25th March 2025. He stresses that the Petitioners' have failed to demonstrate that his nomination was irregular.

46. He states additionally that this Court lacks jurisdiction to entertain the matter as it is not yet ripe for determination. The Petition is thus said to be premature and not justiciable.

47. He notes that the 3rd Respondent is mandated to vet all nominees to the Commission before they are appointed thus this Petition seeks to have the Court interfere with the process. This is contrary to the Petitioners' presenting their Petition before the 3rd Respondent to enable it consider their complaints while exercising its mandate as provided under Section 7 of the *Public Appointments (Parliamentary Approval) Act*. He argues as such that the Petition offends the doctrine of exhaustion. Ultimately, the 5th Interested Party asserts that the Petitioners' application has failed to meet the threshold for grant of conservatory orders.

DIVISION - 6th Interested Party's Case

48. In reply, the 6th Interested Party filed its Grounds of Opposition dated 15th May 2025 on the premise that:

i. The instant application is an abuse of the Court process, fatally defective and hence ought to be struck off and/ or dismissed with costs.

ii. The Application is superfluous and a clog in judicial time and processes as the 6th Interested Party applied for the position as advertised, handed in the academic credentials; attended the interview as publicly aired; and shortlisted for confirmation.

iii. The 6th Interested Party was vetted by IEBC selection panel and IEBC is not a party to the suit.

iv The Application has been overtaken by events and is absurd because the IEBC Selection panel has already been disbanded.

v The said List of Nominees complied with the requirements of Section 5 of the Independent Electoral Boundaries Commission Act.

vi. Section 5 of the Independent Electoral Boundaries Commission Act provides a membership limited to seven (7) members hence it is impractical to represent all ethnic groups or achieve complete regional or ethnic balance in Kenya on the Independent Electoral Boundaries Commission.

vii. Section 5 of the Independent Electoral Boundaries Commission Act does not set out a strict formula for achieving ethnic and regional balance in a body limited to seven (7) members hence that discretion is left to the selection panel

viii. The principle of inclusiveness under Article 10 of *the Constitution* was complied with in context of selecting nominees to the Independent Electoral Boundaries Commission as provided for under the Independent Electoral Boundaries Commission (Amendment) Act, 2024, which contemplates a broad diversity particularly regarding gender and integrity as opposed to the selection of specific nominees based on their regional locality, although the discretion is entirely bestowed on the respective bodies.

ix. Article 54(2) of *the Constitution* is framed in a language envisaging progressive realization, to ensure that no less than 5% of public bodies comprise of persons with disabilities. This

requirement means that an appointing authority must take active steps to search for and include qualified candidates with disabilities, subject to the size and nature of the body.

x. Section 107 and 108 of the *Evidence Act* require the Applicant to prove that qualified persons living with disability applied or were interviewed but were overlooked or that the selection panel acted in bad faith or in deliberate disregard of known disabled candidates who met the qualifications listed under Section 6 of the Independent Electoral Boundaries Commission Act.

xi. The Applicant has failed to satisfy and/ or provide the provisions of the law the 6th Interested Party has violated.

xii. The Applicant's Application is premised to deny the 6th Interested Party enjoyment of the fruits of the selection panel's outcome and to serve the nation as a qualified commissioner contrary to Section 4 of the Independent Electoral Boundaries Commission Act.

xiii. There is no prejudice that will be occasioned upon the Applicants.

xiv The Application ought to be struck out or dismissed with costs to the 6th Interested party.

7th Interested Party's Case

49. The 7th Interested Party in response filed Grounds of Opposition dated 18th May 2025 as follows:

i. The Affidavit sworn on 13.05.2025 and the Further Affidavit sworn on 15.05.2025 are argumentative and disclose no issues of facts capable of being responded to by the 7th Interested Party. As such, there is neither a legal nor viable cause of action by the Petitioners as against the 7th Interested Party. The 7th Interested Party should be struck out from these proceedings in accordance with Section 5(d)(i) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules.

ii. Notice of Motion and the Petition are drafted in an omnibus manner. The process of shortlisting and nomination was conducted on the basis of individual qualification and merit. The omnibus manner in which the Petitioners gravamen is espoused is prejudicial and unfair to the candidature 7th Interested Party whose process of shortlisting and nomination the Petitioners find no issue with.

iii. The Notice of Motion and the Petition violates the doctrine of judicial restraint as it invites this Court to interfere with the constitutional and statutory mandate of constitutional institutions and mechanism - This is supported by the Supreme Court in Speaker of the Senate & Another v Attorney-General & 4 Others [2013] KESC 7 (KLR) where the court emphasized the need for courts to be cautious not to usurp the role of Parliament unless there is a demonstrated breach of *the Constitution*; In Judges and Magistrates Vetting Board & 2 others v Centre for Human Rights and Democracy & 11 others[2014]KESC 9(KLR) the Supreme Court ruled that decisions by constitutionally established vetting bodies should not be interfered with lightly so as to uphold the mandate of independent institutions and further, the Court of Appeal in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others[2013]KECA 445 (KLR) emphasized that Courts should not substitute their judgment for that of the appointing authorities.

iv The Notice of Motion and the Petition violates the doctrine of separation of powers as it invites this Court to determine the outcome of a process within the exclusive legal mandate of Parliament:

a. Article 250(2) that requires chairpersons and each member of a commission, and the holder of an independent office, to be identified and recommended for appointment in a manner prescribed by national legislation, approved by the National Assembly and appointed by the President.

b. Section 7 and 10 of the *Public Appointments (Parliamentary Approval) Act* that requires Parliament to consider the procedure used to arrive at a nomination, any constitutional or statutory requirements relating to the office in question, the suitability of the nominee and being clothed with the powers to reject any such nominees after such consideration.

c. This is a direct mandate and process entrusted to Parliament and it has already called for public participation vide submission of memoranda including supporting affidavits on oath contesting the suitability of any the Nominees as provided for under Section 6 of the *Public Appointments (Parliamentary Approval) Act*.

d. Therefore, the Notice of Motion and the Petition are premature and if at all the same was to be in issue, it would have sufficed as a memorandum submitted before the Departmental Committee on Justice and Constitutional Affairs in Parliament for consideration rather than a matter before this court.

e. The Supreme Court in Justus Kariuki Mate & another v Martin Nyaga Wambora Wambora & another [2017] KESC 1 (KLR) cautioned against undue interference with running processes in other arms of Government and that the doctrine of separation of power which bars interference with the Parliament's internal arrangements and procedures; The Supreme Court in Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others[2013]KESC 7 (KLR) equally held that the Parliament has a right under article 117 and 124 of *the Constitution* to regulate its internal affairs, courts cannot supervise the workings of Parliament and that the institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another.

v The Notice of Motion and the Petition does not specifically state how the application, shortlisting and nomination of the 7th Interested Party violates the national values and principles of government under Article 10; the values and principles of public service under Article 232; the specific qualifications required by *the Constitution* or national legislation that the 7th Interested Party did not meet under Article 232(3); or how her nomination violates the regional and ethnic diversity of the people of Kenya under Article 232(4).

Indeed, the 7th Interested party is a woman from the Bajuni Community, a minority group but was also professionally and academically qualified to be a member of the Commission and her presence amongst the nominees reflect the regional and ethnic diversity in this Country within the provisions of Paragraph 6 in the 1st Schedule of the *Independent Electoral and Boundaries Commission Act*.

a. Further, there are no sufficient grounds or evidence on the face of the Notice of Motion and the Petition to support the allegation that the shortlisting and nomination of the 7th Interested Party violated the guiding principles of leadership and integrity under Article 73(2) (a) or that she failed to meet the eligibility criteria set out under Article 88(2) (a).

b. That the Notice of Motion dated 03.05.2025, Petition dated 13.05.2025 and the Further Affidavit sworn on 15.05.2025 are consequently incompetent, incurably defective and an abuse of the court processes and should be dismissed with costs to the 7th Interested Party.

Petitioners' Submissions

50. The Petitioners through Douglas and Associates Advocates filed submissions dated 17th May 2025 and set out the issues for discussion as: whether the preliminary objections are merited and whether the Petition deserves conservatory orders.

51. On the first issue, Counsel submitted that the Petition was chiefly opposed on the ground of being premature thus unjustifiable. It was asserted that these objections lack merit as Article 22 and 258 of *the Constitution* provide that one has a right to institute a suit where they believe their fundamental rights are threatened with violation. As a result, Counsel argued that the Petitioners are not required to wait until a breach occurs.

52. Reliance was placed in (CORD) & 2 others v Republic of Kenya &10; others [2015] KEHC 7074 (KLR) where it was held that:

> "A party does not have to wait until a right or fundamental freedom has been violated, or for a violation of *the Constitution* to occur, before approaching the Court. He has a right to do so if there is a threat of violation or contravention of *the Constitution*. We take this view because it cannot have been in vain that the drafters of *the Constitution* added "threat" to a right or fundamental freedom and "threatened ..... contravention" as one of the conditions entitling a person to approach the High Court for relief under Article 165(3) (b) and (d) (i). A "threat" has been defined in Black's Dictionary, 9th Edition as "an indication of an approaching menace e.g. threat of bankruptcy; a Person or a thing that might cause harm" (emphasis added). The same dictionary defines "threat" as "a communicated intent to inflict harm or loss to another..."

53. Similar reliance was placed in Speaker of the Senate v Attorney-General & Another & 3 Others [2013] eKLR and Katiba Institute v Inspector General of Police & another; Law Society of Kenya (Interested Party) [2025] KEHC 5240 (KLR).

54. In this matter, Counsel argued that the 1st to 7th Interested Parties' nomination threatens to violate *the Constitution* and the right to a free and fair election conducted by an independent body. As such, the validity of the nomination process and its outcome is said to be a question ripe for determination by this Court.

55. In like fashion, Counsel submitted that the claim of breach of separation of powers cannot also stand as the Court has power to determine the legality of the executive or administrative actions as held in Re the Matter of the Interim Independent Electoral Commission [2011] eKLR.

56. Counsel submitted further that the Respondents cannot assert failure to exhaust available remedies without demonstrating the existence of such remedies and that they have not been exhausted. Counsel submitted thus that the various preliminary objections were unmerited.

57. Counsel relied in Mark Ndumia Ndung'u v Nairobi Bottlers Ltd & another [2018] eKLR where the Court pointed out that:

> " A remedy is available if the petitioner can pursue it without impediment, it is effective if it offers a prospect of success, and it is sufficient if it is capable of redressing the complaint".

58. Like dependence was placed in Likowa v Aluochier & 2 others [2025] KESC 25 (KLR) and Jovet (Kenya) Limited v Bavaria N V (SC Petition E039 of 2024 Petition) (unreported).

59. On the second issue, Counsel submitted that the Petition was arguable as elicits cognizable constitutional controversies as noted by the Supreme Court in George Mike Wanjohi v Steven Kariuki & 2 others (2014) eKLR. This is in relation to the validity of the nominations and intended vetting and intended appointment of the Commissioners.

60. Additional reliance was placed in Wilson Bursen Mokua v Central Conference of the Seventh Adventist and another [2021] eKLR and Satrose Ayuma & 11 Others v Registered Trustees of Kenya Railways Staff Retirements Benefits Scheme [2011] eKLR.

61. Turning to the second condition, Counsel emphasized that failure to grant the conservatory orders to halt the purported unlawful nomination and vetting process will render the Petition nugatory. To buttress this point reliance was placed in Attorney General v Matindi & 55 others [2023] KECA 1475 (KLR) where it was held that:

> " Is not reduced to a mere pyrrhic victory or paper judgment. Whether or not [a matter] will be rendered nugatory is determined on a case by case basis depending on the peculiar circumstances of the case. But ordinarily, the Court will grant relief if what is apprehended cannot be undone once it happens or cannot be undone without undue hardship or expense, or cannot be adequately compensated by award of damages. The Court also takes into account the respective hardship that grant or refusal of relief is likely to wrought on the parties."

62. Like dependence was placed in Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR.

63. According to Counsel, public interest in this matter dictates that conservatory orders be issued to preserve and safeguard the Petition from being rendered nugatory. In that allowing the vetting and approval to proceed while the Petition is pending would defeat the purpose of petitioning. Further the same would restore trust in the IEBC process.

64. The Petitioners submissions were highlighted in Court on 19th May, 2025.

65. In a nutshell, Mr. Paul Muite (SC) submitted that this Court has the requisite jurisdiction to determine the matter as empowered under Article 165 of *the Constitution*. He stressed that the issues raised require comprehensive hearing of the matter so as to appreciate the full arguments and evidence adduced. Devoid of this, Counsel stressed that the Petition would be rendered nugatory and further that the Court is not be called upon to determine the matters on merit.

66. Senior Counsel submitted that the 1st Interested Party's nomination is challenged for violating *the Constitution* stating that the actions complained of will undermine public confidence on free and fair elections. He pointed out that the 1st and 4th Interested Parties come from the same region, that is Rift Valley, while the 5th and 7th Interested Parties are from the same ethnic community. He stressed that this information was within the Selection Panel's knowledge when they were considering the candidates.

67. Counsel submitted that the 5th Respondent was not among the shortlisted candidates. Further, that public participation exercise was not adequate.

68. Mr. Arnold Ochieng, argued that contrary to the Respondents and Interested Parties assertions that the instant Petition is premature and offensive to the doctrine of Separation of powers that, Article 22 and 258 of *the Constitution* make it clear that one need not wait until an actual violation of *the Constitution* occurs, and that a threat is sufficient. He added that this Court under Article 23(3) of *the Constitution* is given unlimited power to grant conservatory orders.

69. In relation to the vetting and approval of the 1st to 7th Interested Parties by Parliament, Mr. Ochieng submitted that the Parliament's process is only limited to consideration of the nominees' competence and thus the process does not suffice to address the issues raised in this Petition. This is particularly in relation to the legality and constitutionality of the discharge of statutory power by the Selection Panel, constitutionality of the selection and interview process and the President's action on the recommendation of the Selection Panel. Counsel emphasized therefore that the entire process must comply with the constitutional dictates.

1st Respondent's Submissions

70. Mr. E.Bita for the 1st Respondent submitted that contrary to the Petitioners belief, issuance of conservatory orders under Article 23 of *the Constitution* is only available in relation to violations under the Bill of Rights. Mr. Bita asserted that the Petitioners case does not allege any such breach.

71. Mr. Bita refuted the Petitioners assertion of jurisdiction of this Court and submitted that this Court's jurisdiction is limited in relation to matters such as proceedings before Parliament, as in this case. Counsel stated that Article 250(2)(b) of *the Constitution* as read with Section 7(b) of the *Public Appointments (Parliamentary Approval) Act* states that commissioners are nominated and subject to Parliament's approval, are appointed by the President. In assuming jurisdiction of this matter, Counsel submitted that this Court will be acting like the approval body contrary to the structure of *the Constitution*. Reliance was placed in Mate & another v Wambora & another [2017] KESC 1 (KLR) where the Supreme Court at paragraph *84* held that:

> "From the facts of this case, it is clear to us that the integrity of court orders stands to be evaluated in terms of their inner restraint, where the express terms of *the Constitution* allocate specific mandates and functions to designated agencies of the State. Such restraint, in the context of express mandate-allocation under *the Constitution*, is essential, as a scheme for circumventing conflict and crisis, in the discharge of governmental responsibility. No governmental agency should encumber another to stall the constitutional motions of the other. The best practices from the comparative lesson, signal that the judicial organ must practice the greatest care, in determining the merits of each case."

72. Like dependence was placed in Mwende Maluki Mwinzi v Cabinet Secretary, Ministry of Foreign Affairs & 2 others [2019] KEHC 2293 (KLR) and Chamao & 2 others v Ichung'wah & 13 others; Independent Electoral and Boundaries Commission & 2 others (Interested Parties) [2024] KEHC 15727 (KLR).

73. Mr. Bita in conclusion, submitted that although the Petitioners raised the issue of access to information on the selection and nomination process, no relief has been sought in that regard and no information was ever sought from the State.

2nd Respondent's Submissions

74. Mr. Kipkosgei echoed Mr. Bita's submissions that the Petition is premature and not yet ripe for this Court's consideration as set out in the 2nd Respondent's Notice of Preliminary Objection.

75. Mr. Kipkosgei stated that the process of appointment of an IEBC Commissioner is a tired process involving a number of actions being: the selection panel, nomination by President, approval by parliament and appointment by President. Counsel submitted thus that all actors in the process act as checks.

76. Mr. Kipkosgei further noted that the process in Parliament is not an idle process but the most crucial as guided by the *Public Appointments (Parliamentary Approval) Act*. Consequently, he asserted that the Petitioners' invitation at this juncture is akin to asking the Court to prematurely intervene in circumstances where other organs of State can provide a remedy.

77. Mr. Kipkosgei further rebuffed the Petitioners allegations that once commissioners are appointed, they cannot be removed from office. Counsel reasoned that the provisions of Article 251 of *the Constitution* were drafted on the assumption that the nomination and appointment of the Commissioner is lawful in the first place. As such, where it is found that the same is unlawful such an appointment would be void ab initio.

78. Finally, Mr. Kipkosgei noted that the Petitioners had raised under Prayers e, f and g which are matters in respect of the Selection Panel which is not a party herein.

3rd Respondent's Submissions

79. Mr. Kuiyoni in like fashion stated that the 3rd Respondent is opposed to the Petition and filed a Notice of Preliminary Objection in response. Counsel set out the key issues for deliberation as: whether application is justiciable at this stage, whether the Petitioners have exhausted all available avenues and whether the Application meets the threshold for conservatory orders.

80. Mr. Kuiyoni on the first issue, submitted that the Petition is not ripe for determination as the process envisaged under Article 250(2) of *the Constitution* was ongoing. Counsel, stated that the vetting and approval by Parliament had commenced and the public invited to submit their comments to the 3rd Respondent's Justice and Legal Affairs Committee. Considering this, Counsel argued that the Court was being invited to act on an anticipated outcome that may or may not happen.

81. Mr. Kuiyoni on the second issue submitted that Petitioners had not exhausted the mechanisms set out under Article 118 of *the Constitution* and the Public Appointment, (Parliamentary Approval) Act. In this regard, Counsel noted that the Act provides the public participation exercise, an avenue the Petitioners can use to raise any issue before the Vetting Committee. Section 7 of the Act further provides that Parliament is required to assess the process used to arrive at the nominee, compliance with statutory prerequisites and the overall suitability of nominee to hold that office.

82. Counsel in light of this submitted that the Petitioners' concerns fall within the mandate of the vetting Committee. Counsel placed reliance in Okiya Omtatah v National Assembly & 2 others [2019] eKLR where the Court declined jurisdiction, for reasons that the issues raised could be considered by the Committee.

83. Mr. Kuiyoni further argued that the issues raised in the Application do not meet the grounds for issuance of conservatory orders. He argued that the issues raised can only be determined at the full hearing of the Petition.

1st Interested Party's Submissions

84. Dr. Arua concurring with Mr. Bita submitted that conservatory orders under Article 23(3) of *the Constitution* cannot issue unless there is an alleged violation of fundamental rights which is different from violation of *the Constitution*.

85. Reliance was placed in Munya v Kithinj*i & 2 others (Application 5 of 2014*) [2014] KESC 30 (KLR) where the Supreme Court outlined the conditions to be met for conservatory orders to be issued.

86. Dr. Arua submitted that no prima facie case had been established as only a list of nominated persons had been forwarded to Parliament which does not constitute an appointment. Counsel added that there was no direct threat in this matter to warrant this Court's intervention.

87. Reliance was placed in Adrian Kamotho Njenga v Selection Panel for the Appointment of Commissioners of the Independent Electoral and Boundaries Commission (2021) & 2 others; Independent Electoral and Boundaries Commission [2021] eKLR where the Court declined a similar application as was filed at the interlocutory stage of the process.

88. Dr. Arua similarly submitted that the allegations made against the 1st Interested Party that he is a friend of one Josephat Nanok who works with the President were preposterous. Counsel stressed that a Petition cannot be based on assumptions. Reliance was placed in Wilson Kaberia v Judges and Magistrate Vetting Board [2016] eKLR where it was held that where it is obvious that a Petition has no chance of success, the Court should not grant conservatory orders.

2nd Interested Party's Submissions

89. Mr. Abubakar, referring to the 2nd Interested Party's Preliminary objection submitted that the objection was capable of disposing the entire Petition since it invokes the doctrine of exhaustion, justiciability and constitutional avoidance.

90. Mr. Abubakar restating the Respondents' opinions emphasized that the Parliament is mandated under the Public Appointment (Parliamentary Approval) Act to consider all issues concerning every nominee, not this Court. At this juncture therefore, Counsel submitted that the matter was neither ripe nor justiciable and is offensive to the principle of separation of powers.

91. Reliance was placed in Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others [2016] KEHC 5536 (KLR) where it was held that the justiciability dogma prohibits the Court from determining hypothetical or academic cases, such as the one before this Court.

92. Mr. Abubakar submitted that the Petitioners allegations that the 2nd Interested Party is a State Officer and thus not eligible for appointment, is based on a misapprehension of the Article 88(2) of *the Constitution*. According to Counsel, the provision relates to appointment whereas the 2nd Interested Party has not yet been appointed. Counsel added that this Article ought to be read alongside Article 77 of *the Constitution*. It was further noted that the nominees were from different counties not provinces as these are no longer administrative units.

93. Mr. Abubakar as well submitted that the Application does not meet the conditions for issuance of conservatory orders. Counsel averred that no irreparable harm would be occasioned as alleged, since the nominees will still be vetted by Parliament which is an appropriate remedy in this matter. Accordingly, Counsel concluded that no prejudice would be occasioned if the orders are not issued.

3rd Interested Party's Submissions

94. Mr. Omenta, on the onset submitted that the sought orders cannot issue as the Petitioners are required to satisfy the three-tier test of issuance of conservatory orders as held in Wilson Kaberia Nkunja (Supra). Counsel submitted that the Petitioners had not met this test.

95. Mr. Omenta moreover submitted that this Court lacks jurisdiction to entertain the matter as it is offensive to the principle of separation of powers and such interference was cautioned against by the Supreme Court in Justus Kariuki v Wambua Mate (2017) eKLR.

96. Mr. Omenta stated that while the Petitioners argued that the 3rd Interested Party had scored low marks, they failed to substantiate the allegation by way of evidence.

97. Mr. Omenta submitted likewise that while ethnicity does not translate to formulaic representation of Kenya community as observed in Njogu v Attorney General & another [2025] KEHC 301 (KLR).

4th Interested Party's Submissions

98. Mr. Rotich reiterating the other parties' views submitted that this matter is premature having been initiated without exhausting the alternative procedure. Counsel noted that the dispute is not ripe for determination as the Petition is dependent on occurrence of procedure in Parliament hence is not justiciable until the procedure is concluded. Reliance was placed in Jirongo & Anorther v IEBC (Petition No.005 of 2022).

99. Mr. Rotich stressed that the issue of eligibility and suitability are not constitutional violations, instead, the suitability of candidate is provided for under Section 6 and 7 of the *Public Appointments (Parliamentary Approval) Act*. As such, Counsel reasoned that the Petitioners are inviting the Court to assist the relevant constitutional bodies to ascertain suitability of candidates.

100. Mr. Rotich opposing the assertion about this Court's jurisdiction submitted that this is a question that should be interpreted holistically and in a manner that anticipates procedures established under Article 159 of *the Constitution*.

101. Mr. Rotich equally submitted that the allegations made against the 4th Interested Party of being affiliated to a political party are rebutted in the letter issued by the Registrar of Political parties affirming otherwise. Counsel as well added that the insistence of regional balance based on an unrealistic consideration as the membership of the Commission is limited to 7 members. In this regard, reliance was placed in John Waweru Wanjohi & 27 others v Attorney General & 6 others [2012] KEHC 5557 (KLR).

5th Interested Party's Submissions

102. Mr. Issa Mansur, submitting on the 5th Interested Party's qualification, Counsel contended that the 5th Interested Party was not barred under the criteria set out in Article 88 of *the Constitution*. Furthermore, Counsel submitted that the 5th Interested Party was among the persons who applied for the positions. Counsel as well submitted that shortlisting of the candidates is conducted by the Selection Panel. That said, Counsel averred that majority of the issues raised refer to the Selection Panel which is not joined in this suit.

103. Mr. Issa correspondingly argued that the Petitioners ought to allow the Parliament to discharge its mandate and if dissatisfied, they may thereafter approach this Court. Reliance was placed in Attorney-

General & 2 others v Ndii & 79 others; Dixon & 7 others [2022] KESC 8 (KLR) where the Supreme Court affirmed that:

> "In determining whether a question is ready for determination, the courts look to the principle of justiciability, rooted in the doctrines of ripeness and mootness. This is a necessary examination that the courts must do in order to ensure that they do not overstep their constitutional authority by either adjudicating on a question too early based on conjecture or too late when its decision would be rendered superfluous.

6th Interested Party's Submissions

104. Mr. Fred Adhuok, in addition to the 6th Interested Party's Grounds of Opposition dated 15th May 2025. On regional balance, he argued that it is impossible to include representation of all the Counties within the 7-member positions. Also, Counsel argued that the Petitioners had not shown that people with disabilities had applied for the positions and were disqualified.

105. Mr. Adhuok also noted that most of the prayers are in relation to the Selection Panel which has since become functus officio. According to Counsel grant of the conservatory orders would be tantamount to reconstitution of the Selection Panel which would be against public interest.

106. In sum, Mr. Adhuok submitted that the Petition is academic and that grant of the sought orders would breach the 6th Interested Party's legitimate expectation.

7th Interested Party's Submission

107. Ms. Julu, relied on the 7th Interested Party's grounds of opposition dated 18th May 2025 and also adopted the Respondents and other Interested Parties submissions.

108. Ms. Julu submitted that the Petition does not present any evidence that alleges that the 7th Interested Party's shortlisting and nomination violates any constitutional provisions. Counsel stressed that the 7th Interested Party's eligibility is not question in the Petition.

109. Ms. Julu further argued that the Petitioners had not satisfied the requirements for grant of conservatory orders.

110. Ms. Julu noted that the Application had not questioned the procedures and that the statutory timelines were still running. Moreover, Counsel submitted that the 3rd Respondent's Justice and Legal Affairs Committee has 12 members who are conducting the Parliamentary process.

111. Ms. Julu likewise submitted that the allegation that the 5th and 7th Interested party come from the same ethnic background had not been proved.

Analysis and Determination

112. It is my considered view that the issues that arise for determination are:

    1. Whether the Preliminary Objections against the Petition are merited

    2. Whether the Petitioners have met the threshold for grant of conservatory orders.

Whether the Preliminary Objections raised against the Petition are merited.

113. The Respondents and the Interested Parties objected to the jurisdiction of this Court citing various grounds, namely:

i) That this Petition is non- justiciable for offending the doctrine of ripeness

ii) That the Petitioner has not exhausted the Constitutionally provided for remedies before approaching the Court (doctrine of exhaustion of remedies)

iii) That the Petition offends the doctrine of separation of powers

iv) The Petition offends the doctrine of Constitutional avoidance

114. The legal characteristics of a preliminary objection were reiterated by the Supreme Court in Joho & another v Shahbal & 2 others [2014] KESC 34 (KLR) as follows:

> "(31) To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co Ltd –v - West End Distributors (1969) EA 696:
>
> "a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".

115. A proper preliminary objection thus is one that is argued on assumption that the facts pleaded by the opposite side are correct, that is, there is no contest as made to facts and further, if successful, a P.O. must be capable of disposing the entire suit without the need for a the full trial. Further, a preliminary objection cannot be raised if what is sought is the exercise of Court's discretion.

116. In arguing their preliminary objections, the Respondents and interested parties did not introduce contrary or contested facts in respect of the preliminary objections. They raised pure jurisdictional issues based on the above principles hence I find that they were proper preliminary objections.

117. The next question is whether they managed to persuade this Court that the present Petition offends the said principles thus ousting the jurisdiction of this Court.

118. Jurisdiction refers to authority of the Court to legally hear and determine a dispute. In Benson Makori Makworo v Nairobi Metropolitan Services & 2 others [2022] KEHC 26937 (KLR), the Court citing with approval the Court appeal decision explained the concept of jurisdiction as follows:

> "I will, however, briefly reiterate what the Court of Appeal stated in Nakuru Civil Appeal No. 119 of 2017 Public Service Commission & 2 Others v Eric Cheruiyot & 16 Others consolidated with Civil Appeal No. 139 of 2017 County Government of Embu & Another v Eric Cheruiyot & 15 Others (unreported) in a decision rendered on 8th February, 2022 on the doctrine of jurisdiction in general as follows: -
>
> 36. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in "Words and Phrases Legally Defined", Volume 3 at Page 113 defines court jurisdiction as follows:

> By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given..."

119. When a jurisdictional question is raised, it is imperative for the Court to make an inquiry into the matter and ascertain whether it has jurisdiction or not. In doing so, the Court is guided by *the Constitution*, legislation or the principles established through judicial precedents. The Supreme Court affirmed this position in the Matter of the Interim Independent Electoral Commission [2011] KESC 1 (KLR) where it held thus:

> " Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent."

120. The jurisdiction of the High Court to hear and determine constitutional disputes is provided for in Article 165(3) of *the Constitution* as follows:

'Subject to clause (5), the High Court shall have—

a. unlimited original jurisdiction in criminal and civil matters;

b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

i. the question whether any law is inconsistent with or in contravention of this Constitution;

ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

(4) Any matter certified by the court as raising a substantial question of law under clause (3)(b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

(5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

121. Strikingly, the High Court's jurisdiction under Article 165(3) of *the Constitution* is quite expansive. Nevertheless, as was held in Benson Ambuti Ambega & 2 Others v Kibos Distillers Limited (2020) eKLR

> "... a Court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism..."

122. This thus brings me to the doctrine of exhaustion raised by the respondents and the interested parties. This doctrine prevents a Court from adjudicating a dispute where the statute or a regulatory regime has provided other alternative mechanisms of dispute resolution. This is underpinned in Article 159 of *the Constitution* which obliges the Court in exercising judicial authority, to be guided by the principles stipulated thereunder of which 'alternative forms of dispute resolution...' forms part.

123. Elaborating on the doctrine, the Court in John Githui v Trustees, Nakuru Golf Club [2019] KEHC 5523 (KLR) stated:

> "25. There is no doubt that the doctrine of exhaustion of local remedies is one of esteemed juridical ancestry in Kenya. In Republic v IEBC Ex Parte NASA-Kenya & 6 Others [2017] eKLR, the Court – a three-judge bench -- described our jurisprudential policy on the doctrine of exhaustion which the Respondents raised in a bid to preliminarily swat away the Applicants' suit in the following words:
>
> This doctrine [of exhaustion] is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of

National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:-

> Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.
>
> While this case was decided before *the Constitution* of Kenya, 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine. This is Geoffrey Muthinja Kabiru & 2 Others – v – Samuel Munga Henry & 1756 Others [2015] eKLR, where the Court of Appeal stated that:-
>
> It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews..... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.
>
> We have read these cases carefully and considered the salutary decisional rule of law they announce.....
>
> 26. The existence of the doctrine is not in question. What is in question is whether it is applicable in the case at hand..."

124. The Respondents and the Interested Parties in this case argued that there exists an alternative remedy that the petitioners have not exhausted.

125. They were unanimous that under Article 118 (1) (a) of *the Constitution* as read with the relevant provisions of the Public Appointments (Parliamentary Approvals) Act, the vetting process of the nominees is done in Parliament where the issues raised in this Petition should have been directed may be considered as it is by Parliament that is authorized to evaluate the correctness of the procedure that was followed in selecting the nominees and carrying out a merit review of the entire selection process under the said law. They submitted that the mandate to consider the suitability of the nominees lies with the Parliament and not this Court and the Petitioners should have presented any issues that they have to Parliament.

126. Closely connected to this contention by respondents and interested parties was the submission that the Petition offends the doctrine of ripeness. It was contended that the process was still underway before the 3rd Respondent hence it is premature to challenge a process that was still in progress since the controversy is at the very best speculative. The Petitioners were urged to give Parliament a chance to conclude the process first.

127. The principle of ripeness was given judicial consideration by Supreme Court in Attorney-General & 2 others v Ndii & 79 others; Prof. Rosalind Dixon & 7 others (Amicus Curiae) (Petition 12, 11 & 13 of

2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent) where the Court held as follows:

> "61. The doctrine of ripeness focused on when a dispute had matured into an existing substantial controversy deserving of judicial intervention. The doctrine of ripeness prevented a party from approaching a court before that party had been subject to prejudice, or the real threat of prejudice, as a result of the legislation or conduct challenged.
>
> 63. Ripeness discouraged a court from deciding an issue too early. It therefore required a litigant to wait until an action was taken against which a judicial decision could be grounded and a court was able to issue a concrete relief. That approach shielded a court from dealing with hypothetical issues that had not crystalized."

128. Citing a number of authorities with approval in County Assembly Forum & 6 others v Attorney General & 2 others; Senate of the Republic of Kenya (Interested Party) (Constitutional Petition E229, E225, E226, E249 & 14 of 2021 (Consolidated)) [2021] KEHC 304 (KLR) (Constitutional and Human Rights) (15 October 2021) (Judgment) the Court noted as follows:

> "171. The Ripeness doctrine is one facet of the larger principle of non-justiciability. It is a jurisdictional issue that bars a Court from considering a dispute whose resolution has not crystallized enough as to warrant Court's intervention. Its operation is informed by the idea that there exist other fora with the capacity to resolve the dispute other than Court process.
>
> 172. The operation of the doctrine was discussed by a multi-Judge Bench of the High Court in Nairobi Constitutional Petition No. 254 of 2019, Kiriro wa Ngugi & 19 Others v Attorney General & 2 others [2020] eKLR in the following manner: -
>
> > 107. The doctrine focuses on the time when a dispute is presented for adjudication. The Black's Law Dictionary 10th Edition, [supra] at page 1524 defines ripeness as:
> >
> > The state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made
> >
> > 108. Courts should therefore frown upon disputes that are hypothetical, premature or academic which have not fully matured into justiciable controversies....
> >
> > ... In Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others Nairobi Constitutional Petition No. 453 of 2015 [2016] eKLR, Onguto J stated:
> >
> > (27) Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases..... The Court is prevented from determining an issue when it is too early or is simply out of apprehension, hence the principle of ripeness.

> An issue before Court must be ripe, through a factual matrix for determination."

129. Reacting to these submissions, the Petitioner asserted that these objections lack merit as Article 22 and 258 of *the Constitution* provide that one has a right to institute a suit where they believe their fundamental rights are threatened with violation. They argued that the Petitioners need not wait until a breach occurs to mount a Constitutional challenge.

130. The question which this Court is required to answer is whether in the circumstances of this case, the doctrines of ripeness and exhaustion of remedies affect the instant petition.

131. Under *the Constitution*, even a threat to violation of *the Constitution* can be actionable if it is demonstrated that the threat is imminent, is real and is not imaginary or fictional. The set of facts or circumstances relied upon must credibly demonstrate the looming threat of violation.

132. In Martin Nyaga Wambora v Speaker of The County of Assembly of Embu & 3 Others [2014] eKLR the Court affirmed that a demonstrable threat is actionable if it relates to violation of the Constitutional rights, the Court held:

> " To those erudite words I would only highlight the importance of demonstration of "real danger". The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention."

133. In the instant case, the process of selection of nominees by the Selection Panel has already been completed. The Petitioners pin-point the Constitutional violations that have allegedly taken place at this initial phase in the process which they are apprehensive that left unaddressed by this Court they could be carried all the way to the end of the process tainting the whole exercise and getting any other viable remedy later on will not be feasible. The Petitioners have flagged out the breaches that they say have violated *the Constitution*.

134. What has already been done by the Selection Panel, if it is in disregard of *the Constitution* can challenged before this Court hence it is not premature or speculative. 'Anything that is done by outside *the Constitution* and the law warrants the intervention of the Court at whatever level of the process' and this Court has the authority to pronounce itself on the Constitutionality of the process at any level, it does not have to wait until the end of the process to undo an unconstitutional act as long as unconstitutionality is established.

135. It was argued that because the Selection Panel is now defunct and is not a Party in this Petition, the Petition is misconceived.

136. Indeed, under the First Schedule To The Independent And Electoral And Boundaries Commission Act, Cap 7f; Procedure For Appointment Of Chairperson And Members Of The Commission; Rule 6 (1) provides that:

'(1) The selection panel shall finalize the recruitment exercise within ninety days of its appointment and forward the names of the nominees to the President and shall thereafter stand dissolved'

6 (2) says:

'Despite sub-paragraph *(1)*, Parliament may, by resolution passed in both the National Assembly and the Senate, extend the tenure of the selection panel for a specified period'

137. There is no evidence that Parliament has extended the tenure of the Selection Panel.

138. However, the fact that it is no longer in existence does not give immunity to an unconstitutional act if indeed that can be established, the decision can still be declared invalid and will not be spared just because the body that made the decision no longer exists or cannot come to Court nowhere to defend that decision as an unconstitutional decision can never be allowed to stand on any pretext.

139. Moreover, the Court does not think that in public service, institutions just disappear without a trace, there are transitional mechanism that ensure documented work of such bodies is handed over and properly safeguarded. In this case, the 'First Schedule - Procedure For Appointment Of Chairperson And Members Of The Commission'

Rule 1 (6) & (7) provide thus:

(6) The Parliamentary Service Commission shall provide the secretariat services and facilities required by the selection panel in the performance of its functions.

(7) The Parliamentary Service Commission shall provide for and meet the expenditure of the selection panel.

140. This makes the Parliamentary Service Commission the custodian of the records ensuring continuity and accountability.

141. And in case of any further doubt, the Attorney General is mandated under Article 156 (3) (b) to represent the National Government in Court. Any legal vacuum, if any, that is left by the defunct Selection Panel is the responsibility, first of Parliament under which the Secretariat Services fall but in the event of any further doubt, the Attorney General must assume the mandate.

142. In view of my findings above, I do find that the doctrine of ripeness does not apply as the process can be challenged even at this stage it has reached if it is shown there has been violation of *the Constitution*. The Court can interpose and deal with the violation at any level.

143. As to whether or not there was violation in fact, that has to await the trial on merits. In a Preliminary objection, the Court is not concerned with evidence, only the pleadings.

144. The other issue is on the doctrine of exhaustion of remedies where it was argued that because the process is work in progress, then it is Parliament has mandate to examine the suitability of the nominees and review the whole process undertaken by the Selection Panel hence the Petitioners ought to take that route of petitioning Parliament instead of instituting the instant Petition in Court.

145. Such a contention has been advanced regarding the neighbour Article 119 (1) and (2) of *the Constitution* which allows any person to Petition Parliament to consider any matter within its authority including to enact, amend or repeal legislation. The Court discussed the implication of this Constitutional clause on the Court's Constitutional jurisdiction and categorically stated that this does not oust the interpretive jurisdiction of the Court as the ultimate authority on legality. In the case of Pharmaceutical Society of Kenya & another v Attorney General & 3 others [2021] KEHC 85 (KLR) the Court held thus:

> " ... The High Court has on a number of occasions pronounced itself on the right to petition Parliament under the article 119 of *the Constitution*... in the case of Council of Governors & 3 others v Senate & 53 others [2015] eKLR it was held that:
>
> "71. It is useful, however, in closing on jurisdictional questions, to address ourselves to the provisions of article 119(1) of *the Constitution*. The AG submits that

the petitioners ought to have approached Parliament in accordance with the provisions of article 119(1) prior to filing its petition. Article 119(1) and (2) are in the following terms:

"Every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal legislation.

2. Parliament shall make provision for the procedure for the exercise of this right."

72. The question is whether this provision is intended to take away the right of a party to question the constitutionality of an Act of Parliament, or indeed any action taken by the legislature, guaranteed under articles 22 and 258. Further, whether it can also be taken as ousting the jurisdiction of the Court under article 165(3)(d) to determine any question respecting the interpretation of *the Constitution*, including "the question whether any law is inconsistent with or in contravention of" *the Constitution*...

73. In our view, the answer must be in the negative. Doubtless, article 119(i) will serve a useful purpose in allowing citizens to petition Parliament to consider matters of concern to them that are within the purview of Parliament, including the repeal or amendment of legislation. It appears to us, however, that article 119 is not intended to cover situations such as is presently before this Court.

74. It would therefore be, in our view, for the Court to abdicate its responsibility under *the Constitution* to hold that a party who considers that legislation enacted by Parliament in any way violates *the Constitution* is bound to first petition Parliament with respect to the said legislation. The constitutional mandate to consider the constitutionality of legislation is vested in the High Court, and articles 2(4) and 165(3(d)(i) mandate this Court to invalidate any law, act or omission that is inconsistent with *the Constitution*. This is in harmony with the mandate of the courts to be the final custodian of *the Constitution*."

146. The contention that the Petitioners must approach Parliament prior to filing a Petition that challenges constitutionality of actions that are deemed to violate *the Constitution* is untenable. The right to approach the Court to challenge unconstitutional actions cannot be limited by the doctrine of exhaustion of remedies. *The Constitution* gives the Petitioners a direct access to this Court which has the interpretive role of determining if there has been a violation of *the Constitution*. That process of petitioning Parliament does not oust the constitutional authority of this Court to determine the constitutional questions raised in the Petition. The authority to interpret *the Constitution* is vested on the Court, not Parliament.

147. The other jurisdictional question was that this Petition offends the principle of Separation of Powers. The Respondents and the interested parties contended the Petition is an attempt to usurp Parliamentary function and therefore violates of the doctrine of separation of powers. It was premised on the fact that the process is still work in progress and thus the Court should defer to Parliament by giving it time to conclude the process without intrusion.

148. In Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2017] eKLR the Supreme Court guided as follows:

> "(55) In Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others [2015] eKLR, the High Court examined the extent to which a Court may inquire into the conduct of parliamentary proceedings. The Court held that, as Article 165(3)(d) clothed it with powers to determine the constitutionality of a given act, the doctrine of separation of powers does not preclude it from examining acts of the Legislature or the Executive. The Court thus observed [paragraph 172]:
>
> "[I]n a jurisdiction such as ours in which *the Constitution* is Supreme, the Court has jurisdiction to intervene where there has been a failure to abide by Standing Orders which have been given Constitutional underpinning under the said Article. However, the Court must exercise restraint and only intervene in appropriate instances, bearing in mind the specific circumstances of each case" [emphasis supplied].
>
> (56) The same principle is reflected in the case of Okiya Omtatah & 3 Others v Attorney General & 3 Others [2014] eKLR, in which the High Court thus held [Paragraph 54]:
>
> "Our view is that all organs created by *the Constitution* must live by the edict of *the Constitution*."
>
> (57) The Court of Appeal, in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 2 Others, Civil Appeal No 290 of 2012, [2013] eKLR, adopted the High Court's dicta, in the following terms:
>
> "[Separation of powers] must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the Executive sufficient latitude to implement legislative intent. Yet, as the respondents also concede, the Courts have an interpretive role – including the last word in determining the constitutionality of all governmental actions..."

149. The Supreme Court proceeded to set out the following general principles:

> "(63) [63] From the course of reasoning emerging from such cases, it is possible to formulate certain principles, as follows:
>
> a. each arm of Government has an obligation to recognize the independence of other arms of Government;
>
> b. each arm of Government is under duty to refrain from directing another Organ on how to exercise its mandate;
>
> c. the Courts of law are the proper judge of compliance with constitutional edict, for all public agencies; but this is attended with the duty of objectivity and specificity, in the exercise of judgment;

d. for the due functioning of constitutional governance, the Courts be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interests attending each case;

e. in the performance of the respective functions, every arm of Government is subject to the law."

150. Correspondingly, in Appollo Mboya v AG & 2 others [2018] eKLR, the court held thus:

> " According to the doctrine of the separation of powers, one of the important functions of the judiciary is to keep the other organs of the State in check by ensuring that their actions comply with the law, including, where applicable, *the constitution*. Ouster clauses prevent courts from carrying out this constitutional function.....The primary duty of the courts is to uphold *the Constitution* and the law "which they must apply impartially and without fear, favour or prejudice." And if in the process of performing their constitutional duty, courts intrude into the domain of other branches of government, that is an intrusion mandated by *the constitution*. What courts should strive to achieve is the appropriate balance between their role as the ultimate guardians of *the Constitution* and the rule of law including any obligation that parliament is required to fulfill in respect of the passage of laws, on the one hand and the respect which they are required to accord to other branches of government as required by the principle of separation of powers, on the other hand".

151. in Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) [2020] eKLR the Court however emphasized as follows:

> " 540. The 6th Respondent has attempted to ward off the court's inquiry into the issues raised by the Petitioners by flashing the separation of powers card and asserting the principle of parliamentary privilege. It has told the court that it should not touch the impugned amendments as that would amount to interference with the National Assembly's constitutional mandate to legislate. Our response to these arguments is that there is a plethora of authorities which confirm that Parliament can only successfully raise the defence of separation of powers or parliamentary privilege by proving compliance with *the Constitution* and the law. Anything done by Parliament outside the confines of *the Constitution* and the law attracts the attention and action of this court. In conducting an inquiry into the constitutionality of the decisions and actions of the legislature the Court finds constitutional authority in Article 165(3)(d) ..."

152. In the light of the above authorities, I agree that the Court must to some degree exercise a measure of restraint to allow the activities within the Parliamentary organ to proceed because Parliament, just like the Court, is also discharging its Constitutional functions but this must be counterbalanced with the Court's ultimate role as the guardian of *the Constitution* to ensure that legitimate constitutional grievances are not sacrificed at the altar of expediency.

153. The fourth limb of the preliminary objection was that the Petition offends the doctrine of constitutional avoidance. This doctrine asserts that *the Constitution* should not be invoked to resolve disputes that are not Constitutional controversies, that is to say, matters that may be resolved by

application of ordinary legislation, regulatory regimes or established legal principles, the Court must avoid using *the Constitution* in resolution of such matters.

154. Discussing the doctrine of Constitutional avoidance, the Supreme Court in Communications Commission of Kenya (Supra) observed:

> " (256) The appellants in this case are seeking to invoke the "principle of avoidance", also known as "constitutional avoidance". The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:
>
> "I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."
>
> (257) Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v Tennessee Valley Authority, 297 U.S. 288, 347 [1936])."

155. Likewise, in C O D & another (supra) with regard to this principle the Court noted as follows:

> " 11. Similarly, in Papinder Kaur Atwal v Manjit Singh Amrit Nairobi Petition No. 236 of 2011where after considering several authorities on the issue, Justice Lenaola remarked as follows:
>
> "All the authorities above would point to the fact that *the constitution* is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes..... I must add the following; Our Bill of Rights is robust. It has been hailed as one of the best in any Constitution in the World. Our Courts must interpret it [with] all the liberalism they can marshall. However, not every pain can be addressed through the Bill of Rights and alleged violation thereof."

12. The Supreme Court of India has also held that ordinary remedies available under common law and statutes must be pursued in the ordinary manner or as provided under statute. For instance, in Re Application by Bahadur[1986] LRC (Const) the Court expressed itself as follows at page 307:

"The Courts have said time and again that where infringements of rights are alleged which can be founded in a claim under substantive law, the proper course is to bring the claim under such law and not under *the Constitution*. This case highlights the un-wisdom of ignoring that advice.... *The Constitution* sets out to declare in general terms the fundamental concepts of justice and right that should guide and inform the law and the actions of men. While an infringement of *the Constitution* might in certain cases give rise to the redress provided for at section 14, yet, as has been proclaimed by the highest Court in the land, it is not, "a general substitute for the normal procedures for invoking judicial control of administrative action." (See Harrikissoon v A-G [1979] 3 WLR 62)."

156. Correspondingly, in Council of County Governors v Attorney General & 12 others [2018] eKLR the Court expressed itself as follows:

> " 59. The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In that regard, the Supreme Court stated in Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others (supra) (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis.
>
> 60. In the South African case of S v Mhlungu, [1995] (3) SA 867 (CC), Kentridge AJ, stated in the dissenting opinion respecting the principle of avoidance (at paragraph 59), that he would lay down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. And in Ashwander v Tennessee Valley Authority, 297 U.S. 288, 347 [1936]), the U.S. Supreme Court held that it would not decide a constitutional question which was properly before it if there was also some other basis upon which the case could have been disposed of."

157. With due respect to the submissions by the Respondents and the interested Parties, my reading of this Petition shows a Petition that is grounded on violation of various Constitutional provisions and the nature of violations is detailed. In brief, the Petition challenges the selection process of the interested parties mainly on grounds that it was carried out in violation of Articles 10, 27(1), 73 (2), 88 (2), 232 (1) and 250 (3) & (4) of *the Constitution*. The issues generated by this Petition cannot be determined without making reference to *the Constitution*. The doctrine of Constitutional avoidance does therefore apply in the instant Petition.

158. The upshot of the foregoing therefore is that all the Preliminary objections are hereby dismissed.

Whether the Petitioners have met the threshold for grant of conservatory orders.

159. The law on issuance of conservatory orders in constitutional petitions is anchored on Article 23(3) (c) of *the Constitution*. Further Rule 23 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which reads as follows:

> **Conservatory or interim orders.**
>
> a. Despite any provision to the contrary, a Judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim orders.
>
> b. Service of the application in sub rule (1) may be dispensed with, with leave of the Court.
>
> c. The orders issued in sub rule (1) shall be personally served on the respondent or the advocate on record or with leave of the Court, by substituted service within such time as may be limited by the Court.

160. The Court in Nkunja v Magistrates and Judges Vetting Board & another [2016] KEHC 7269 (KLR) summarized three main principles for consideration when dealing with such applications as follows:

> "a. 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*.
>
> b. Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
>
> c. The public interest must be considered before grant of a conservatory order."

161. Likewise, in Board of Management, Ngara Girls High School & another v Erdemann Property Limited & another; Ministry of Education (Interested Party) [2025] KEELC 95 (KLR) the Court stated that:

> "25. Foremost, the applicant ought to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice....
>
> 26. It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis....
>
> 28. Once the applicant has established to the court's satisfaction a prima facie case with a likelihood of success the court is then to decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights....
>
> 29. Thirdly, flowing from the first two principles, is whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is indeed the business of the court to ensure and secure so far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice....
>
> 30. The fourth principle which emerges from the various cases and is well captured by the Supreme Court of Kenya in the case of Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others [2014] eKLR is that the court must consider conservatory orders also in the face of the public interest dogma.
>
> 31. Finally, the court is to exercise its discretion in deciding whether to grant or deny a conservatory order. The court must consequently consider all relevant material facts and avoid immaterial matters. The court will consider the applicants credentials, the prima facie correctness of the availed information, whether the grievances are genuine legitimate and deserving and finally whether the grievances and allegations are grave and serious or merely vague and reckless."

162. Further, on public interest, the Supreme Court in Munya v Kithinji & 2 others (Application 5 of 2014) [2014] KESC 30 (KLR) guided as follows:

> " 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 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 applicant's case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes …."

163. Before embarking on determining if the threshold of conservatory order has been met, Mr. Bita raised an interesting dimension. Citing Article 23 (3) (c), Mr. Bita vehemently submitted that conservatory orders can only issue where there is a violation of a right in the Bill of Rights. He argued that this does not apply where the allegation is not violation of a right in the Bill of Rights. This was supported by Dr. Arua who quipped:

> "… conservatory orders under Article 23(3) of *the Constitution* cannot issue unless there is an alleged violation of fundamental rights which is different from violation of *the Constitution*…"

164. In rejoinder Mr. Duddley Ochiel submitted by pointing the Respondent and 1st Interested Party to the provisions of Article 19 (3) (b) of *the Constitution* which provides that the rights and fundamental freedoms in the Bill of Rights do not exclude rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with the Chapter on Bill of rights. He added that in fact, that this Petition was all about Article 38 (2) which guarantees free, fair and regular elections by an Independent Electoral and Boundaries Commission established under Article 88.

165. The position taken by Mr. Duddley is one that tallies with what *the Constitution* demands in Article 259 (1), that it shall be interpreted in a manner that promotes its purposes, values and principles by recognizing that the rights in the Bill of Rights are not exhaustive, there still rights that may be outside the Bill of Rights which are still protectable as long as they do not violate what is the Bill of Rights. The right to vote in free and fair elections is sacrosanct and is protectable right.

166. In any case, I do not think there is merit in the submission that that conservatory orders can only issue in violation of fundamental rights and not in matters relating to violation of *the Constitution*. That is a narrow view that does not augur well with what the Supreme Court said in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR where it held that:

> " 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 adjudicatory authority of the Court, in the public interest."

167. Turning now to the threshold question, the instant matter revolves around the Petitioners Application that seeks issuance of conservatory orders pending the determination of the Petition.

168. The Petitioners assert that the issues raised concerning the nomination of the 1st to 7th Interested Parties as Commissioners to IEBC disclose serious constitutional questions touching on the constitutionality

of the nomination process which is a threat to right to free and fair elections by an independent electoral body.

169. The Petitioners are required to satisfy the established threshold of issuance of conservatory orders. The first being whether the Petitioners have raised serious arguable Constitutional questions.

170. The question therefore is, does the Petition raise arguable fundamental Constitutional questions?

171. The Court has already dealt with all the Preliminary Objections.

172. It has been stated that in ascertaining whether a prima facie case has been established the, Court is confined to a limited scope in determining the issues raised. This was aptly captured in Kevin K Mwiti & others v Kenya School of Law & others [2015] KEHC 2294 (KLR) where it was held that:

> " 51. 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 a case which is frivolous. In other words the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success. Accordingly in determining this application, the Court is not required-indeed it is forbidden- from making definite and conclusive findings on either fact or law. I will therefore refrain from making any determinations whose effect would be to prejudice the hearing of the main Petitions/Application."

173. At this stage, the Court is not concerned with the conclusive determination of issues as this will be done at the hearing of the Petition to avoid prejudicing the trial of the suit. This was the position taken by the Court in Muslims For Human Rights (Muhuri) & 2 Others v Attorney General & 2 Others [2011] eKLR where it was held thus:

> " In an application for interim orders of the nature of Conservatory Orders or even one for an injunction, the court is not hearing and/or being called upon to determine the main Petition. The Constitutional court is being called upon to preserve the status quo pending the hearing of the Constitutional Petition or motion. The court does not have to take and hear all the evidence and delve into the entire case on its merits. The hearing of the Petition and determination of all issues and questions in dispute will be done at the "trial" and upon completion thereof when a final judgment is to be delivered.
>
> As a result, at this stage I am not obligated to go into all the evidence and even consideration of all the matters of law. My function is to have a reasonable overview to enable me decide on the criteria or principles applicable when considering an application for a Conservatory Order and to what extent and principles are applicable to the facts and circumstances of this case."

174. The Petitioners have raised a number of Constitutional questions concerning the selection process of the nominees, this includes:Whether the actions of Selection Panel violated the laid down Constitutional dictates under Article 10, 232, 250 (3) and undermined the selection process by having a lop-sided post-shortlisting and nomination process.Whether as part of participatory, inclusive, consensus-oriented, accountable, transparent, and responsive process, His Excellency the President was

required to consult the Majority and Minority Party in the National Assembly in line with the National Dialogue Committee Recommendations adopted by the National Assembly prior to making the selection of the nominees.Whether in-eligible candidates were shortlisted, interviewed and nominated by the Selection Panel in violation of Article 88 (2) of *the Constitution*.Whether the lists of nominees reflect the regional and ethnic diversity as required by *the Constitution* and reinforced by the -First schedule to the *Independent Electoral and Boundaries Commission Act*; Procedure for Appointment of Chairperson and Members of the Commission, Rule 5.Whether the Selection Committee, the State and the Respondents have a duty to publish and publicize the interview report and results on the performance of all candidates.

175. In my view the above are fundamental constitutionally arguable questions that deserve a further detailed examination and consideration by the Court, they are neither flippant nor frivolous. On the face of it, they raise serious Constitutional questions that the Court cannot dismissively wave off, they are matters that deserve an in-depth interrogation and analysis. It is therefore my finding that the Petition raises serious arguable questions of Constitutional nature.

176. On prejudice, the Petitioners are apprehensive that if the orders are not issued the right to free and fair elections by an independent electoral body could be put in jeopardy thereby undermining the credibility of the elections.

177. On the nugatory aspect, it was argued that if the conservatory order is not granted, the application will be rendered nugatory because once the nominees are appointed, they will assume office and the manner of their nomination is not one the grounds that can be raised for their removal.

178. In my view, the Petitioners have succeeded in demonstrating that there is a real threat to the right to free and fair elections if the process is not constitutionally compliant as that is capable of posing a threat to free and fair elections which is a protected constitutional tenet.

179. On the nugatory aspect, should the process proceed to completion and the 1st to 7th Interested Parties are appointed as the Chairman and Commissioners respectively, the nomination process cannot be reversed on the basis of flawed nomination process because upon appointment, Commissioners can only be removed on specific individual-related grounds as opposed to the issues relating to their selection.

180. Under Article 251(1) of *the Constitution*;

A member of a Commission can only be removed from office for-

a. serious violation of *the Constitution* or any other law, including a contravention of Chapter Six

b. gross misconduct, whether in the performance of the member's or office holder's functions or otherwise

c. physical or mental incapacity to perform the functions of office

d. incompetence; or

e. bankruptcy

181. The purpose of this Application is to maintain the status quo for purposes of ensuring the process does not violate *the Constitution*.

182. As already observed when I addressed the question about the separation of powers, a delicate balance must be struck to ensure the substratum of the Petition is not rendered nugatory and also, the Vetting and Approval that Parliament is legally mandated to undertake within specified statutory timelines

is not hampered. In this regard, I take note of Section 9 of the *Public Appointments (Parliamentary Approval) Act* which states as follows:

Failure of Parliament to act on nomination

If, after expiry of the period for consideration specified in section 8, Parliament has neither approved nor rejected a nomination of a candidate, the candidate shall be deemed to have been approved.

183. Nevertheless, Parliament can extend the timeline in exceptional circumstances as provided for in Section 13 of the The *Public Appointments (parliamentary Approval) Act* CAP. 7F that:

13. Extension of time

(1) Despite the provisions of this Act or any other written law, where a time is prescribed for doing an act or taking a proceeding by the National Assembly relating to a public appointment, the National Assembly may, by resolution, extend that time by a period not exceeding fourteen days.

(2) Where an extension of time is granted under subsection (1), the doing of all other acts consequential thereto shall be deemed to have been extended accordingly.

(3) The power of the National Assembly contemplated under subsection (1), may be exercised —

a. only once in a session of the National Assembly in respect of a particular matter; and

b. only in exceptional circumstances to be certified by the Speaker

184. What is in issue is not the Vetting and Approval process in the National Assembly, it is the selection and nomination process. I will allow the Vetting and Approval Process in Parliament to proceed but the Court has a duty to determine the constitutionality of issues raised in this Petition on the selection and nomination process.

185. Under the principle of separation of powers, the Court must respect the institutional comity and allow Parliament to discharge its constitutional function without also endangering the substratum of this Petition.

186. In Mate & another v Wambora & another [2017] KESC 1 (KLR) the Supreme Court held follows:

> "(55) In Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others [2015] eKLR, the High Court examined the extent to which a Court may inquire into the conduct of parliamentary proceedings. The Court held that, as Article 165(3)(d) clothed it with powers to determine the constitutionality of a given act, the doctrine of separation of powers does not preclude it from examining acts of the Legislature or the Executive. The Court thus observed [paragraph 172]:
>
> "[I]n a jurisdiction such as ours in which *the Constitution* is Supreme, the Court has jurisdiction to intervene where there has been a failure to abide by Standing Orders which have been given Constitutional underpinning under the said Article. However, the Court must exercise restraint and only intervene in appropriate instances, bearing in mind the specific circumstances of each case"

187. It is my humble take therefore that the public interest in this matter leans in the favour of granting conservatory orders that are aptly molded to allow the 3rd Respondent to proceed with the vetting

process while giving the Court an opportunity to interrogate the constitutionality of the selection and nomination process without jeopardizing the substratum of the Petition.

188. The reason I take this path is because it is *the Constitution* and the law that dictates the manner of appointing the 1st to 7th Interested Parties, meaning that the entire process has to comply with the dictates of *the Constitution* and such a determination cannot be made without the benefit of a full trial on merits and unless the substratum of the subject matter is preserved, the whole Petition will just become an academic exercise.

189. The substance and the nature of the matters raised are matters of immense national and public interest. This is a matter that is at the very core of our Constitutional democracy and my view is that the issues raised are substantial questions of law on matter that touches sovereignty of the people. I suo moto find that this Petition satisfies the requirements of Article 165 (4) of *the Constitution* and in reaching this finding, I am guided by the following authorities; the case of Philomena Mbete Mwilu v Director of Public Prosecution, Director of Criminal Investigation, Chief Magistrate's Court (Anti-Corruption) Nairobi, Attorney General & Stanley Muluvi Kiima [2018] KEHC 3432 (KLR) where the Court opined as follows:

> " 26. I appreciate that *the constitution* confers discretion on the court considering the application for certification to decide whether or not to certify a particular matter for purposes of empaneling a bench. At the same time we have to bear in mind that *the constitution* itself recognizes that there may be cases that would sometimes require more than one Judge thus the reason why Article 165(4) found space in our constitution although the jurisprudential value of the decision of a bench would not override that of a single judge of the same court... Although the present petition can be heard by a single judge of this court and also being fully aware that a bench would sometimes require resources both personnel and financial as well as more time to resolve a petition than if it were heard by a single Judge, the present petition is the kind of petition that this court should exercise its discretion in favour of an expanded bench due to its public importance and significance in our constitutional democracy. The issues sought to be decided are not mere questions of law, they are substantial questions of law and their resolution will have a material bearing on the 1st respondent's decision to arrest and prosecute the petitioner and the independence of the judiciary."

190. Correspondingly, the Court in National Super Alliance (NASA) Kenya v Independent Electoral and Boundaries Commission [2017] eKLR held that:

> " The only constitutional provision that expressly permits *the constitution* of bench of more than one High Court judge is Article 165(4) which requires that for the matter to be referred to the Chief Justice under the said provision, the High Court must certify that the matter raises a substantial question of law... In my view, the determination of such issues is a judicial one, the Court is obliged either on its own motion or on an application of the parties to the cause to identify the issues which in its view raise substantial questions of law."

191. To this end, the upshot is that that the Petitioners have satisfied the threshold for grant of the conservatory orders. I also find that it satisfies the requisite condition under Article 165 (4) of *the Constitution*. I thus make the following orders:

a. That pending the hearing and determination of this Petition, a Conservatory Order is hereby issued forbidding and/or preventing the gazettement, taking of oath or assuming office by the Interested Parties, namely: Erastus Edung Ethokon; Ann Njeri Nderirtu; Moses Alutalala Mukhwana; Mary Karen Sorobit; Hassan Noor Hassan; Francis Odhiambo Aduol; Fahima Araphat Abdallahor any other person(s) as the Chairman or Commissioners of the Independent Electoral and Boundaries Commission. For avoidance of doubt, the Vetting and Approval Process in the National Assembly may proceed but subject to this order.

b) This file is hereby forwarded to the Chief Justice for empanelment of an uneven number of Judges to hear and determine the Petition pursuant to provisions of Article 165(4) of *the Constitution*

c) Costs shall be in the cause.

d) Once the Honourable Chief Justice has constituted a Bench, the Deputy Registrar will fix the matter for mention and notify the parties accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 29TH DAY OF MAY, 2025.

.....

L N MUGAMBI

JUDGE